



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Vey v. Newfoundland and Labrador Pharmacy
Board*, 2022 NLCA 55

Date: October 3, 2022

Docket Number: 201901H0068

BETWEEN:

BEVERLEY VEY

APPELLANT

AND:

NEWFOUNDLAND AND
LABRADOR PHARMACY BOARD

RESPONDENT

Coram: Welsh, Hoegg and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201801G2093
(2019 NLSC 111)

Appeal Heard: September 12, 2022

Judgment Rendered: October 3, 2022

Reasons for Judgment by: Welsh J.A.

Concurred in by: Hoegg and O'Brien JJ.A.

Counsel for the Appellant: Cletus E. Flaherty

Counsel for the Respondent: Augustine F. Bruce K.C.

Authorities Cited:

CASES CITED: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867.

REGULATIONS CONSIDERED: *Pharmacy Regulations, 2014*, NLR 94/14, section 12(o).

STATUTES CONSIDERED: *Pharmacy Act, 2012*, SNL 2012, c. P-12.2, sections 35, 36, 37, 39, 41, 51, 28, 52, 53, 54, 57; *Personal Health Information Act*, SNL 2008, c. P-7.01, section 3.

TEXTS CONSIDERED: R. Sullivan, *Sullivan on the Construction of Statutes*, fifth edition, (Markham, ON: LexisNexis Canada Inc., 2008).

Welsh J.A.:

[1] Beverley Vey is a pharmacist who was the subject of disciplinary proceedings by the Newfoundland and Labrador Pharmacy Board. The adjudication tribunal determined that Ms. Vey had engaged in conduct deserving of sanction. Her appeal of that decision to the Supreme Court of Newfoundland and Labrador was dismissed. She now appeals to this Court on the basis that the complaint dealt with by the adjudication tribunal was grounded in conduct by the Board for which it lacked authority.

BACKGROUND

[2] In May 2016, Ms. Vey, the owner of a pharmacy and the pharmacist in charge, applied to the Pharmacy Board for approval of renovations to provide for a private consulting area in the pharmacy. Once completed, the renovations were subject to inspection by the Board. The Board advised Ms. Vey that the person assigned to conduct the inspection would also conduct a practice site assessment. Ms. Vey objected to the latter, and refused to comply with the request that she cooperate with the practice site assessment. She took the position that only an assessor appointed by a quality assurance committee had authority to conduct a practice site assessment, and that the Board, which had not appointed the necessary committee, did not have the authority to appoint a person to conduct the assessment.

[3] A short summary of the disciplinary procedure that applies to pharmacists, as set out in Part V of the *Pharmacy Act, 2012*, SNL 2012, c. P-12.2, provides background context for the appeal.

[4] Disciplinary proceedings are commenced by the making and filing of an allegation. An “allegation” is defined to mean “a written document alleging that a person has engaged in conduct deserving of sanction” (section 35(a) of the *Act*). A complainant or the registrar, appointed by the Pharmacy Board under the *Act*, may make and file an allegation against a pharmacist (section 37(1) of the *Act*).

[5] As part of the disciplinary process, the *Act* provides for a complaints authorization committee and a disciplinary panel. The complaints authorization committee, appointed by the Board, is composed of members of the Board, with at least one member appointed to represent the public interest (section 36(2) of the *Act*). The disciplinary panel, appointed by the Board, is composed of not less than ten pharmacists who are not members of the Board, one pharmacy technician, and three persons, who are not pharmacists or pharmacy technicians, appointed by the minister to represent the public interest (section 36(4) of the *Act*).

[6] Pursuant to section 39(6) of the *Act*, an allegation may be characterized as a complaint:

Where the complaints authorization committee is of the opinion that there are reasonable grounds to believe that a [pharmacist] has engaged in conduct deserving of sanction, the allegation shall be considered as constituting a complaint, and the committee may

...

(b) instruct the registrar to file the complaint against the [pharmacist] and refer it to the disciplinary panel; and

...

[7] A complaint that has been referred to the disciplinary panel is heard by an adjudication tribunal composed of three persons appointed from members of the disciplinary panel (section 41(1) of the *Act*).

[8] In this case, the adjudication tribunal determined that Ms. Vey had engaged in conduct deserving of sanction based on her refusal to allow a practice site assessment at the same time as the renovations to her pharmacy

were to be inspected. Ms. Vey was of the opinion that the person designated to conduct the practice site assessment was not properly authorized to do so under the *Act*. In addition, she expressed concern about client confidentiality.

ISSUES

[9] The issues in this appeal are: (1) the correct standard of review to be applied to the decision of an adjudication tribunal; and (2) the Board's authority to appoint a person to conduct a practice site assessment of Ms. Vey's pharmacy.

ANALYSIS

Appeal of a Decision of an Adjudication Tribunal

[10] Section 51(1) of the *Pharmacy Act* provides for an appeal of a decision made by an adjudication tribunal:

The board or the respondent may, within 30 days after receiving notice of a decision or order of an adjudication tribunal under this Act, appeal the decision or order to the [Supreme Court of Newfoundland and Labrador] by filing a notice of appeal with the court.

[11] The standard of review that applies to a statutory appeal from the decision of an administrative tribunal is discussed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653:

[37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. ...

[12] In this case, it is accepted by the parties and by the Court that the issues on appeal involve questions of statutory interpretation and the scope of the Board's authority. These issues engage a standard of correctness. It follows that the judge in the court appealed from (the "appellate judge") was required to assess the correctness of the adjudication tribunal's decision. While the appellate judge did not have the benefit of the decision in *Vavilov*, he erred by

assessing the tribunal's decision and its interpretation of the legislation on the basis of reasonableness. In addition, the judge stated at paragraph 36 that even if the correctness standard applied, the tribunal's decision was "appropriate". I do not accept that conclusion. In fact, as discussed below, the judge erred in his interpretation of the legislation.

The Complaint Against Ms. Vey

[13] The complaint against Ms. Vey states:

On November 29, 2016, an allegation ("the Allegation") was made by correspondence from the Registrar of the Board, Margot Priddle ("the Complainant"), dated November 29, 2016, against Beverley Vey, R. Ph., The Allegation related to [the] alleged refusal of Ms. Vey to cooperate with the Board's Quality Assurance Program ("the Program").

(Emphasis added.)

[14] Having determined that there were reasonable grounds to believe that Ms. Vey had engaged in conduct deserving of sanction, the complaints authorization committee deemed the allegation to constitute a complaint which was referred to the disciplinary panel. The Committee directed that reference be made in the complaint to sections 28 and 54 of the *Act*, sections 12(n), (o) and (p) of the *Pharmacy Regulations, 2014*, NLR 94/14, and Board by-laws 81 and 94(n).

[15] Section 28(1) of the *Act* addresses the responsibility of a pharmacist who is in charge of a pharmacy:

The pharmacist in charge of a pharmacy operating under this Act shall ensure that that pharmacy is operated in compliance with this Act and failure to do so constitutes conduct deserving of sanction.

[16] For purposes of the appeal, following are the relevant legislative provisions.

The Legislation

[17] As discussed above, disciplinary proceedings, which led the adjudication tribunal to determine that Ms. Vey had engaged in conduct deserving of sanction, fall under Part V of the *Pharmacy Act*. The underpinnings of the complaint against Ms. Vey that led to that determination are found in Part VI of the *Act*, which deals with "Quality Assurance".

[18] Section 52 of the *Act* requires the Board to establish a quality assurance program:

- (1) The board shall establish and maintain a quality assurance program to promote high standards of practice within the pharmacy profession.
- (2) The quality assurance program shall include mandatory continuing education and professional development and shall be designed to promote continuing
 - (a) competence; and
 - (b) quality improvement.

(Emphasis added.)

[19] Section 53 of the *Act* provides authority for the appointment of a quality assurance committee:

- (1) The board may appoint a committee known as the quality assurance committee consisting of a number of pharmacists and pharmacy technicians determined by the board and at least one person appointed to the board [who is not a pharmacist but who is suitable to represent the public interest].
- (2) The quality assurance committee shall investigate a concern
 - (a) on the referral of a quality assurance issue by
 - (i) the registrar, or
 - (ii) the complaints authorization committee; or
 - (b) on its own accord.
- (3) The quality assurance committee may
 - (a) subpoena records, including patient records;
 - (b) order a pharmacist ... to undergo an evaluation, assessment or examination;
 - (c) order a review of a pharmacist's ... practice, including any consequential review of patient records;
 - (d) order periodic or random audits of aspects of a pharmacist's ... practice;and

(e) accept an agreement between the board and a pharmacist ... to give effect to matters which could be ordered by the quality assurance committee.

(4) Where a pharmacist ... fails to comply with an order made by the quality assurance committee, that committee shall refer that failure to comply as an allegation to the complaints authorization committee.

(Emphasis added.)

[20] Section 54 of the *Act* provides authority for the appointment of quality assurance assessors:

(1) The quality assurance committee may appoint persons registered as pharmacists or pharmacy technicians under this Act as assessors for the purpose of the quality assurance program.

(2) An assessor may, for the purpose of the quality assurance program

(a) enter, without notice and at reasonable times, places where pharmacy is practiced to make necessary inspections;

(b) inspect that pharmacist's ... records of care administered to patients;

(c) require from the pharmacist ... information required by the quality assurance committee or the assessor respecting the assessment and care of patients by the pharmacist .., or his or her records of care administered to patients; and

(d) require that that pharmacist .. confer with the quality assurance committee.

(3) A pharmacist ... whose standards of practice are the subject of an assessment under the quality assurance program shall cooperate fully with the quality assurance committee and assessors.

(4) An assessor may access patient records without the consent of that patient.

(5) All records and specific information relating to the quality assurance program or a review or recommendation under it are confidential.

(Emphasis added.)

[21] Section 57(1) of the *Act* provides for referral of a matter by an assessor to the complaints authorization committee:

Where an assessor ... learns, in the course of a review, that a pharmacist ... may be guilty of conduct deserving of sanction ..., the assessment shall be terminated, the

pharmacist ... shall be advised, and the matter shall be referred to the complaints authorization committee to be dealt with as an allegation.

[22] Section 12(o) of the *Pharmacy Regulations* provides:

In addition to the responsibilities prescribed in the Act, a pharmacist in charge shall be responsible for the following:

...

(o) cooperating with any person appointed by the board in accordance with the Act;

...

Interpretation of the Legislation

[23] The adjudication tribunal's interpretation of the *Act* was that it was not mandatory to appoint a quality assurance committee, and that, if no committee was appointed, the Board retained the authority itself to conduct quality assurance assessments. Both the tribunal and the appellate judge accepted this interpretation of the *Act*.

[24] For purposes of assessing the appeal it is necessary to review and apply the appropriate principles of statutory interpretation. I begin with the language of the legislation. The meaning of the word "may" is fundamental to the interpretation of the relevant sections of Part VI of the *Act*. While section 52 states that the Board "shall" establish and maintain a quality assurance program, section 53, on the other hand, provides that the Board "may" appoint a quality assurance committee.

[25] In determining the legislative intention in using the word "may" in section 53, the discussion in R. Sullivan, *Sullivan on the Construction of Statutes*, fifth edition, (Markham, ON: LexisNexis Canada Inc., 2008), is of assistance. The author identifies two approaches to the interpretation of the word "may" as considered in the case law; that is, "may" is interpreted to grant complete authority or discretion to exercise a power, or the authority is intended to be coupled with a duty. In particular, at pages 71 to 72:

... The word "may" alone cannot determine the outcome; it must be considered in context, having regard to the usual things – the Act as a whole, the purpose and scheme, the entire context.

There are many cases in which the courts have found the power conferred by “may” to be coupled with a duty once all the conditions for the exercise of the power have been met. In *Brown v. Metropolitan Authority* [(1996), 150 N.S.R. (2d) 43 (N.S.C.A.)], for example, the Nova Scotia Court of Appeal ruled that Sackville’s Metropolitan Authority was obliged to pay the claimant [compensation pursuant to the legislation]. ... The Authority argued that the words “may pay” conferred entitlement to pay, but not obligation. Responding to this argument Pugsley J.A. wrote:

There was, in my opinion, no discretion left to the Authority to impose any further conditions before being required to pay compensation to [the claimant].

It is the duty of the Authority not to act in such a manner as to frustrate the policy and objects of the Act, and in my opinion, the position taken by the Authority in this case would do just that.

The Authority has confused what is a very clear distinction between a power coupled with a duty and a complete discretion

Even though imperative language was not used, a duty arose to exercise the power once the conditions of exercise were met. Otherwise the purpose of the legislation would have been thwarted.

(Emphasis added.)

[26] Accordingly, in determining the legislative intention in using the word “may”, it is necessary to consider whether the authority to exercise a power is, in fact, coupled with a duty to exercise that power. In this case, a review of the purpose and scheme of the *Pharmacy Act*, together with other contextual factors leads to the conclusion that the Board’s authority to appoint a quality assurance committee was intended by the legislature to be coupled with a duty to make that appointment.

[27] I begin with the objects of the Board enumerated in section 7 of the *Act*:

(1) The board shall regulate the practice of pharmacy and the pharmacy profession in the public interest.

(2) The objects of the board include

(a) the promotion of

(i) high standards of practice, and

(ii) continuing competency and quality improvement through continuing education;

- (b) the administration of a registration and licensing program;
- (c) the establishment, maintenance and development of standards for the operation of pharmacies; and
- (d) ensuring that the public interest is protected in all matters relating to the practice of pharmacy.

To achieve these objectives, the Board exercises authority vested through the legislation.

[28] Part VI of the *Act*, “Quality Assurance” is an integral component of the Board’s responsibility to promote high standards of practice and to ensure protection of the public interest. Appointment of a quality assurance committee is the vehicle adopted in the legislation for that purpose. It is the quality assurance committee that has the authority to investigate quality assurance concerns of its own motion, or as referred by the registrar or the complaints authorization committee (section 53(2) of the *Act*). In conducting an investigation, the quality assurance committee may subpoena records, including patient records, and make orders, including an order that a pharmacist undergo an evaluation, assessment or examination or an order for a periodic or random audit of a pharmacist’s practice (section 53(3) of the *Act*). These are significant powers which the legislature intended to be exercised by a properly constituted quality assurance committee.

[29] Further, section 54(1) of the *Act* gives the appointed quality assurance committee the authority to appoint assessors for purposes of the quality assurance program. That authority is not given to the Board. An assessor appointed pursuant to section 54(1) has broad powers to enter a pharmacy without notice to make an inspection or to inspect a pharmacist’s records or obtain information from the pharmacist regarding the assessment and care of patients (section 54(2) of the *Act*). The assessor may access patient records without the patient’s consent (section 54(4) of the *Act*). Finally, section 54(3) of the *Act* requires a pharmacist specifically to “cooperate fully with the quality assurance committee and assessors”.

[30] In summary, under Part VI of the *Act* it is the quality assurance committee, not the Board, which has the authority to conduct quality assurance assessments under this Part. It is clear from the purpose and scheme of the *Pharmacy Act* that the word “may” in section 53 is intended to confer authority on the Board to appoint a quality assurance committee, but that that authority is coupled with the duty to appoint the committee. In the absence of a quality

assurance committee, the Board has no authority to conduct quality assurance assessments.

[31] That conclusion is consistent with other indicia of statutory interpretation. In *Sullivan on the Construction of Statutes*, at page 578, the author discusses the principle of legislative evolution, that is, a change in legislative intention evidenced by an amendment, such as an addition to the statute:

In *R. v. Ulybel Enterprises Ltd.* [2001 SCC 56, [2001] 2 S.C.R. 867, at paragraph 33], Iacobucci J. wrote:

To understand the scope of [a provision] it is useful to consider its legislative evolution. Prior enactments may throw some light on the intention of Parliament in repealing, amending, replacing or adding to a statute. ...

[32] As applied in this case, provisions comparable to those contained in Part VI of the current statute are not found in the previous legislation. This new focus on quality assurance is indicative of the legislature's intention to give special attention to an aspect of the regulation of the practice of pharmacy that previously was not emphasized. To achieve the purpose, a specific procedure was adopted, with authority vested in the quality assurance committee.

[33] Further, the attention given to Part VI of the *Act* indicates an intention by the legislature to address a perceived social concern, in particular, the privacy that should attach to medical and health records. Powers exercised for the purpose of the quality assurance program that may affect the privacy of clients, such as accessing client records, are restricted to being exercised by the quality assurance committee or an assessor appointed by that committee. Had the legislature intended the Board to have parallel powers to those of the quality assurance committee, that could have been achieved with appropriate language.

[34] Finally, assessing the legislation at issue in the context of the entire body of provincial legislation provides an additional aid to statutory interpretation. The principle "for harmonizing different statutes" is referenced by Iacobucci J. in *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at paragraphs 30 and 50, and is set out in *Sullivan on the Construction of Statutes*, at page 411:

The presumptions on which statutory interpretation is based apply not only to single Acts but also, albeit with lesser force, to the entire body of legislative provisions of which the law is comprised at a given time. ... The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures,

conventions, and habits of expression as well as the substantive law embodied in existing legislation.

[35] Further, at page 416 in *Sullivan on the Construction of Statutes*, regarding analogous subject matter:

Often two or more statutes enacted by a legislature touch on the same subject or are analogous to one another without actually constituting a single integrated scheme. Statutes that deal with the same subject are presumed to operate together harmoniously. ...

See: *R. v. Ulybel Enterprises Ltd.*, *supra*, at paragraphs 50 to 51.

[36] As applied in this case, the scheme for accessing client information in Part VI of the *Pharmacy Act* provides specific authority for access to the pharmacist's client information by the quality assurance committee and assessors appointed by that committee. That scheme must be interpreted to operate harmoniously with the policy that underpins the *Personal Health Information Act*, SNL 2008, c. P-7.01, that is, protecting the confidentiality of personal health information. The purposes of that *Act* are set out in section 3:

(a) to establish rules for the collection, use and disclosure of personal health information that protect the confidentiality of that information and the privacy of individuals with respect to that information;

...

(d) to establish mechanisms to ensure the accountability of persons having custody or control of personal health information and to safeguard the security and integrity of the personal health information in their custody or control;

...

[37] Accordingly, for purposes of the quality assurance program, where the confidentiality of personal health information is a consideration under both the *Pharmacy Act* and the *Personal Health Information Act*, limiting access to the pharmacist's client information as set out in sections 53 and 54 of the *Pharmacy Act* results in the two statutes being read harmoniously.

[38] In summary, applying the relevant principles of statutory interpretation, the conclusion follows that conducting a practice site assessment pursuant to the quality assurance program is within the authority of the quality assurance

committee and an assessor appointed by that committee. The Board has no similar authority.

Application of the Legislation

[39] In this case, the complaint against Ms. Vey states that the allegation relates to the “alleged refusal of Ms. Vey to cooperate with the Board’s Quality Assurance Program”. That program was established under Part VI, as required by section 52 of the *Pharmacy Act*. The Complaint Document states:

A hearing of an Adjudication Tribunal of the Discipline Panel of the Board would determine whether the conduct of [Ms. Vey] in this matter constituted a violation of [1. section 28 of the *Act*; 2. section 54 of the *Act*; 3. section 12(n), (o), and (p) of the *Pharmacy Regulations, 2014*; 4. Board by-laws 81 and 94(n)].

(The relevant provisions, which were quoted in the Complaint Document, are set out above under “The Legislation”.)

[40] Section 28 of the *Act* relates to the responsibility of a pharmacist to ensure that the pharmacy is operated in compliance with the *Act*. It has no effect on the assessment of this appeal.

[41] As set out above, section 54 of the *Act* provides for the appointment of assessors by the quality assurance committee, and sets out the authority of an assessor, including the right to access patient records without the consent of the patient, while providing that all records and specific information are confidential. As discussed, the interpretation of that provision was engaged in the analysis of the appeal.

[42] Sections 12(n), (o) and (p) of the *Regulations* relate, respectively, to pharmacy facilities, cooperation with a person appointed by the Board in accordance with the *Act*, and compliance with legislation pertaining to pharmacy practice. These provisions have no effect on the assessment of this appeal. Section 12(o) could not be relied upon to find that Ms. Vey had engaged in conduct deserving of sanction because that provision requires the pharmacist to cooperate with any person appointed by the Board. An assessor appointed under Part VI of the *Act* by the quality assurance committee is not a person appointed by the Board. While the committee is appointed by the Board, the assessor is appointed directly by the committee and has, as a result of that appointment, specified authority and responsibility. It follows that the appellate judge erred by finding as reasonable the adjudication tribunal’s decision that Ms. Vey had

committed conduct deserving of sanction by breaching section 12(o) of the *Regulations*.

[43] Finally, by-law 94(n) states that professional misconduct includes refusing to allow the registrar or a designated agent to enter a pharmacy “for the purpose of an assessment or investigation”. While the Board is authorized by section 11 of the *Act* to make by-laws, that authority is limited to making by-laws that are not inconsistent with the *Act*. In this case, Part VI of the *Act* provides the relevant scheme for implementing and operating the quality assurance program, which is the basis of the complaint against Ms. Vey. In the circumstances, the by-law is irrelevant and could not be relied upon.

[44] Applying Part VI of the *Act*, the conclusion follows that the person designated to conduct the practice site assessment in respect of Ms. Vey’s pharmacy was not properly authorized to do so under the *Act* because she was not an assessor appointed by a quality assurance committee appointed pursuant to section 53 of the *Pharmacy Act*. The Board had no authority to proceed with a practice site assessment under the quality assurance program in the absence of compliance with Part VI of the *Act*.

SUMMARY AND DISPOSITION

[45] On an appeal from an adjudication tribunal’s decision, a standard of correctness applies to questions of statutory interpretation and the scope of the Board’s authority.

[46] The person designated to conduct Ms. Vey’s practice site assessment was not properly authorized to do so under the *Act*. The appellate judge erred in concluding that the adjudication tribunal’s decision was reasonable, and in dismissing Ms. Vey’s appeal.

[47] The complaint dealt with by the adjudication tribunal was grounded in conduct by the Board for which it lacked authority. In the result, there is no basis on which to find that Ms. Vey engaged in conduct deserving of sanction.

[48] The appellate judge erred (1) by assessing the adjudication tribunal’s decision and its interpretation of the legislation on the basis of reasonableness, and (2) in his interpretation of the legislation.

[49] Accordingly, I would allow the appeal, set aside the decision of the adjudication tribunal, and order that Ms. Vey shall have her costs on column 3 of the scale of costs in this Court and in the court appealed from.

B.G. Welsh J.A.

I concur: _____

L.R. Hoegg J.A.

I concur: _____

F.P. O'Brien J.A.