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Money attracts procedural fairness: The case of the overbilling doctor

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Cases Considered:

Searles v. Alberta (Health and Wellness), 2008 ABQB 307

Government compensation payable to physicians in Alberta is differentiated under the Alberta Health Care Insurance Plan based upon the type of service provided: in short, some service categories pay better than others for physicians. In 2002 Dr. Gordon Searles received notice from Alberta Health and Wellness that his billings to the Alberta Health Care Insurance Plan were being reviewed. This review led to a reassessment under section 18 of the *Alberta Health Care Insurance Act*, R.S.A. 2000, c. A-20, which provides the Minister of Health and Wellness with authority to reassess physicians' billings on select grounds including where the Minister is of the opinion that "the total amount of benefits paid for service was, in the circumstances, greater compensation to the practitioner for that service than it should have been." In this case, the Minister's reassessment (via her delegate) required Dr. Searles to repay $985,777.09 having concluded upon review of his billings that he was overcompensated. The reassessment was based upon the Minister's conclusion that between April 2000 and February 2004 Dr. Searles' billing submissions were calculated on the provision of a service category with a higher billing rate than the actual service Dr. Searles had administered to his clients. Dr. Searles subsequently applied to the Court of Queen's Bench to have the Minister's reassessment quashed on judicial review for procedural unfairness.

The Minister's reassessment decision was issued to Dr. Searles in March 2007, approximately five years after he was initially notified that his billings were under review. During this time span, his case proceeded through a chronology of stages set out in Alberta Health and Wellness policy and the *Alberta Health Care Insurance Act* as follows:

- Step 1: Compliance review (this is what triggered the 2002 notice). Where this review concludes there is a billing anomaly, the case moves to Step 2.
- Step 2: Peer Review Committee investigative hearing which produces a recommendation to the Minister on reassessment.
- Step 3: Minister (or her delegate) decision
- Step 4: Appeal of Minister's decision on reassessment to the Court of Queen's Bench.

Dr. Searles' case remained in the initial compliance review stage for approximately four years (June 2002 to May 2006). In numerous instances over this period, Dr. Searles exchanged written correspondence with Bonnie McEachern, a billings review officer with Alberta Health and Wellness, disputing whether or not he was overbilling. This stage concluded in March 2006, at which point Ms. McEachern advised Dr. Searles that Alberta Health and Wellness was of the position he was overcompensated as a result of his inappropriate billing submissions, and that the matter was being referred to the Peer Review Committee.

The Peer Review Committee, consisting of Ministerial appointments from the profession or public at large, is an opportunity for the physician to present his or her case in person with or without legal counsel. The Committee held an in-person meeting in October 2006 wherein Dr. Searles attended with legal counsel. After hearing his submissions and considering other written documentation, in late October the Committee issued its recommendation to the Minister that Dr. Searles had overbilled Alberta Health and Wellness.

The Minister's delegate for the reassessment decision was Lorraine McKay, the Director of Integrative Business and Information Services for Alberta Health and Wellness. The record indicates that Ms. McKay received a further written submission from Dr. Searles in November 2006 and thereafter exchanged oral correspondence with Bonnie McEachern, the compliance review officer who had been involved in the file since 2002, in December 2006. During this oral exchange, she indicated her agreement with McEachern's earlier position that Dr. Searles had overbilled Alberta Health and Wellness and instructed Ms. McEachern to draft the decision letter. On March 26, 2007, the Minister's decision letter (signed by McKay as her delegate) was issued to Dr. Searles, advising that he was required to repay $985,777.09 having concluded upon review of his billings that he was overcompensated.

Dr. Searles' subsequent application for judicial review to the Court of Queen's Bench to have the Minister's reassessment quashed for procedural unfairness was granted by Justice Brian R. Burrows. Justice Burrows decided that the Minister's reassessment process violated procedural fairness by giving rise to a reasonable apprehension of bias. In his reasoning, Justice Burrows applies the factors set out by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, to determine the extent of the duty of procedural fairness owed by the Minister in this case. He then goes on to consider applicable case law on impermissible bias. I agree with his application of the law here. Indeed, these facts seem to be an easy case of improper bias, with Ms. McEachern acting as the judge in her own cause by drafting the Minister's decision.

What is noteworthy about this decision is how the Minister responded to Dr. Searle's application. In particular, the Minister argued that the duty of procedural fairness ought to be minimal because the adverse impact to Dr. Searles in this case was monetary rather than an imposition on his liberty. Had this argument been accepted by Justice Burrows, it would have been a significant shift from the early days of procedural fairness in Canada where applicants fought to have the duty of procedural fairness apply in their favour *even in cases where their issue was not solely economic*.

Furthermore, this case illustrates that despite significant development by the Supreme Court of Canada in recent decades on procedural fairness in administrative process, we still have a long way to go towards ensuring fairness actually plays out in regulatory process. Having robust common law principles is one thing, but ensuring they are applied at the administrative level is quite another.