

## Is a dismissed complainant in a professional disciplinary proceeding sufficiently 'aggrieved' to seek judicial review?

By Shaun Fluker

### Cases Considered:

[\*Mitten v. College of Alberta Psychologists\*](#), 2010 ABCA 159

Many professions governed by statute have a legislated complaint process whereby the public (typically a current or former client) is able to instigate an investigation into alleged member misconduct. In March 2005, Ida Mitten filed a written complaint against her former psychologist with the College of Alberta Psychologists pursuant to section 29 of the *Psychology Profession Act*, R.S.A. 2000, c. P-36 (Note this legislation has been superceded by amendments to the *Health Professions Act*, R.S.A. 2000, c. H-7, but here the Court of Appeal applies the *Psychology Profession Act* in accordance with legislated transitional provisions and all section references in this comment relate to the *Psychology Profession Act*). Her complaint was ultimately dismissed by the College in October 2007 on the basis of insufficient evidence of psychologist misconduct.

In March 2008 Mitten applied for judicial review on a number of grounds including an allegation that the College was procedurally unfair in dealing with her claim, and the College subsequently applied to the Court of Queen's Bench to strike her Originating Notice pursuant to section 129 of the *Alberta Rules of Court*, Alta. Reg. 390/1968. Madam Justice Sulyma granted the College's application to strike on the basis that Mitten is not a party to a disciplinary proceeding between the College and its member psychologist ([\*Mitten v. College of Alberta Psychologists\*](#), 2008 ABQB 748). The Court of Appeal reversed this ruling by taking a slightly different account on the status of Mitten here. I think the Court of Appeal decision is an important ruling for public complainants in a professional discipline context (and perhaps for public complainants more broadly), in that it confirms the possibility of judicial review for public complainants seeking to challenge the fairness of a statutory appeal process.

On the receipt of a section 29 complaint under the *Psychology Profession Act*, the registrar of the College must order an investigation into the allegations (section 30), and upon completion of that investigation the registrar must either dismiss the complaint or submit the matter to a disciplinary hearing in front of the College disciplinary committee and notify the complainant of the course of action taken. Where the registrar dismisses the complaint, section 36 provides the complainant with the right to appeal the dismissal to the College disciplinary committee. Section 36 read as follows:

**36(1)** A complainant who is served with a notice under section 35 that no further action will be taken may, by notice in writing to the Registrar mailed within 30 days

after service of the notice under section 35 on the complainant, appeal that direction to the Discipline Committee.

(2) On an appeal under subsection (1), the Discipline Committee shall determine whether

- (a) the complaint is frivolous or vexatious, or
- (b) there is sufficient evidence of unskilled practice of psychology or professional misconduct, and the matter should be the subject of a hearing,

and shall notify the complainant and the investigated person in writing of its decision.

In Mitten's case, the registrar denied her claim and the disciplinary committee also subsequently denied her claim on insufficient evidence of misconduct. It isn't clear from either the Queen's Bench or the Court of Appeal judgements in this matter what aspects of the process are alleged by Mitten to be procedurally unfair, but with the absence of guidance in the legislation one can imagine many possibilities here for contravention by the College of the *audi alteram partem* principle (at its basic level the right to know the case against you and having an opportunity to meet that case) in dealing with Mitten's complaint.

The Court of Appeal observes that section 36 provides a complainant (such as Mitten in this case) with a right of appeal to the disciplinary committee, which at the very least makes the complainant a participant in the appeal proceeding concerning the registrar's decision not to commence disciplinary proceedings. The Court of Appeal rules that a complainant is thus sufficiently aggrieved by a committee decision to dismiss her claim to allow her call upon the Court to review the process by which her complaint is dismissed. Accordingly, judicial review is available for an allegation by a complainant that the disciplinary committee breached a duty of procedural fairness owed to the complainant in conducting the appeal. The Court distinguishes this from any substantive disciplinary hearing concerning the member conducted by the disciplinary committee, wherein Alberta law seems well-settled that the complainant has a very limited role, if any (*Friends of the Old Man River Society v. APEGGA*, 2001 ABCA 107).