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Divergence at the Court of Appeal on What Amounts to Unreasonable Decision-making

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Case Commented On: *Hunter v College of Physicians & Surgeons of Alberta*, 2014 ABCA 262

In this judgment the Court of Appeal reviews a disciplinary decision made by the College of Physicians & Surgeons of Alberta against one of its physician members. I think the judgment is noteworthy to a broader audience of administrative law scholars and practitioners because of the stark contrast in how the majority and the dissent apply the reasonableness standard to review the College's decision. The majority judgment written by Justice Slatter and Madam Justice Veldhuis dismisses the appeal by the physician using only 6 paragraphs of reasons to conclude the disciplinary decision is reasonable. The dissenting opinion written by Justice O'Ferrall concludes the College's decision is unreasonable and in doing so probes much further into the impugned regulatory process and the record in this case. There would appear to be a divergence of views at the Court of Appeal in how to apply the reasonableness standard in judicial review.

The governing legislation here is the *Health Professions Act*, RSA 2000, c H-7 and the decision in question is a disciplinary decision issued by the Council of the College under sections 87 to 89 of the Act. The physician was found guilty by the Council of 'unprofessional conduct' as defined in section 1(1)(pp) of the Act for contravening the College's *Standards of Practice* by terminating a physician-patient relationship to pursue a personal relationship with the patient. The physician appealed this finding to the Court of Appeal under the statutory appeal provisions set out in section 90 of the Act, arguing that the personal relationship in question was not of the predatory or exploitive sort contemplated by the prohibition in the *Standards of Practice* and that entering the relationship did not amount to professional misconduct.

The majority of the Court dismisses this application by observing that judicial deference is owed to disciplinary decisions made by self-regulatory professional tribunals and concludes the Council's finding of unprofessional conduct in this case was an available outcome given the facts and the law in question (at para 3). In short, the majority concluded there was no reviewable error of law or unreasonable exercise in discretion by the Council.

Justice O'Ferrall agrees that the applicable standard of review here is reasonableness, but he

approaches this case from a very different perspective than the majority. Justice O'Ferrall's reasons include a description of the governing legislative framework, noting in particular (at paras 20 to 24) the relation between the *Standards of Practice* and the Act as well as making the point that the Council enacts the *Standards of Practice* under statutory authority. He also provides a detailed description of the facts as determined in the disciplinary hearing process, including a summary of how the relationship between the physician and the patient developed over the years (at paras 25-39). Justice O'Ferrall parts ways with the majority starting at para 58, where he probes into the reasoning provided by the College in its disciplinary decision and undertakes a contextual interpretation of what is meant by 'personal relationship' in the *Standards of Practice*. This investigation leads him to conclude the College erred in its interpretation and application of the *Standards of Practice* in this case – there was no evidence to conclude the personal relationship here was predatory or exploitive (at para 75). Justice O'Ferrall also notes that the disciplinary proceeding was commenced by an anonymous complainant who refused to be interviewed by the College and moreover that there was no evidence to support a finding that the conduct in question would harm the integrity of the medical profession (at paras 76-77).

Certainly it is not unusual for a dissent to significantly part ways with the majority in an appellate decision, and there is little doubt that consensus in how to administer substantive judicial review remains elusive for the Canadian judiciary despite pronouncements by the Supreme Court of Canada back in 2008 that *Dunsmuir v New Brunswick,* 2008 SCC 9 was a game-changer and would help to alleviate these difficulties. The troublesome application of the reasonableness standard, in particular, has attracted some scholarly attention – Professor Paul Daly has an article on point forthcoming in the Alberta Law Review (see here).

My initial reaction here was that Justice O'Ferrall is far too intrusive in his review of the College's disciplinary decision to be consistent with the deferential reasonableness standard of review. And indeed there is very little sense of deference in his reasoning. But on reflection and giving closer consideration to the governing legislative framework, I wonder if perhaps his dissent is the more appropriate approach and outcome for this case. We shouldn't overlook the fact that the Act provides a physician with the ability to appeal disciplinary decisions to the Court of Appeal without the need to seek leave of the Court, and that the substance of the appeal is not limited to questions of law or jurisdiction (section 90). In the conduct of the appeal, the Court is entitled to make findings of fact based on the record and may quash, confirm or vary the impugned College decision (section 92). These are unusual provisions for a statutory appeal to the Court of Appeal, and on reflection they provide pause for thought on whether the very deferential and brief majority decision in this case is consistent with the role contemplated for the Court by the legislature. Justice O'Ferrall makes reference to these provisions at para 51 but he also cites the earlier Court of Appeal decision in *Sussman v College of Alberta Psychologists*, 2010 ABCA 300 for authority that the reasonableness standard of review should normally apply in these cases despite the legislative provisions that allow for an intrusive review.

I will conclude this comment by simply suggesting that such widely divergent approaches towards applying the reasonableness standard is not terribly helpful for scholars and practitioners in administrative law charged with either having to advise their clients or instruct their students on what it means to apply the reasonableness standard of review.