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Does a Privative Clause Completely Oust Judicial Review?

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Case Commented On: *Green v Alberta Teachers' Association*, 2015 ABQB 379

Green v Alberta Teachers' Association is a short judgment by Justice T.D. Clackson in a judicial review of disciplinary action taken by the Alberta Teachers' Association. A hearing committee organized under the bylaws of the Association found that Green had committed professional misconduct. Green appealed that decision to a 4 person appeal committee under the Association bylaws, and the appeal committee split 2 – 2 on whether to grant Green's appeal. The tie vote resulted in the committee dismissing her appeal because of an Association bylaw that states the decision of a committee shall be by majority. Green sought judicial review on the grounds that it was procedurally unfair to lose her appeal on a tie or, alternatively, that the appeal committee's decision was unreasonable for failing to follow an earlier Court of Appeal decision on point. Justice Clackson dismisses Green's application, and in doing so he makes some interesting remarks on the application of privative clauses to judicial review.

Professional conduct hearings are governed by sections 81 to 93 of the Alberta Teachers' Association general bylaw (here). The bylaw particularly relevant to this case is section 84(4) which states the decision of any committee shall be by majority of those participating in the decision. I could not find a provision in the Association's bylaws which prescribe the number of committee members who sit in a hearing, but apparently from this case it is possible for an appeal committee to have an even number of members. The problem with this of course being the possibility of an even split amongst committee members and a failure to reach a majority decision.

The composition of a tribunal hearing committee can definitely form the basis of a procedural fairness claim under bias. For example, a committee member whose past activities give the appearance they are partial to a particular outcome in a hearing is one of the more common grounds under this area of judicial review (a leading Alberta case on improper bias is *Alberta Securities Commission v Workum*, 2010 ABCA 405). But I hadn't come across a procedural fairness case where the problem was alleged to be an even number of hearing members and tie outcome. Justice Clackson notes the Court of Appeal had an opportunity to rule on this issue back in 1996 (*Ostrensky v Crowsnest Pass (Municipality) Development Appeal Board*, [1996] 181 AR 96), finding that the result did not breach procedural fairness.

One might argue the result here is unreasonable on the basis that bylaw 84(4) requires the appeal committee to make decisions by majority rule and that the committee has decided to dismiss Green's appeal without a majority. However there is no reference to this sort of argument being made by the applicant here. Instead it appears Green argued the committee's decision was unreasonable because it failed to follow *Eggerston v Alberta Teachers Association*, 2002 ABCA 262. In *Eggerston* the Court of Appeal set aside a finding of professional misconduct by the Association. The facts in Eggerston involve critical comments made by Eggerston – a teacher but also a parent of elementary school aged children – in a parent-teacher conference. The basis of

her misconduct was criticizing the professional competence of other members of the Association in a non-confidential manner. The Court of Appeal set aside this finding on the basis that the rule ought not be read literally to prevent Eggerston from making such critical comments as a parent during the parent-teacher conference.

Unfortunately here Justice Clackson does not provide any details concerning Green's misconduct. In light of Green's argument that the committee acted unreasonably by not following *Eggerston*, we can surmise the facts are similar. Moreover it does appear the facts are similar since the appeal committee here split on whether *Eggerston* is distinguishable (at para 6). If the facts and law of this case are indeed similar to Eggerston – it does raise the increasingly interesting question of the extent to which a statutory tribunal is bound by earlier rulings even if the doctrine of stare decisis does not strictly apply in administrative law (For some discussion on this point see my recent ABlawg here).

Justice Clackson observes that since the time *Eggerston* was decided by the Court of Appeal the legislature added a privative clause in section 57 of the *Teaching Profession Act*, RSA 2000 c T-2 to protect Association decisions from judicial review. The applicable provisions are as follows:

> 57 (2) A decision made by a committee is final and binding on the parties in respect of whom the decision is made and, subject to subsection (3), shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court.
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> (3) On a question of jurisdiction only, a decision is reviewable on an application for judicial review of the decision.
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> (4) An application referred to in subsection (3) for judicial review of a decision must be commenced within 15 days from the day the decision is made.

This is known as a 'strong' privative clause as opposed to a weak one, since it not only states the committee decision is final and binding it also purports to shield decisions from judicial review.

It is trite law in Canada that the presence or absence of a privative clause in legislation is not determinative of how much scrutiny a reviewing court should apply to a tribunal decision, but rather a factor in how much deference is owed in judicial review. Privative clauses are almost a given in statutes governing administrative tribunals these days, and the Supreme Court has repeatedly affirmed that a privative clause cannot completely oust judicial review. The authority on this point is *Crevier v Quebec*, [1981] 2 SCR 220. However, a strong privative clause is typically regarded as an indication that more deference than not is owed by a reviewing court to the impugned administrative decision.

In this case I think Justice Clackson relies too heavily on the privative clause when he concludes his jurisdiction to consider whether the committee erred in distinguishing *Eggerston* is ousted by section 57. As Justice Clackson puts it (at para 13):

> In this case, the real issue is nothing more than whether the tribunal made a reasonable decision. By refusing to apply a precedent because it reasoned the precedent to be distinguishable. In my view, my jurisdiction to consider that question is clearly ousted by the privative and preclusive clause in s. 57.

This appears to give section 57 a literal reading and purports to limit judicial review of a committee decision under the *Teaching Profession Act* to matters of jurisdiction only. This cannot be the correct outcome under current administrative law principles following *Dunsmuir v New Brunswick*, 2008 SCC 9 which generally state an administrative decision must be reasonable given the applicable law and facts. To put it another way – the question of whether this statutory committee properly distinguished the Court of Appeal's decision in *Eggertson* must surely be within the jurisdiction of a reviewing court.