June 17, 2010

The case of the overbilling doctor Part II: The zero-sum game of enhancing administrative legitimacy?

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Cases Considered:

Searles v. Alberta (Health and Wellness), 2010 ABQB 157

This comment relates to an earlier post of mine back in June 2008 concerning the reassessment by the Minister of Health and Wellness on the billings of Dr. Gordon Searles, and the successful judicial review application by Searles in the Court of Queen's Bench wherein Justice Burrows set aside the Minister's reassessment because he found the process exhibited a reasonable apprehension of bias (*Searles* No. 1). (See Money attracts procedural fairness: the case of the overbilling doctor for necessary background to this discussion.) Subsequent to that judicial review the Minister recommenced the assessment process using a new delegate, and in September 2008 the Minister's delegate advised Searles that he was once again reassessed in the amount of $985,777.09. Searles applied for judicial review of this second reassessment, once again asserting a reasonable apprehension of bias on the part of the Minister's delegate (*Searles* No. 2).

The *Searles* No. 2 judicial review focuses on institutional bias - a ground that was raised in *Searles* No. 1 but about which I did not comment in 2008 since Justice Burrows dismissed the argument. Back in 2008, Searles argued that the Health and Wellness reassessment process was institutionally biased against him – the argument essentially is that the regulatory process is structured such that the decision-maker is influenced to decide the matter a certain way. In some cases this situation is argued as improper bias, in other cases it is argued as a lack of independence. *Searles* No. 1 and *Searles* No. 2 demonstrate the difficulty in applying these principles to an administrative process. On the one hand Searles is entitled to procedural fairness, yet on the other hand we have an administrative process wherein the decision-maker is accountable to the Minister who is in effect the adversary of Dr. Searle. Canadian courts have struggled with this – some of the leading decisions include: *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *International Woodworkers of America v. Consolidated Bathurst Packaging*, [1990] 1 S.C.R. 282; *2747-3174 Quebec v. Quebec (Regie des permits d'alcool)*, [1996] 3 S.C.R. 919; *Ocean Port Hotel v. British Columbia (Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781. In effect these decisions stand for principle that institutional bias is not unlawful if the impugned administrative process is expressly set out in the governing legislation.

Where institutional bias is found to exist in regulatory process, one of the accepted solutions is to restart the process with new individuals. This is what happened here with Ms. Darlene Bouwsema acting as the decision-maker in the place of Ms. Bonnie McEachern (the delegate in *Searles* No. 1 who Justice Burrows found was improperly biased). For Dr. Searles this makes no

difference, and he argues the process continues to suffer from institutional bias on a number of grounds including: (1) Ms. Bouwsema's position is held at the pleasure of the Minister; (2) the level of her monetary compensation is subject to the exercise of discretion by the Minister; (3) she works with Bonnie McEachern and thus would be influenced to some degree to agree with McEachern's earlier assessment; (4) the Minister has a financial interest in reassessing Searles.

In *Searles* No. 2, Justice Thomas does not agree with Searle's contentions of unlawful influence by the Minister in the reassessment process. And in this regard, Justice Thomas concurs with the earlier finding of Justice Burrows in *Searles* No. 1 that the reassessment process is authorized by the *Alberta Health Care Insurance Act*, R.S.A. 2000, c. A-20 and is thus lawful. While Justice Thomas does not cite the leading Supreme Court authorities on this point, this decision does seem to be in line with the doctrine.

What is perhaps most notable here for me is the message these decisions send in relation to the legitimacy of administrative process. That the Minister of Health and Wellness can escape legal scrutiny by simply launching a subsequent reassessment using a different delegate but the same investigation certainly impairs the appearance of legitimacy. This issue is not an isolated instance. The Supreme Court of Canada has spent a considerable amount of time in recent decades advocating for the legitimacy of administrative process by increasingly finding elements of legality in Canadian administrative process; one example being the imposition of the obligation on administrative decision-makers to provide adequate reasons for their decisions. The Supreme Court has taken care to ensure that these developments continue to respect legislative intentions. While this is an admirable cause, I'm starting to wonder if the Supreme Court is playing a zero-sum game. In its endeavor to enhance the legitimacy of administrative process, is the Court actually placing the legal system as a whole into disrepute?