

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Levesque v. Nova Scotia College of Optometrists , 2014 NSSC 22

**Date:** 20140127

**Docket:** Hfx No. 416154

**Registry:** Halifax

**Between:**

Dr. Yves Levesque

Applicant

v.

Nova Scotia College of Optometrists

Respondent

**Judge:** The Honourable Justice Michael J. Wood

**Heard:** January 13, 2014, in Halifax, Nova Scotia

**Written Decision:** January 27, 2014

**Counsel:** John O'Neill, for the Applicant  
Thomas Donovan, Q.C., and Alison Bird for the  
Respondent

**By the Court:**

[1] As with most self-regulating professions, the Nova Scotia College of Optometrists has a two stage discipline process which is set out in the *Optometry Act* S.N.S. 2005, c. 43 and related *Regulations*. The *Act* establishes both a Complaints Committee and a Hearing Committee, each of which consists of two practicing optometrists and a lay member.

[2] The Complaints Committee is authorized to investigate complaints laid against an optometrist and decide if they should be dismissed or referred to the Hearing Committee. Once a matter has been referred to the Hearing Committee, they are required to hold a formal hearing, receive evidence and determine whether the optometrist is guilty of unprofessional conduct. If so, the Hearing Committee will determine what sanction to impose.

[3] This application for judicial review explores the extent to which the investigation and decision making functions of the Complaint Committee should be subject to Court scrutiny.

[4] The applicant, Dr. Levesque, says that the decision to refer the complaint to a hearing was not reasonable and that the investigation carried out was procedurally unfair to him. He requests that the referral of the complaint to the Hearing Committee be set aside and the matter returned to the Complaints Committee for further consideration and investigation.

[5] The College submits that the Complaints Committee met the required standard of procedural fairness and that the decision to refer the matter to the Hearing Committee was reasonable in the circumstances. The College goes on to say that judicial view of a preliminary screening decision should be rare and limited to situations of exceptional circumstances which do not exist in this case. Even if there were procedural defects in the investigation process, the College says these could be corrected by the formal hearing to be carried out by the Hearing Committee.

## **BACKGROUND**

[6] Dr. Levesque practices optometry in Liverpool, Nova Scotia. In October, 2012, the College received a written complaint from a patient of Dr. Levesque. The essence of the complaint was that Dr. Levesque delayed in referring the patient to an ophthalmologist when she presented with certain symptoms. As a result of the delay, the patient alleges she has suffered a partial loss of vision in one eye.

[7] The College provided a copy of the letter of complaint to Dr. Levesque and he submitted a written response in November, 2012. He explained that it was his intention to refer the patient to an ophthalmologist within a few days if her symptoms did not improve. The College also obtained a copy of Dr. Levesque's chart notes with respect to this patient.

[8] In November, 2012, the chair of the Complaints Committee contacted a colleague in New Brunswick and requested an independent opinion on a particular scenario which was similar to the circumstances of the complainant. The email request outlined certain symptoms and asked the following question:

**My question to you is, according to current optometric standards of care, what needs to be done (procedures or tests) in this case?**

[9] The New Brunswick optometrist responded by indicating that they would attempt to determine the cause of the vision loss and would refer the patient out, although the urgency of the referral would depend upon the cause determined for the vision loss.

[10] In December, 2012, the Complaints Committee visited Dr. Levesque's office to carry out an audit. At that time they reviewed various patients' charts.

[11] On December 23, 2012, the chair of the Complaints Committee wrote a letter to the chair of the College which summarized the steps taken in the investigation. The letter also indicated that the Complaints Committee was of the view that this was likely an isolated incident, but that the question of whether the patient's care met the minimum standard should be referred to the Hearing Committee.

## ISSUES

[12] Dr. Leveque's notice of judicial review raises two issues. The first is whether the failure to inform him of the New Brunswick consultation and provide him with an opportunity to respond was procedurally unfair. The second is whether the Complaints Committee's decision was reasonable.

## PROCEDURAL FAIRNESS OBLIGATIONS OF THE COMPLAINTS COMMITTEE

[13] The *Optometry Act* includes the following relevant provisions with respect to the work of the Complaints Committee:

**29** An optometrist named in a complaint must be given a copy of the complaint prior to the commencement of any investigation.

**30** A complaints committee is governed by the principles of natural justice, this Act and the by-laws and regulations in the conduct of an investigation.

**31** A complaints committee may engage such legal or other assistance as it deems necessary in the exercise of its duties.

**32** A complaints committee shall dispose of the complain in accordance with the by-laws and regulations.

[14] A body such as the Complaints Committee which carries out investigations and performs a screening function is required to act in accordance with the requirements of procedural fairness. This is encompassed within the phrase "principles of natural justice" found in s. 30 of the *Act*. Counsel for the College acknowledged this, but said that it was a limited duty which did not include the right to be informed of and respond to the New Brunswick opinion.

[15] The content of the duty of fairness will depend upon the nature of the decision being made and its impact on the applicant. In a regulated profession, the primary consideration will be the extent to which the decision under review may affect the applicant's professional status and, in particular, their licence. Where the process may result in practice restrictions or lead to the suspension or

revocation of a licence, a high degree of procedural fairness is owed. For those decisions, the member is entitled to notice of all allegations and an opportunity to respond.

[16] In this case, the Complaints Committee must decide whether to dismiss the complaint on the basis that it is frivolous, vexatious or malicious, or refer the matter to the Hearing Committee if the optometrist appears to have engaged in unprofessional conduct (s.15 of the *Optometry Regulations*, N.S. Reg. 453/2007).

[17] The decision to refer the complaint to the Hearing Committee does not impinge on Dr. Levesque's right to practice. He argues that the fact of the referral and that the hearing will be public is potentially harmful to his reputation and may have a negative impact on his practice. I acknowledge that a public hearing involving alleged unprofessional conduct might be harmful to the reputation of a professional; however, that is part of the price that has to be paid for practicing in a self-regulating profession. Gone are the days when professional disciplinary hearings could be conducted behind closed doors. Any profession which chooses to regulate itself has an obligation to ensure that members of the public are able to see the discipline process in action. It is simply part of the public accountability that comes from the privilege of self-regulation.

[18] The potential embarrassment that may be suffered by Dr. Levesque is not sufficient to impose a high level of procedural fairness on the work of the Complaints Committee. That Committee is charged with the responsibility of investigating complaints and determining if they pass the relatively low threshold justifying referral to a formal hearing. Section 31 of the *Act* permits the Committee to engage assistance as it deems necessary which could include consultation with other optometrists, particularly with respect to the standard of care. There is no statutory requirement to provide that information to a member for comment, and I do not believe that the nature of the Complaints Committee function justifies imposing that obligation as part of the duty of procedural fairness.

[19] The circumstances in this case are similar to those considered by the British Columbia Court of Appeal in *Puar v. Association of Professional Engineers and Geoscientists*, [2009] BCCA 487. In that case, one of the issues for consideration was the failure to give the appellant a copy of a report which had been provided to

the investigation committee. The Court of Appeal concluded that the duty of fairness did not require disclosure of the report at the investigation stage. The Court's reasoning is found in the following passage from the decision:

**22** What was said there, however, applies to the Association as an investigating body with authority to investigate and discipline its members. What the Association conceded in *Netupsky* goes only as far as establishing that before a decision is ultimately taken to discipline a member of the Association, the member is entitled to know the allegations against him and be given the opportunity to respond. *Netupsky* does not assist Mr. Puar. It does not establish that, where the investigative function in a disciplinary process is distinct from the adjudicative function, as is the case here, procedural fairness requires the duty to disclose an allegation and afford the opportunity to be heard to be discharged at the investigative stage. While early disclosure may be useful, it is not normally required until the adjudicative stage where the member can expect to be afforded a hearing.

**23** An exception is found in *Hammond v. Association of British Columbia (sic) Professional Foresters* (1991), 47 Admin. L.R. 20 (B.C.S.C.), upon which Mr. Puar also relies. There, the investigating body had no statutory existence and operated on a manual which specifically afforded the member a hearing during the course of the investigation. There is nothing similar here governing s. 30(3) investigations.

**24** I agree with the judge. The duty of procedural fairness owed to Mr. Puar was not breached by the Association because it did not disclose the allegation against him and afford him an opportunity to be heard before the Notice of Inquiry was issued. He was not entitled to disclosure of Mr. Nakai's report before that time.

[20] I have concluded that there was no breach of the limited duty of fairness owed to Dr. Levesque by the Complaints Committee.

[21] I should note that my conclusion with respect to the scope of the duty of fairness may well not apply if the Complaints Committee is exercising its jurisdiction under s. 33 of the *Optometry Act* which permits the imposition of licence restrictions or suspension of a licence on an interim basis by the Committee. Such a decision has obvious implications for an optometrist's ability to practice and, therefore, may attract a different degree of procedural fairness.

## **REVIEW OF THE SUBSTANCE OF THE COMPLAINTS COMMITTEE DECISION**

[22] An initial investigation and screening decision, such as that carried out by the Complaints Committee in this case, is rarely subject to judicial review. The preferred route is for the administrative process to continue to its conclusion. This is particularly so if the concerns giving rise to the review relate to the merits of the underlying complaint. There are several reasons for this judicial reticence, and these include the lack of factual findings which would establish an evidentiary record, the absence of any detailed reasons and the relatively low threshold for referral.

[23] Where the legislature has established a two stage process with an initial screening followed by a formal adjudicative decision, it is obvious that the intention was to have the substantive merits decided at the latter stage. These decisions can only be reviewed by a court on a standard of reasonableness because of the deference which is given to the administrative decision maker. If the court is asked to review the decision at the preliminary screening stage, the statutorily designated decision maker has not yet been able to consider the matter. They have not had an opportunity to consider the evidence and make findings of fact or to apply the applicable legislation to those facts.

[24] The screening decision does not require factual findings to be made. Evidence is not tested in the way that it would at a formal hearing. There may be no complete record of all of the information obtained through the investigation process which would allow a court to examine the basis for the referral decision. As with most administrative decision makers, any review of the substantive merits of the Complaints Committee decision would apply a standard of reasonableness.

[25] Under s. 15 of the *Optometry Regulations*, a referral is to be made to a Hearing Committee where there is an appearance that the optometrist has engaged in unprofessional conduct as that term is defined in the *Regulations*. It is difficult to envision how a court can assess the reasonableness of a determination that there was an appearance of misconduct when there was no hearing, no tested evidence, no factual findings and no written reasons.

[26] The Supreme Court of Canada recently dealt with the issue of judicial review of preliminary decisions in the human rights context in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10. In that unanimous decision, Justice Cromwell emphasized that courts ought to be hesitant to exercise their discretion and intervene to review interim administrative decisions. The decision under review in that case was one by the Human Rights Commission to refer a complaint to a board of inquiry. The Court discussed the rationale for restraint at para. 36:

[36] While such intervention may sometimes be appropriate, there are sound practical and theoretical reasons for restraint: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at §540; P. Lemieux, *Droit administratif: Doctrine et jurisprudence* (5th ed. 2011), at pp. 371-72. Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a “correctness” stand with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive, legislative regimes: [authorities omitted]. Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal, particularly when asked to review a preliminary screening decision such as that at issue in *Bell* (1971).

[27] For such decisions, the Court described the standard of review as follows:

[45] In my view, the reviewing court should ask whether there was any reasonable basis on the law or the evidence for the Commission’s decision to refer the complaint to a board of inquiry. This formulation seems to me to bring together the two aspects of the jurisprudence to ensure that both the decision and the process are treated with appropriate judicial deference.

[28] It is this standard that should be applied in assessing the Complaints Committee referral decision in this case.

[29] There were two arguments advanced by counsel for Dr. Levesque in challenging the merits of the Complaints Committee Decision. The first was that the New Brunswick reviewer was not told that Dr. Levesque was considering referring the patient to an ophthalmologist in the near future. I would note that the opinion from the New Brunswick practitioner was simply one piece of information obtained by the Committee through its investigation. It also had the benefit of written submissions from Dr. Levesque and a visit to his office. They were clearly



informed by Dr. Levesque that he intended to make the referral in the near future should the situation not improve. We do not know how any particular piece of information affected the Committee's decision and they were not required to provide reasons for the referral.

[30] The other argument advanced by counsel for Dr. Levesque was that an isolated incident of an alleged breach of the standard of care could not amount to unprofessional conduct. He said that it might support a claim for negligence, but was not enough to justify discipline. Unprofessional conduct is defined in s. 10 of the *Optometry Regulations*. That section provides, in part:

- 10 (2) Unprofessional conduct by an optometrist includes, but is not limited to, the following:
- (a) displaying a lack of competence, skill or judgment in providing professional services, including services related to diagnostic and therapeutic optometric drugs;

[31] On its face, this provision applies to conduct that might be considered professional negligence. It does not include language to suggest that it is inapplicable to single incidents and requires a pattern of repeated behaviour. I cannot conclude that it would be an unreasonable interpretation to include a single incident of negligence within the definition of unprofessional conduct.

[32] Dr. Levesque has not met the burden of showing that there was no reasonable basis for the Complaints Committee decision to refer the matter to the Hearing Committee. I am not satisfied that this is a situation where the Court should exercise its discretion to intervene by way of judicial review.

## **CONCLUSION AND DISPOSITION**

[33] An initial referral decision by an investigatory committee in a regulated profession should rarely be subject to judicial review. If a complaint has been referred to a formal hearing, that process should be allowed to unfold and its decision rendered. Any concerns with respect to procedural fairness or the reasonableness of the decision can be dealt with at that time either by way of statutory appeal or judicial review.

[34] In this case, Dr. Levesque has not established a breach of the limited duty of fairness owed by the Complaints Committee to him, nor has he shown that the referral decision was unreasonable. As a result, I must dismiss his application for judicial review.

[35] At the conclusion of the hearing, I invited counsel to make submissions on the issue of costs. Both agreed that Tariff C applied and that the length of the hearing justified an award of \$750.00 to \$1,000.00. Counsel for the College submitted that the award should be at the low end of the range and, therefore, I fix costs payable by Dr. Levesque at \$750.00 plus reasonable disbursements.

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Wood, J.