Aspects of the AIC discipline process – the Contract and the *Charter*

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The following paragraphs review two recent Ontario court cases addressing aspects of the discipline process administered by voluntary associations such as the Appraisal Institute of Canada (AIC). The first case reaffirms that members of a voluntary association have a right to procedural fairness based on the nature of the relationship members have with their association and the impact a decision could have on a member. The second case provides an example of how the Canadian Charter of Rights and Freedoms (Charter) might affect a discipline hearing.

Voluntary organizations governed by Contract

In past articles, I have discussed the contractual nature of the relationship between the AIC and its Members. The recent decision of the Ontario Court of Appeal in *Aga v. Ethiopian Orthodox Tewahedo Church of Canada*[1] *[Aga]* reinforces the nature of this relationship.

In *Aga*, five longstanding members (the Group) of the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral (Congregation) participated in a committee to investigate an alleged heretical movement with the church. In due course, findings were made and recommendations suggested, none of which were implemented. The Group was not happy and it began to level criticism at church officials. The Group was warned through correspondence that they would be expelled if they continued to express dissatisfaction with the decision not to put the recommendations into effect, but they persisted. Some months later, the Group was advised by letter from the Archbishop that, in apparent reliance upon the Congregation's constitution and bylaws, their membership was suspended. The Group was advised shortly thereafter that the required steps had been taken to expel them from the Congregation. The Group sued, seeking a declaration that the expulsion was null and void. The respondent Church and certain members of the Congregation brought a summary application to dismiss the Group's legal action on the basis that there was no contract between the parties and, therefore, there was nothing to litigate. The summary application judge agreed, but on appeal to the Ontario Court of Appeal, the lower court decision was overturned and the Group was permitted to continue their action.

The Court of Appeal relied heavily upon the Supreme Court of Canada decision in *Senez v. Montreal Real Estate Board*[2] that stated, in part, that when an individual joins a voluntary association:

> he accepts its constitution and the by-laws then in force, and he undertakes an obligation to observe them. In accepting the constitution, he also undertakes in advance to comply with the by-laws that shall subsequently be duly adopted by a majority of members entitled to vote, even if he disagrees with such changes. Additionally, he may generally resign, and by remaining he accepts the new by-laws. The corporation may claim from him arrears of the dues fixed by a by-law. Would such a claim not be of a contractual nature? What other basis could it have in these circumstances? In my view, the obligation of the corporation to provide the agreed services and to observe its own by-laws, with respect to the expulsion of a member as in other respects, is similarly of a contractual nature.

In *Aga*, the Ontario Court of Appeal affirmed that a written constitution and by-laws constitute a contract and once it is found that a contract exists, there is an expectation of procedural fairness. The requirements of procedural fairness will depend on the circumstances, but, at a minimum, where expulsion is involved, it involves notice, opportunity to make representations and an unbiased tribunal.[3]

Both the organization and its members are bound by the terms of the constitution and by-laws and the court has jurisdiction to determine if the rules of the voluntary association have been met.[4]

Charter rights in discipline hearings

Given the right to procedural fairness, does the *Canadian Charter of Rights and Freedoms* have a role to play in the discipline process administered by the AIC? The recent Ontario Superior Court of Justice (Divisional Court) decision in *College of Veterinarians of Ontario v. Choong*,[5] *[Choong]* gives some insight into the question.

Choong, a veterinarian, had been charged with child pornography offences that were eventually withdrawn on the basis that Choong's Charter rights against unreasonable search and seizure had been violated. However, the College of Veterinarians in Ontario learned of the charges, acquired the police evidence and initiated disciplinary proceedings against Choong for professional misconduct. At the Discipline Committee hearing, Choong sought an order from the Committee to exclude the evidence on the basis that the evidence was obtained in violation of his rights. There was an Agreed Statement of Facts that, among other things, agreed that there had been three breaches of the Charter. Consequently, the Committee only had to determine if there was a basis to exclude the evidence under sections 24(1) and (2) of the *Charter*:

> (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
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> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Application of section 24 required consideration of three factors set out in the Supreme Court of Canada decision in *R. v. Grant*[6] *(Grant)*:

- the seriousness of the *Charter* infringing conduct;
- the impact of the breach on the *Charter* protected interests of the individual; and
- society's interest in adjudicating the case on its merits.

A majority of the Committee found that the impact of the breach on the Charter-protected interests was worthy of excluding the evidence and they were not convinced that there was a greater societal interest in a professional disciplinary proceeding than there is in a criminal proceeding. The majority of the Committee ruled to exclude the police evidence.

The College appealed to the court seeking to set aside the Committee decision. The court ruled that Committee's decision was unreasonable in large measure because, in considering the second factor, the majority relied upon a court decision that was not applicable to the circumstances. The Committee decision excluding the police evidence was set aside and the matter was remitted to the Committee to reconsider whether the evidence should be excluded.

Of interest in relation to the third factor in Grant, is the following passage at paragraph 71 of *Choong*:

> 71 Moreover, even if it can be discerned that the Crown determined that there was little societal interest in proceeding with the criminal charges, the same reasoning is not strictly applicable to the disciplinary context. The Discipline Committee did not consider the distinction as Justice Belobaba explained in *Kelly v. Ontario*, 2014 ONSC 3824 (Ont. S.C.J.), at para. 36:
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> Nonetheless, even where there is serious police misconduct in a criminal proceeding and the unlawfully obtained evidence is or could have been excluded under s. 24(2), it does not follow that the same evidence will or should be excluded in a civil or administrative proceeding. The strong message of the Supreme Court in the Mooring to Conway line of cases discussed earlier is two-fold: one, evidence excluded in criminal proceedings may well be admitted in administrative proceedings because the context of the s. 24(2) inquiry in the civil or administrative context is very different; and two, given that specialized administrative tribunals have primary jurisdiction to make s. 24(2) decisions, they should be allowed to do so.

Although section 24(2) of the *Charter* refers to the court and does not reference other tribunals, there was no suggestion in *Choong* that the Committee did not have jurisdiction to rule on the application to exclude evidence. Indeed, the *Kelly* decision, relied upon in *Choong*, expressly contemplates administrative tribunals having jurisdiction to decide section 24 applications.

While one expects that the cases will be rare, *Choong* suggests that 1) there may be circumstances that give rise to a consideration of *Charter* rights and possible exclusion of evidence in an AIC discipline hearing, and 2) if those circumstances arise, the Adjudicating Committee panel will have to engage in an analysis reflecting upon the factors set out in Grant to decide if the evidence should be admitted. As noted in the quote from the Kelly decision above, the fact that evidence was unlawfully obtained in a criminal proceeding may not be a bar to admitting the evidence in a discipline hearing.

End notes

1 2020 ONCA 10
2 [1980] 2 S.C.R. 555, pp. 566-567
3 Aga, paras. 40,41
4 Aga, paras. 43, 45
5 2019 ONSC 946, application for leave to appeal to SCC dismissed 2020-02-06
6 2009 SCC 32

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