

LITIGATION UPDATE

FEBRUARY 2011

LEGISLATIVE UPDATE

Broader Public Sector Accountability Act, 2010, S.O. 2010, c. 25

Proclamation: Sections 1 to 4, 17 to 23 and 25 to 27 in force January 1, 2011; sections 5 to 16 in force April 1, 2011 (Ont. Gazette, Jan. 1, 2011). Sections 24 and 28, which amend the *Freedom of Information and Protection of Privacy Act* to include hospitals, come into force on January 1, 2012.

Introduction

The *Broader Public Sector Accountability Act, 2010* (“BPSAA” or “Act”) will have a significant impact on broader public sector organizations. Its central purpose is to regulate the spending of public funds in a variety of areas, including new rules on the use of lobbyists and consultants, expenses and expense reporting, and procurement policies. While the BPSAA provides the framework, the full impact of the Act will occur when the government and ministries roll out regulations and directives containing specific obligations.

Legislative History

The BPSAA was introduced as Bill 122 in the Ontario Legislature in late October 2010. The Bill was fast-tracked through the legislative process and received Royal Assent in early December 2010. The Act responds to concerns raised in the Ontario Auditor General’s report, *Consultant Use in Selected Health Organizations*, with respect to irregularities in the health sector’s use of public funds, although the BPSAA is not so limited in scope. Certain sections of the BPSAA were proclaimed into force as of January 1, 2011, with further sections to come into force on April 1, 2011, and final sections on January 1, 2012.

Application of the BPSAA

Compliance under the BPSAA depends on the type of organization. Two subcategories define the “broader public service organizations” to which the Act applies.

First, an organization may be a “publicly funded organization”, which is any organization that received “public funds” in the previous fiscal year. Public funds include funding received by way of grants, taxes (school boards), and transfer payments. Public funds do not include money paid by the government for goods or services, money

paid under a fee for service arrangement, or money provided by a loan or guarantee.

Second, the BPSAA applies to “designated broader public sector organizations”, including the following: school boards, universities and other post-secondary institutions; hospitals and local health integration networks (“LHINs”); hydro entities; children’s aid societies; and every publicly funded organization that received more than \$10 million dollars in government funding in the previous fiscal year.

Explicit exclusions to this designation include municipalities, local boards defined in the *Municipal Act* and the *City of Toronto Act*, boards of health, long-term care homes, and for-profit organizations (subject to as yet unpublished regulations).

NEW REQUIREMENTS

Procurement: Since April 2010, the government has expected that the existing directive on public procurement from the Management Board of Cabinet – the “BPS Supply Chain Guideline” – be applied to hospitals, school boards, colleges and universities. When portions of the BPSAA relating to procurement come into effect on April 1, 2011, the Management Board of Cabinet will have authority to issue directives governing the procurement of goods and services by broader public service organizations, including those listed above. The BPSAA states that such directives may incorporate existing government policies or standards, but does not specify which ones. Compliance for such organizations should remain with the BPS Supply Chain Guideline until further directives are issued.

Lobbyists: The BPSAA prohibits “designated broader public sector organizations” and agencies of the Government of Ontario (LCBO, Heritage Trust, Lottery and Gaming Corp., etc.) from using public funds to pay for the services of lobbyists, unless the lobbyist is employed in-house. Additionally, specific organizations (not including “designated broader public sector organizations”) are further prohibited from paying for lobbyists from revenues outside public funds. These prohibitions do not apply to fees for membership of associations established to represent a group or class of similar organizations.

All existing lobbyist contracts are deemed to expire 30 days after these requirements apply, despite any existing notice provisions in these contracts.

Consultants: LHINs, hospitals and any other organizations prescribed by regulation are required to prepare reports on the use of consultants. The Minister of Health and Long-Term Care may issue directives concerning the content, timing and form of these reports. The Lieutenant Governor in Council may make regulations to be applied to “designated broader public sector organizations”.

Expenses: Starting April 1, 2011, hospitals and LHINs must post expense claim information on publicly accessible websites. Directives from the Ministry of Health and Long-Term Care will designate reporting specifics. Further, the BPSAA provides authority for the Management Board of Cabinet to make expense rules and guidelines for broader public sector organizations.

Compliance and Enforcement: Effective April 1, 2011, all hospitals and LHINs must provide “attestations” of their compliance with expense claim and procurement directives. Again, the BPSAA provides the Minister of Health and Long-Term Care with authority to issue directives as to content, form, timing, etc. Further, the Lieutenant Governor in Council can create regulations requiring attestations from other broader public sector organizations.

Requirements under the BPSAA are deemed to be part of funding agreements and must be complied with as part of those agreements. The BPSAA takes precedence over any contract found to be in violation of the Act, even if the contract was executed before the BPSAA came into force. Furthermore, the BPSAA restricts the ability of a party affected by its requirements to claim against the Crown or to claim compensation for any damages, loss of revenues, etc., as a result of an application of the Act, or its regulations and directives.

DEVELOPMENTS OF INTEREST IN CASE LAW

(a) Administrative Law – Investigative Powers – College of Physicians and Surgeons

***Sazant v. College of Physicians and Surgeons of Ontario*, [2011] O.J. No. 192 (Released January 17, 2011)**

In this case the Divisional Court upheld the constitutionality of search and seizure

provisions embedded within more than 60 provincial statutes. The court also confirmed the jurisdiction of the Discipline Committee of the College of Physicians and Surgeons (the “College”) to adjudicate the constitutionality of its own provisions.

The Appellant Sazant, a longstanding Member of the College, appealed a number of decisions of the Discipline Committee, including the decision to revoke his licence. Before the Discipline Committee and on appeal, Sazant challenged the constitutionality of section 76 of the *Health Professions Procedural Code* (“**Code**”), Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18. This provision provides a College investigator with the powers of a commission of inquiry under the *Public Inquiries Act*, R.S.O. 1990, c. P.41.

Sazant argued that the impugned provision violated his rights under section 8 of the *Canadian Charter of Rights and Freedoms* (“**Charter**”) which contains the right to be secure against unreasonable search and seizure. He submitted that the provision infringed section 8 of the *Charter* in three ways: (1) it empowered investigators to issue their own summons to compel the production of any document or witness without prior judicial authorization; (2) it gave investigators the exclusive ability to determine issues of relevance, privacy and privilege; and (3) the summoning power is unconstrained, entitling the investigator to compel both witnesses who are not regulated by the College and documents that contain highly personal information.

In upholding the constitutionality of the impugned provision, the court distinguished the regulatory scheme of the College from the rules that govern criminal trials. The court also stressed the value to various self-regulated professions of this investigatory power. Importantly, the court diminished concerns regarding a lack of pre-authorization by describing the summons powers as a less intrusive form of investigation than traditional searches. The court ultimately concluded that safeguards embedded in the Code removed any concerns regarding the constitutionality of the section. Such safeguards include requiring investigators to demonstrate reasonable and probable grounds to believe that the member has committed an act of professional misconduct before being appointed, and the limiting of the summons to relevant evidence that is not subject to privilege.

Sazant also pleaded before the Divisional Court that the Disciplinary Committee erred

in ruling that it had jurisdiction to adjudicate the constitutional question. Sazant had sought before the Disciplinary Committee a declaration of unconstitutionality pursuant to section 52(1) of the *Constitution Act, 1982*, even though the Disciplinary Committee did not have jurisdiction to strike down the legislation. The Divisional Court acknowledged that the Disciplinary Committee does not have jurisdiction to strike down the impugned provision, but concluded that the Disciplinary Committee had properly decided the constitutional question. It concluded that the Disciplinary Committee is able to avail itself of the broad powers enshrined in section 24(1) of the *Charter* to craft an appropriate remedy to cure the alleged *Charter* violation.

The court rejected several other grounds of appeal and ultimately upheld the findings of the Disciplinary Committee, as well as the penalty and order of costs.

(b) Statutory Interpretation – Patented Medicine Prices Review Board – Consideration of Mandate – Standard of Review

***Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 (Released 20 January 2011)**

In this case, the Supreme Court of Canada upheld a regulatory board’s decision to interpret its statutory mandate with reliance on a consumer protection purpose.

The issue before the Patented Medicine Prices Review Board (“**Board**”) was the extent of the Board’s jurisdiction over medicine “sold in any market in Canada”. The Board is constituted under the Patent Act. This Act permits the Board to investigate the price of a medicine, or to require the patentee of that medicine to provide the Board with information on that medicine’s price, where the medicine “is being or has been sold in any market in Canada”.

New Jersey-based Celgene made Thalomid. Since 1995, Celgene sold Thalomid directly to medical practitioners in Canada pursuant to the Special Access Programme. Under ordinary rules of commercial law, these sales took place in New Jersey – Celgene prepared the invoices in New Jersey and sent them to the practitioner with the medicine, and practitioners paid Celgene by mailing payment to New Jersey, in U.S. dollars and without Canadian tax.

When Celgene obtained a Canadian patent for Thalomid in 2006, the Board requested pricing information since 1995. Celgene

began to supply that information but then refused, arguing that Thalomid had been “sold” in New Jersey during the relevant period and so fell outside the Board’s jurisdiction. In making this argument, Celgene chose an interpretation of “sold in any market in Canada” that relied on commercial law principles. The Board disagreed with this approach. It held that its mandate was consumer protection and was unrelated to commercial concerns. This would mean that the interpretation of “in any market in Canada” includes sales of medicine delivered and used in Canada, medicine regulated by Canadian law, and medicine for which Canadians will bear the cost.

Justice Abella agreed on behalf of a unanimous Supreme Court of Canada. She held that although “sold in any market in Canada” may have a commercial law purpose in some contexts, the Board was correct in interpreting the phrase through the Board’s consumer protection mandate. The legislative history underlying the Board’s establishment supported this interpretive choice. The result is that the Board has jurisdiction to monitor and regulate prices of medicine that, while on a technical commercial interpretation is “sold” in a foreign market, is brought into Canada for use by Canadians, is regulated by the public laws of Canada (i.e., through the Special Access Programme), and for which Canadian patients or taxpayers bear the cost.

Both parties proceeded on the basis that the applicable standard of judicial review was correctness, although neither presented argument on this point. Justice Abella, like Evans J.A. in the Federal Court of Appeal below, questioned whether this was the applicable standard. The Board is a specialized tribunal interpreting its home legislation, and should be accorded deference, such that the operative standard is reasonableness. While Abella J. commented that parties should not be able, by agreement, to contract out of the appropriate standard of review, the Board’s decision ultimately could be upheld under either standard.

(c) Unjust Enrichment – Jurisdiction – Small Claims Court

***Grover v. Hodgins*, 2011 ONCA 72 (Released January 27, 2011)**

The Court of Appeal for Ontario held that the Small Claims Court has equitable jurisdiction for the payment of money and the return of personal property. The appellants and respondents are

individuals who lived in Ontario and owned units in the same condominium complex in British Columbia. A dispute arose between the owners and the management of the condominium complex. The respondents John Hodgins and Ann Dorans (“**Hodgins and Dorans**”) hired legal counsel in British Columbia and obtained an order in the Supreme Court of British Columbia appointing an administrator to manage the condominium council and to prepare an expert report on the financial management of the complex.

Hodgins and Dorans brought an action in the Ontario Small Claims Court (“**OSCC**”) seeking payment of a portion of their legal expenses by the appellants Chander Grover and Tabassum Grover (“**Grovers**”). Hodgins and Dorans based their claim in (1) contract or, in the alternative, (2) the unjust enrichment of the Grovers. The deputy judge dismissed the contract claim but upheld the unjust enrichment claim. The deputy judge found that there was a benefit to the Grovers, a corresponding deprivation to Hodgins and Dorans, and no juristic reason for the enrichment. The Grovers lost at the first stage of appeal before a single judge of the Divisional Court.

The question for the Court of Appeal was whether the OSCC has jurisdiction to grant equitable remedies. Two sections in the *Courts of Justice Act*, R.S.O. 1990, c. C.43 appear to conflict: section 23(1)(a) states that the OSCC “has jurisdiction in any action for the payment of money ...”, while section 96(3) states that only “the Court of Appeal and Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided”.

Justice Epstein, writing for the Court, reviewed the legislative history of these sections and the history of the OSCC. Of importance was section 96(1) of the *Courts of Justice Act* which states that courts “shall administer concurrently all rules of equity and the common law”. Justice Epstein held that this section extends to the OSCC, which therefore has the power to administer the rules of equity. Because it would not make sense for the legislature to extend this power to the OSCC but then to preclude the OSCC from granting equitable relief, the OSCC can grant equitable relief. However, section 96(3) limits such equitable relief to the payment of money within the OSCC’s jurisdictional boundary and to the return of personal property.

Although Justice Epstein held that the deputy judge had jurisdiction to make the unjust enrichment award, she found he erred in doing so on the facts before him.

There was no benefit to the Grovers and no deprivation to Hodgins and Dorans. The court allowed the appeal.

(d) Expropriation – Standard of Review – Costs – National Energy Board Act

***Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (Released February 2, 2011)**

In this case the Supreme Court of Canada held that it was reasonable for an arbitration panel formed pursuant to the *National Energy Board Act* to award substantial indemnity costs to an individual whose land has been expropriated.

Pursuant to an expropriation agreement between the two parties, Alliance Pipeline Ltd. (“Alliance”) obtained a right-of-way over Smith’s land. Alliance then failed to reclaim the land in a timely manner, as required by the agreement, and refused to compensate Smith fully for Smith having done so in Alliance’s place. Smith brought arbitration proceedings pursuant to the *National Energy Board Act* (“**NEBA**”) to recover his costs related to the reclamation.

Before the arbitration panel delivered its decision, Alliance brought proceedings in the Alberta Court of Queen’s Bench for unhindered access to Smith’s land, a declaration that the parties’ releases in the expropriation agreement precluded Smith’s compensation claim, and an order that the panel not render its decision pending resolution of the Queen’s Bench action. Alliance discontinued its action after 18 months, and the Queen’s Bench awarded Smith costs on a party-and-party (partial indemnity) basis in regard to that action.

A newly appointed arbitration panel awarded Smith compensation for his costs before the first panel and the balance of the costs he had incurred defending Alliance’s Queen’s Bench action on a solicitor-client (substantial indemnity) basis.

The Supreme Court (per Fish J., with Deschamps J. concurring in separate reasons) held that the standard of review of the panel’s costs decision was reasonableness. This standard was appropriate because the arbitration panel was interpreting its “home statute” and awards for costs are fact-sensitive and generally discretionary.

With respect to the reasonableness of the costs decision, Fish J. noted that NEBA, like various provincial expropriation statutes, is remedial and so should be given a broad and liberal interpretation. The decision to award costs on a solicitor-client basis was

reasonable for several reasons. First, in the context of modern expropriation law, where a statute authorizes awards of “all legal, appraisal and other costs”, costs should generally be given on a solicitor-client basis. Second, awarding costs on a solicitor-client basis accords well with the remedial purpose of NEBA. Third, Fish J. noted the inordinate amount of money and time that Smith had had to invest in what should have been an expeditious process. Fish J. held that Smith should not be made to bear the costs of what was clearly a test case for Alliance.

(e) Generic Drugs – Regulatory Provisions – *Ultra Vires*

Shoppers Drug Mart Inc. v. Ontario, 2011 ONSC 615 (Divisional Court) (Released February 3, 2011)

In this case three judges of the Divisional Court ruled invalid two Ontario regulations which purported to prevent the sale of “private label” generic drugs. Private label drugs are made by non-arm’s-length companies owned or controlled by pharmacies. The court heard parallel judicial review applications from the Shoppers Drug Mart group of companies and the Katz group of companies (which includes Pharma Plus and Rexall Drug Stores) (together the “Pharmacies”). In the result, the court declared that section 12.02 of Ontario Regulation 201/96 and section 9 of Ontario Regulation 935 were *ultra vires* and of no force and effect.

Health Canada must approve a prescription drug before it can be sold anywhere in the country. Ontario exercises further control via two interconnected legislative schemes: the *Ontario Drug Benefit Act*, R.S.O. 1990, c. O.10 (“ODBA”) and the *Drug Interchangeability and Dispensing Fee Act*, R.S.O. 1990, c. P.23 (“DIDFA”).

The ODBA governs conditions under which the government will pay pharmacies for prescription drugs provided to eligible persons (such as seniors and persons on social assistance). Under the ODBA, a generic drug not listed on the “formulary” is excluded from reimbursement coverage and excluded from the “public” market. The DIDFA governs the sale of prescription drugs to the general public. Under the DIDFA, a generic drug cannot be sold in the “private” market unless the Ontario Ministry of Health and Long Term Care designates that drug as “interchangeable” with the relevant brand-name drug.

In 2010, the Ontario government introduced amending provisions which effectively prohibited the Pharmacies from selling their own private label generic drugs instead of

purchasing those generic drugs from an arm’s-length third party. This prohibition would apply even where the law otherwise permitted substitution of generic drugs for brand-name drugs. The policy basis for the regulations was government concern that non-arm’s-length pharmacies would dispense their own private label drugs in preference to those of others, and that pharmacy-controlled organizations would retain profits without benefiting consumers.

Justice Molloy for the court provided three reasons to declare the provisions invalid. First, the impugned provisions fall outside the regulation-making authority delegated by the parent statutes. A delegated authority to impose conditions on an activity does not authorize a prohibition of the activity. The regulations’ language and their pith and substance were prohibitory.

Second, the provisions do not fall within the purpose of the parent statutes, which is to control prescription drug costs without compromising safety. Instead, the government’s evident concern was the profits to be made by large pharmacy chains. Controlling the profitability of such corporations is not a legitimate object or purpose of the parent statutes.

Finally, the provisions constitute an interference with property and commercial rights that is not expressly authorized by the parent statute. There is a common law presumption that any interference with the right to trade or property rights is invalid without specific statutory authority. In this case, there was no express legislation to validate the intrusive interference imposed by the private label drugs provisions.

(f) Constitutional Law – Interim Costs Awards – Inherent Jurisdiction of the Courts – Inferior Courts

R. v. Caron, 2011 SCC 5 (Released February 4, 2011)

Here the Supreme Court held that Superior Courts can make interim costs awards to fund public interest litigation in the inferior provincial courts.

In the underlying litigation, the Respondent Caron had challenged the constitutional validity of Alberta Provincial Court proceedings on the basis that the court documents were solely in English. Caron pleaded that the provisions of the Alberta Languages Act, which purported to abrogate French Language rights in order to permit such unilingual documents, was unconstitutional.

At issue in the Supreme Court of Canada was the funding of Caron’s litigation. The Provincial Court had made an interim costs order – an “*Okanagan* order”, so named after the case which enables them – in favour of Caron. The Alberta Court of Queen’s Bench (“ACQB”) set aside this order on the ground that the Provincial Court lacked jurisdiction to make it. However, the ACQB then made its own *Okanagan* order to fund Mr. Caron’s litigation in the Provincial Court. Ultimately, the Supreme Court of Canada dismissed the Crown’s appeal of this order.

The Supreme Court emphasized that the language rights issue was of fundamental importance and touched on the validity of the entirety of Alberta’s legal system. The court drew an explicit parallel to the interim award endorsed by the court in *Okanagan*. Further, it emphasized that the basis for such orders is a Superior Court’s inherent jurisdiction, which includes the ability to “render assistance to inferior courts.” The court also held that statutory costs provisions do not oust a Superior Court’s inherent jurisdiction to make these awards. On the present facts, the *Okanagan* criteria were met and the ACQB was within its jurisdiction to make the interim awards to Caron.

Justice Abella’s concurring opinion emphasized that the Supreme Court’s decision does not unduly extend a Superior Court’s ability to intervene in the workings of statutory tribunals. She noted that the decision did not conclusively address whether an inferior court can make interim costs awards. Further, the inherent jurisdiction of a Superior Court must be balanced with the “implied legislative mandate of a statutory court or tribunal to control its own process”.

The decision provides a robust assessment of inherent jurisdiction, while Justice Abella’s concurrence is perhaps a springboard towards more expansive readings of the inherent jurisdiction of statutory tribunals.