PEERREVIEW

Volume 1, Number 2, October, 2005

Peer Review is a publication of the Law Firm o f Anthony G.V. Tobin, Vancouver, British Columbia, Canada

Providing commentary and information on issues affecting professional regulation

CIVIL LIABILTY ARISING FROM THE FAILURE TO REGULATE

Civil Liability

The regulation of a profession encompasses a wide spectrum of duties and obligations related to the overarching object of protecting the public. The relevant governing legislation enables self-regulated professions to make decisions about the conduct of their members in order to protect the public interest. It is usual for the governing statute to contain an immunity clause which protects the regulatory body and its officers from lawsuits arising from actions taken in pursuit of their legislated mandate. Until very recently, it was not possible in law for a client of a professional to sue successfully the professional's governing body for its failure to properly regulate that professional. This issue of *Peer Review* highlights the issue of the potential exposure to civil liability of regulatory bodies and their officers in light of a recent decision of the Supreme Court of Canada and its interpretation by the British Columbia Court of Appeal.

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Finney* v. *Barreau du Québec, (2004) S.C.C. 36 (CanLII).

This decision of the Supreme Court of Canada was in relation the Barreau du Québec, the governing body for lawyers in Quebec. A civil action had been brought by Ms. McCullock-Finney, a complainant, against the Barreau du Québec ("Barreau") for breach of its obligation to protect the public in the handling of complaints against her former lawyer.

At the time of Ms. McCullock-Finney's initial complaint in 1990, her lawyer's practice was already under supervision as he had been found guilty of professional misconduct and incompetence. This was as a result of five years of complaints lodged by the Syndic of the Barreau against Mr. Belhassen. Ten years after the date of the initial complaint of the Syndic, the Professional Inspection Committee recommended complete suspension of practice, repetition of all legal training and a medical examination to determine Mr. Belhassen's fitness to practise; a decision that the Court of Appeal of Quebec found "polite, but alarming". However, the Executive Committee of the Barreau concluded, after a hearing, that supervision of Mr. Belhassen and his completion of a refresher training period would suffice to protect the public.

Upon becoming aware of the complaints brought against him by Ms. McCullock-Finney, Mr. Belhassen commenced a

plethora of proceedings against her. Due to the inaction of the Barreau, Ms. McCullock-Finney was forced to repeat her complaints and seek the assistance of the Office des Professions. The Superior Court of Québec intervened. The Honourable Pierre A. Michaud, Associate Chief Justice, summoned all parties involved, including the Office of the Syndic, and ruled that any proceeding brought by Mr. Belhassen was to be subject of special review. By this point, in 1993, Mr. Belhassen's supervisor reported that he had been unable to contact him. The supervisor notified the Office of the Syndic only to find out about the court proceedings; the supervisor resigned a few days later. It was only then that the Chief Syndic recommended a syndic *ad hoc* be appointed by the Executive Committee. The hearing was held in 1994, at which it was decided that Mr. Belhassen should be provisionally struck off the Roll. In 1998, the Committee on Discipline found Mr. Belhassen guilty of seventeen counts and struck him off the Roll for five years.

The Honourable Justice LeBel, speaking for the majority of the Supreme Court of Canada, succinctly outlined the fundamental objective of self-governing bodies: "… not to provide services to their members or represent their collective interests. They are created to protect the public…" (page 10 at paragraph 16).

Concurring with the decision of the Court of Appeal of Quebec, Justice LeBel, at page 18, paragraph 42, of the decision says:

> *… the Court of Appeal passed harsh judgment on the conduct of the Barreau, particularly in respect of its lack of diligence and its slowness to act, not to say its lack of action, in its handling of McCullock-Finney's complaints. In my view, that judgment was justified. The attitude exhibited by the Barreau, in a clearly urgent situation in which a practising lawyer represented a real danger to the public, was one of such negligence and indifference that it cannot claim the immunity conferred by s. 193. The very serious carelessness it displayed amounts to bad faith, and it is liable for the results. This is apparent on a quick review of all the facts.*

In reprimanding the Barreau for its inaction, Justice LeBel went on to say, at page 18, paragraph 44:

> *Neither the need to adhere to the statutory and procedural discipline framework and act with care and caution nor the complexity inherent in any administrative process can explain the slowness and lack of diligence seen in this case. The nature of the complaints and the lawyer's professional record in fact made it plain that this was an urgent case that had to be dealt with very diligently to ensure that the Barreau carried out its mission of protecting the public in general and a clearly identified victim in particular.*

He continues at page 19, paragraph 45:

> *Exceptional though the case may have been, the conduct of the Barreau in this matter was not up to the standards imposed by its fundamental mandate, which is to*

> *protect the public. The virtually complete absence of the diligence called for in the situation amounted to a fault consisting of gross carelessness and serious negligence.*

Justice LeBel confirmed the award of $25,000 in damages to Ms. McCullock-Finney for moral injury and awarded her costs.
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Commentary

While the decision of the Supreme Court of Canada dealt with civil law statutes, Justice LeBel highlighted the relevancy of this decision to the common law. He states at page 19, paragraph 46:

> *The decisions made by the Barreau were operational decisions and were made in a relationship of proximity with a clearly identified complainant, where the harm was foreseeable. The common law would have been no less exacting than Quebec law on this point.*

In a decision of the Court of Appeal of British Columbia, *V.M.* v. *Stewart,* (2004) B.C.C.A. 458 (CanLII), the Court of Appeal relied on some of the reasoning in the *Finney* decision to conclude that an action in negligence against the College of Physicians and Surgeons of British Columbia was not necessarily barred. The College had sought an order to set aside and dismiss a claim of negligence brought against the College by complainants for allegedly failing in its duty to investigate the allegations brought by them against one the members of the College.

In reasoning whether or not such an action could be brought or sustained against the College, the Honourable Madam Justice Southin noted that there would not have been the possibility for such an action before the decision of the Supreme Court of Canada in *Finney* v. *Barreau du Québec.* She expressed her view, at page 7, paragraph 16, that while acknowledging that the law in Quebec is founded on its Civil Code, there were parts of the judgment of the Supreme Court that had about them a "common law ring":

> *I am of the opinion that there are paragraphs in it which have about them a common law ring; thus, it is possible that the law of Canada on the liability of regulatory bodies is the same in the common law provinces as it is in Quebec.*

She continued at page 8, paragraph 19:

> *There is something to be said for the proposition that a claim in the nature of a Finney claim falls under the common law rubric of "misfeasance in public office".*

The decision of the Supreme Court of Canada in *Finney* well illustrates the need for regulatory bodies to be aware that the immunity provisions in their governing statutes will not necessarily act as an automatic bar to a claim in damages. Moreover, if the conduct of the regulatory body approaches anything like the conduct of the Barreau du Quebec in the *Finney* case it is more than likely that the regulatory body will be held liable for damages.

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Conferences and training

At the recent Professional Regulation Conference in Vancouver, attended by the officers of many self-regulatory bodies, Anthony Tobin provided a half day workshop on the topic of "Preparing for and Expediting the Discipline Process". He also gave a one hour presentation on the topic of "Professional Boundaries".

At the workshop, interest was expressed about further training opportunities. In order to assess the level of need or interest in such training, and with a view to offering these seminars or workshops in 2006, you are invited to complete the following brief questionnaire and return it by fax or email.

Seminars and training opportunities needs assessment questionnaire

Please indicate your level of interest in attending a workshop or seminar on the following topics by circling the appropriate number:

1=no interest, 2=some interest, 3=great interest

a. Strategies and options for the resolution of complaints without a hearing
1 2 3

b. How to conduct an effective investigation of a complaint **1 2 3**

c. How to effectively manage a discipline hearing **1 2 3**

d. Governance under the Health Professions Act of British Columbia, as amended
1 2 3

e. The drafting of documents and decisions related to the complaint and discipline process **1 2 3**

f. Review of the legal principles that inform the complaint and discipline process
1 2 3

Name of Organization ________________

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Peer Review is a publication of the law firm of Anthony G.V. Tobin. Since 1989, the firm has been providing, and continues to provide, legal services to self-regulating professions in British Columbia.
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