SUPREME COURT OF YUKON

Citation: *Gouniavyi v. Yukon (Government of)*, 2019 YKSC 40

Date: 20190809
S.C. No.: 17-AP005
Registry: Whitehorse

BETWEEN:

GENNADI GOUNIAVYI

PETITIONER

AND

GOVERNMENT OF YUKON (MINISTER OF THE DEPARTMENT OF COMMUNITY SERVICES and THE REGISTRAR OF PHARMACISTS) AND THE PHARMACY BOARD OF INQUIRY

RESPONDENT

PUBLICATION BAN ON NAMES AND IDENTIFYING INFORMATION OF ANY PATIENTS WAS ORDERED ON APRIL 25, 2019

Before Madam Justice B. Browne

Appearances:

Don Dear, Q.C.	Counsel for the Applicant
Karen Wenckebach	Counsel for Respondent (Minister of Department of Community Services and the Registrar of Pharmacists)
Mark E. Wallace and Mike Reynolds	Counsel for the Respondent (The Pharmacy Board of Inquiry)

REASONS FOR JUDGMENT

INTRODUCTION

[1] Pursuant to s. 18 of the *Pharmacists Act*, R.S.Y. 2002, c. 170, Gennadi Gouniavyi, the Applicant, appeals two decisions: the July 30, 2017 decision of the Yukon Community Services Pharmacy Board of Inquiry and the August 9, 2017 decision of the Registrar of Pharmacists. Both decisions recommended sanctions against Mr. Gouniavyi who is a licensed pharmacist working at a pharmacy in Whitehorse.

[2] I would remind anyone reading this decision that there is a publication ban on the names of or any evidence that might identify the patients mentioned here. This case is not about patients but rather about the conduct of the pharmacist.

[3] The Government of Yukon had representation at the hearing, but only as they indicated in their Outline to invite the Court to quash the Registrar's requirement in the letter of August 9, 2017, requiring Mr. Gouniavyi to provide the Registrar with a written statement outlining the policies he will follow to prevent future medication errors, including how he will use Pharmacist Intervention Report ("PIR").

CHRONOLOGY

[4] I have set out the chronology in some detail as dates are important when considering the issue of procedural fairness.

[5] May 5, 2016 - A former colleague of Mr. Gouniavyi filed a complaint with the Registrar Professional Licensing & Regulatory Affairs. The initial complaint was general in nature, related to medication errors, breach of patient confidentiality, violation of protocols in dispensing narcotics, and efforts to conceal or destroy relevant information. Prior to filing the complaint, the complainant had been put on an administrative suspension from his employment with regard to allegations of his misconduct in the workplace.

[6] May 5 - 12, 2016 - The complaint provided a list of names of people who could corroborate the allegations and a list of 63 alleged incidents. No dates or names of patients were included with the 63 alleged incidents.

[7] There was a three-month delay after this information was received.

[8] August 18, 2016 – Members of the Board were appointed: Donna Snow and Prev Naidoo, both pharmacists, who had no previous experience on a board of inquiry.

[9] August 24, 2016 - The Registrar forwarded a package to the Board containing the complaint and some information about the inquiry.

[10] There was a six-month delay.

[11] February 3, 2017- Counsel for the Board, Mark Wallace, wrote to Mr. Gouniavyi and Walmart, Mr. Gouniavyi's employer, setting out the following:

- Notification that a complaint had been filed;
- Notification that the Board was appointed to investigate;
- A summary of the complaint containing statements pertaining to dispensing practices, patient confidentiality, narcotic protocols, pharmacy protocols, record keeping and hiring practices; and
- A list of possible recommendations that the Board could make.

The letter did not provide:

- The name of the complainant;
- The identity of the Board members;
- The date of the complaint; and
- The 63 alleged incidents set out in the complaint.

Mr. Wallace's letter acknowledged that the Board was seeking further information from the complainant, including patient names and dates (to be provided by February 10, 2017). The letter further summarized the complaint and requested detailed narcotic information from January 1, 2016 to February 3, 2017. This information was to be supplied by Mr. Gouniavyi by February 10.

[12] February 7, 2017 - The complainant was represented by counsel on his wrongful dismissal lawsuit (from Walmart). After receiving a request for information from the Board, the complainant's counsel forwarded further particulars regarding the 63

allegations (3 dates and some patient names and details of 12 allegations without dates or specific drugs).

[13] February 17, 2017 - Mr. Gouniavyi provided the Board with an 11-page narcotic inventory and 48-page inventory report from November 2016 – February 17 2017.

[14] February 22, 2017 - Counsel for the Board requested a response from Mr. Gouniavyi to the 63 incidents and 12 specific examples as well as line-by-line details of all adjustments in the 59-page inventory noted above with copies of any documents entered in patients' charts relating to narcotic dispensing, within 7 days.

[15] February 27, 2017 - Counsel for Mr. Gouniavyi asked for an extension of deadline to March 24; the extension was granted only until March 20.

[16] March 14, 2017 - Mr. Gouniavyi provided a response to the Board related to the narcotic issue, and provided an explanation of the pharmacy's narcotic inventory reconciliation process.

[17] March 20, 2017 - Mr. Gouniavyi responded to the 63 alleged incidents and 12 specific examples. He noted that the complainant was a former pharmacist whose employment had been terminated, questioned the complainant's motivation, and attempted to address the allegations. Because there were few dates or specifics, he often guessed or attempted to speculate about what the general allegation was, stating things like:

> I have a vague recollection of one incident whereby [J] identified an error in one of his blister pack pickups whereby one pill was placed in the wrong time slot...
> I do not recall any of these patients.

He also addressed mistakes and errors that he did remember or could find information about in the pharmacy records. It was these "admitted mistakes" that the Board relied on in making its findings.

[18] April 15, 2017 – The Board reached a finding of professional misconduct against Mr. Gouniavyi, but did not communicate that decision to him. The Board did not contact any other pharmacists, technicians, doctors, or patients.

[19] Yukon Community Services Pharmacy Board of Inquiry decision is dated July 30, 2017, and the decision of the Registrar of Pharmacists is dated August 9, 2017.

[20] Only the decision of the Registrar was forwarded to Mr. Gouniavyi.

LEGISLATION

> *The Pharmacists Act*
>
> **14 In the case of an offence** under this Act a **complaint shall be made** or the information laid within one year from the time when the matter of the complaint or information arose
>
> …
>
> Board of Inquiry
>
> 17(1) The Commissioner in Executive Council may appoint two or more persons to act as a board of inquiry for the purpose of investigating any complaint made against a person practising as a pharmacist with respect to an alleged contravention of this Act or any complaint of malpractice or infamous, disgraceful, or improper conduct on the part of a person practising as a pharmacist.
>
> (2) Without restricting the generality of the expression "improper conduct", a pharmacist is guilty of improper conduct who
>
> > (a) is convicted of an offence against an Act of Parliament relating to the sale of narcotics; or

(b) is shown to be addicted to the excessive use of intoxicating liquors or narcotics.

(3) A board of inquiry appointed pursuant to subsection (1) may make rules and regulations under which the inquiry is to be held and has power

(a) to summon and bring before it any person whose attendance it considers necessary to enable the board properly to inquire into the matter complained of;

(b) to swear and examine all such persons under oath;

(c) to compel the production of documents; and

(d) to do all things necessary to provide a full and proper inquiry.

(4) A board of inquiry may direct that the person who made the complaint it is appointed to investigate shall deposit with the board, as security for the costs of the inquiry and to the person complained against, a sum not exceeding $500.

(5) If the board of inquiry finds that a complaint is frivolous or vexatious, it may cause to be paid to the Minister out of the deposit for security mentioned in subsection (4) any portion of the costs of the inquiry, or to the person complained against any portion of their costs, it considers advisable, and if the board does not so find or if there is any balance of the deposit remaining, the deposit or balance thereof shall be returned to the person who deposited it.

(6) A majority of the members of a board of inquiry is a quorum.

(7) A board of inquiry shall after investigation of a complaint pursuant to this section make a finding, and shall immediately report its finding to the Minister, and if it finds that the person complained against is guilty of a contravention of this Act or of malpractice or of infamous, disgraceful, or improper conduct may, in its report to the Minister, recommend that the person be

(a) reprimanded;

(b) fined in an amount named by the board, not to exceed $500;

(c) struck off the register and their licence cancelled; or

(d) struck off the register and their licence suspended for a definite period named by the board.

(8) The board of inquiry shall, at the time it sends its report to the Minister pursuant to subsection (7), notify the person complained against of its finding and of the recommendations for punishment, if any, made by it in the report.

(9) Every person who

(a) fails, without valid excuse, to attend an inquiry under this section;

(b) fails to produce any document, book, or paper in their possession or under their control, as required under this section; or

(c) at an inquiry under this section

(i) refuses to be sworn or to affirm, or to declare, as the case may be, or

(ii) refuses to answer any proper question put to them by the board of inquiry,

commits an offence.

Appeal

18(1) A person against whom a finding has been made by a board of inquiry may, within 30 days after the finding has been made, appeal from the finding to a judge.

(2) The judge before whom an appeal is made under subsection (1) may hear the appeal at the time and in the manner the judge considers just and may, by order, quash, alter, or confirm the finding of the board of inquiry (my emphasis)

STANDARD OF REVIEW

[21] The parties agree that the standard of review regarding the issue of procedural fairness is correctness.

[22] The parties further agree that the standard of review regarding the Board's recommendation is reasonableness.

[23] And further, the appropriate standard of review for interpretation of the *Pharmacists Act* is reasonableness.

Unusual Aspects of this Case

[24] Counsel before me acting on behalf of the Board was the same person that was acting for the Board during the course of the inquiry. Counsel, when acting for the Board sent and received all correspondence on behalf of the Board to the complainant and to Mr. Gouniavyi. I found that representation unusual. I appreciate the Yukon is a small jurisdiction and that the legislation is attempting to deal with important issues of public protection, while at the same relying on local people to carry out the appropriate duties under the legislation. I would suggest that independent counsel advocate in supporting the Board decision rather that the Board itself.

[25] As indicated in the chronology, the Board issued a decision on July 30, 2017. This appeal was filed and examination on affidavit of one of the Board members was conducted to explain portions of the Board's decision. I also found this procedure unusual as the Board's decision should speak for itself. It is unusual to go behind the decision to one of the members to find out the reasons for their decision. It would be the expectation of the Applicant that the decision would be full and complete and not require any explanation.

[26] In judicial review, there are rare exceptions to this rule. Generally, the only evidence before the Court on judicial review should be the record of the proceedings before the Tribunal; it is only in exceptional circumstances, such as allegations of breaches of natural justice, that additional evidence may be led: *Cantor v. Edmonton (City)*, 2009 ABQB 70*, White v. Alberta (Workers' Compensation Board, Appeals Commission)*, 2006 ABQB 359, at para. 35.

[27] When there is no, or an inadequate, record affidavits are permissible to show what evidence was actually placed before the tribunal: *Canadian Union of Public Employees, Local 301 v. Montreal (City),* [1997] 1 S.C.R. 793, at para. 86.

[28] As a result, I have relied only on the Board's decision, and not the affidavit.

The Board's Decision

[29] On July 30, 2017, following its investigation, the Board made recommendations about Mr. Gouniavyi to the Minister of Community Services, Professional Licensing & Regulatory as required by s. 17(7), but it did not notify Mr. Gouniavyi of its findings or its recommendations for punishment as required by s. 17(8). Under s. 18, a person against whom a finding was made by the Board has 30 days to appeal those findings to a judge. Mr. Gouniavyi did not have the opportunity to appeal the decision because he was not informed until after the Minister made his decision.

[30] On August 9, 2017, the Registrar sent the decision to Mr. Gouniavyi and set out a chronology of the paperwork that was exchanged between counsel for the Board, Mr. Gouniavyi, and the complainant. The Decision found Mr. Gouniavyi guilty of professional misconduct based on the paperwork he provided to the Board. The Decision goes on to impose a four-week suspension, plus a number of other penalties not provided for in the legislation:

- Courses in therapeutic/clinical evaluation of prescriptions;
- Documentation of PIR evaluation and changes in policy to prevent medication errors;
- Letter of reflection; and
- Follow up after.

Procedural Fairness

[31] A tribunal must adhere to the duty to be fair and/or the principles of natural justice: *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817. As noted above, the standard of review is whether the proceedings met the level of fairness required by law: *Alberta (Securities Commission) v. Workum*, 2010 ABCA 405, at para. 28; *Synergy Group (2000) Inc. v. Alberta (Securities Commission),* 2011 ABCA 194, at para.. 25.

[32] A good summary comes *from Bell Canada v Canadian Telephone Employees Assn*, 2003 SCC36, at paras. 21, 22. The principles can be summarized as:

1. The rules of natural justice depend on the nature of the tribunal and the constraints it faces. *IWA v. Consolidated – Bathurst Packaging Ltd*., [1990] 1 S.C.R. 282;
2. The procedural requirements of a tribunal depend on its nature and function, *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623;
3. Tribunals have a range of executive (policy functions) to judicial like (court-like) functions and those at the quasi-judicial end may bring stringent requirements of procedural fairness. *Ocean Port Hotel Ltd. v.*

British Columbia (General Manager, Liquor Control and Licensing Branch), 2001 SCC 52.

[33] In *Baker*, the Supreme Court of Canada, noting that the duty of fairness is flexible, variable and contextual, set out the following factors to consider when determining the contents of the duty:

1. The nature of the decision being made and the process followed in making it; the more like judicial decision making, the more likely procedural protections closer to the trial model will be required (para. 23);
2. The nature of the statutory scheme; for example, greater procedural protections will be required if there is no appeal (para. 24);
3. The importance of the decision to the individual or individuals affected; the more important the decision to the lives of the person(s), the more procedural protection is necessary (para. 25);
4. The legitimate expectations of the person challenging the decision; this is a right to procedural, not substantive rights, and these expectations may arise where promises or regular practices of administrative decision-makers, and that it would be unfair to reverse representations as to procedure, or "to backtrack on substantive promises without according significant procedural rights" (para. 26);
5. The tribunal or agency's choice of procedure, particularly when the legislation gives the decision-maker the discretion as to procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances (para. 27);
6. This list is not exhaustive (para. 28).

What Standard of Fairness is Applicable Here?

[34] In *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105, at 1113, the Supreme Court of Canada held that "A high standard of procedural fairness is required when the right to continue in one's profession or employment is at stake. ... A disciplinary suspension can have grave and permanent consequences upon a professional career." This decision clearly had an effect on Mr. Gouniavyi's ability to practice his profession and on his reputation, and he is therefore entitled to a high standard of procedural fairness.

[35] Under s. 17(3) of the *Pharmacists Act* the Board has some discretion to set procedures in conducting their inquiry, including the ability to make rules and regulations under which the inquiry will be held; to summon witnesses, and swear and examine those witnesses under oath; to compel the production of documents; and to "do all things necessary to provide a full and proper inquiry."

Allegations of Breach of the Duty to be Fair

[36] The Applicant argues that the following actions of the Board adversely affected the procedural fairness of this inquiry:

- Failing to disclose who were the Board members and scope of inquiry;
- Failing to provide him with opportunity to fully participate in the hearing;
- Failing to consider relevant and material evidence and disregard irrelevant evidence;
- Failing to provide certain and transparent reasons; and
- Providing recommendations that went beyond the authority of the Board.

Names of Board Members

[37] Transparency and accountability require that the names of the individuals constituting the Board should be provided. Not only were the names and CVs never given, the names were not printed under the signatures. Donna Snow was no longer working as a pharmacist at the time of the inquiry.

[38] A fundamental principle of procedural fairness is that decisions must be made free from a reasonable apprehension of bias (*Baker* at para. 45). The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394:

> ... the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[39] At no time in the proceedings was the Applicant advised of who the Board members were. There was an Order in Council published, but even in the body of the decision, the printed names of the Board members did not appear. There was no way for Mr. Gouniavyi to know who the decision-makers were, and therefore no opportunity to know whether to object to the composition of the Board on the basis of bias.

[40] In my view, this problem on its own would not be fatal to the Board's decision, since there is no allegation in this appeal that the Board itself was biased, or that there was a perception of bias. It is merely one indication that the process did not comply with the duty of fairness of the important rights available to Mr. Gouniavyi.

Right to Know the Case to be Met

[41] It is also fundamental that the person under investigation knows the case they have to meet: David Jones Q.C. & Anne S. de Villars Q.C*., Principles of Administrative Law*, 6th ed (Toronto: Thomson Reuters, 2014), at 274:

> The courts have consistently held that a fair hearing can only be had if the parties affected by the tribunal's decision know the case to be made against them; only then can the rebut evidence prejudicial to their case and bring evidence to prove their position.

[42] The Board received evidence from the complainant and required the Applicant to respond to the allegations. But those allegations were seriously deficient: there were only three dates associated with the allegations provided; most of the allegations were very general ("multiple errors and problems," "errors with medications, ordering, etc.," "countless complaints, egregious errors with blister packs," "complaints over the years"); no specifics were given about specific dispensing errors; and no evidence was provided in support of the allegations.

[43] The Respondents allege that in reaching its decision, the Board and the Registrar did not rely on the complainant's assertions and allegations, but upon Mr. Gouniavyi's response to the allegations, in which he admitted to 14 errors. The Board concluded that it did not need an oral hearing because it only found him guilty of the errors he admitted to.

[44] This does not render the Board decision fair; in fact it emphasizes the fundamental breach of Mr. Gouniavyi's right to know the case to be met. He was forced to guess what the complaints were in order to respond to them. In other words, his evidence was used against him because he did not know the case against him, and neither did the Board, until they received Mr. Gouniavyi's response.

[45] A breach of the duty to be fair renders the decision invalid: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 (at para. 23). The Respondents argue that the result would have been the same even if Mr. Gouniavyi had known the exact particulars of the allegations against him. The Supreme Court in *Cardinal* dismissed a similar argument:

> [23] …The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

[46] I therefore grant the application for judicial review based on the failure to advise of the case to be heard, and quash the decision, ordering it to be reheard by a new panel.

Other Arguments

[47] Although unnecessary, in the interests of providing further direction, I will address Mr. Gouniavyi's other arguments.

i. Oral hearing

[48] The Board did not have any type of hearing on the merits nor did they have any hearing or request for submissions on the penalty stage of their hearing. They did not follow up on any of the complainant's witnesses that might confirm or contradict the complainant's allegations. This was a 100% paper process.

[49] The question of the form a hearing must, like all other aspects of the duty to be fair, depend upon the nature of the legislation involved and the rights affected. It may involve an oral hearing, the right to cross-examine witnesses, the right to counsel, etc., but it may not. The Supreme Court of Canada in *Baker*, at para. 33:

> ... it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. …

[50] In this case, the Board had the authority under s. 17(3) to make the rules and regulations under which the inquiry would be conducted. This included the authority to summon witnesses, to swear and examine the witnesses, and "to do all things necessary to provide a full and proper inquiry." In this case, the nature of the consequences to Mr. Gouniavyi's ability to practice his profession is serious, and on the facts, the Board had only general allegations (primarily hearsay) from a former employee whose employment had been terminated. Deciding on the basis of an incomplete and written complaint, without an opportunity to assess credibility and reliability was seriously deficient. In my view, a fair procedure would have included, at a minimum, an oral hearing in which the complainant could be cross-examined by counsel for Mr. Gouniavyi. Given that many of the complaints were about Mr. Gouniavyi's customers, further evidence from these customers might well have been important in assessing the complaints.

[51] Further, Mr. Gouniavyi had no opportunity to make submissions about the penalty phase of the hearing. That too was a breach of the duty to be fair. The opportunity to make submissions on penalty is vital: *Salem v. Metropolitan Licensing Commission* (1993), 63 O.A.C. 198 (O.N.C.J.); *New Brunswick Real Estate Assn. v. Moore,* 2007 NBCA 64, at para. 21; leave to appeal refused [2007] S.C.C.A. No. 510.

ii. Reasons

[52] Mr. Gouniavyi argues that the reasons were insufficient. Evidence of this includes the fact that the Board filed an affidavit to support its reasons. Recent Supreme Court of

Canada jurisprudence has discussed the sufficiency of reasons, holding that the result needs to be reasonable, but inadequate reasons by themselves are not necessarily unreasonable: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62.

[53] In *Newfoundland and Labrador Nurses' Union,* the Court noted that even if the reasons are not adequate to support the decision, "the court must first seek to supplement them before it seeks to subvert them" (at para. 12, citing David Dyzenhaus, "The Politics of Defence: Judicial Review and Democracy", in Michael Taggart, ed*. The Province of Administrative Law* (1997), 279, at p 304). The Court noted at para. 16:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v Nipawin District Staff Nurses Assn*., [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[54] The Board argues that in making recommendations, it considered the seriousness of the incidents, the seriousness of the dispensing errors, that only three PIRs were completed for the 14 errors, causes of errors were repeated, and Mr. Gouniavyi had failed to dispense products safely and accurately. Unfortunately, those reasons or considerations do not appear in the Board decision.

[55] If it were necessary, I would find that these reasons were inadequate. They did not address the above issues or importantly Mr. Gouniavyi's credibility, although the affidavit suggests the Board found him credible based on the submitted documents. At

one point in the decision, the Board is prepared to accept his trustworthiness in making the admissions in his response; yet, in the examination on affidavit of Mr. Naidoo, he discusses Mr. Gouniavyi's untrustworthiness related to narcotic inventory.

[56] Also, regarding the issue of credibility, it is notable that the Applicant seems to have been cooperative with the Board by providing extensive information over short periods of time and best explanations of the allegations made against him. There are times in his evidence where he talks about steps that he took to remind staff members of some of the mistakes that he had made and processes to prevent future mistakes.

[57] Further, within the Reasons there are significant discrepancies. The Board found that Mr. Gouniavyi did not understand the seriousness of the medication errors. Mr. Gouniavyi, in his March 29, 2017 letter, indicates that he did understand. Again, the Board did not take the opportunity to discuss Mr. Gouniavyi's credibility. At one point the Board finds he is lying, and at another that he is telling the truth when he admits the noted errors. There is no discussion of this discrepancy. Such inconsistencies in the Reasons suggest that the decision was unreasonable, and do not go to the sufficiency of the Reasons.

[58] Mr. Gouniavyi argues that there is an acceptable margin of error in the world of pharmacy; a percentage of the total number of prescriptions filled over a certain period of time. But the Board's Reasons do not discuss how it determined that the list of errors over five years were sufficient to make a finding of professional misconduct. There were no submissions asked for or provided on what is misconduct or the standard of care explained or an explanation of the requirements for the PIR. The Board did not discuss or decide on the acceptable error rate nor did they have information to make a finding regarding the number of prescriptions in any given year by Mr. Gouniavyi as pharmacist

or by the pharmacy in question. In my view, like the inconsistencies within the decision, these are complaints not about the sufficiency of the Reasons, but about whether the decision was reasonable. I need not comment on this aspect, as the matter will be re-heard based on my finding that Mr. Gouniavyi's right to procedural fairness was breached. Alternatively, I conclude that the decision did not meet the reasonableness standard.

iii. One-Year Limitations

[59] The purpose of the *Pharmacists Act* is to protect the public. However, limitation periods serve a valuable purpose as well, ensuring certainty, availability of evidence and diligence on the part of the party complaining or prosecuting a claim: *Sturgeon Lake Indian Band v. Canada (Attorney General)*, 2016 ABQB 384, at para. 462; aff'd 2017 ABCA 365 :

> The underlying rationale of limitation periods is three-fold: certainty, evidentiary and diligence. The first is that "potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations". The second concern is to avoid the problems with stale evidence so that "the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim". The third is that "plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion". (M(K) v M(H) [KM v HM], [1992] 3 SCR 6 at paras. 22-24).

[60] Section 14 of the *Pharmacists Act* reads:

> In the case of an offence under this Act **a complaint shall be made** or the information laid **within one year** from the time when the matter of **the complaint** or information arose. (emphasis added)

[61] Complaint is not defined. However, the only other sections that refer to a "complaint" are the disciplinary sections. I conclude that the only reasonable

interpretation of this limitation period is that it refers to both the prosecution of offences under the *Act* and to complaints leading to a Board of Inquiry under s. 17.

[62] Of the 14 complaints found by the Board to be justified:

3 had no dates whatsoever

2012 – 1 complaint

2013 – 0

2014 – 6 complaints

2015 – 3 complaints

2016 – 1 complaint

[63] Therefore, only the allegations within the one-year limitation can be the subject of the inquiry.

iv. Penalty

[64] I have already determined that Mr. Gouniavyi should have had an opportunity to make submissions on penalty. I also note that the penalties imposed included penalties not expressly provided for in the legislation. The Board may only recommend the penalties set out in the legislation under s. 7: reprimand, fine to a maximum of $500.00, struck from the register and licence cancellation, or temporarily struck from the register and licence suspended. The Board has acted outside its jurisdiction in recommending penalties not expressly provided for in the *Pharmacists Act*.

CONCLUSION

[65] I am satisfied after considering the matter carefully that the Applicant was not treated fairly, in particular because he was not provided with sufficient information to know the case to be met. Had it been necessary to go further, I would have found that:

- Mr. Gouniavyi had a right to an oral hearing in order to test the credibility and reliability of the complainant;
- Mr. Gouniavyi had a right to make submissions as to penalties;
- The Board's decision was unreasonable because it was inconsistent and did not address the standard of care;
- The one-year limitation period in s. 14 of the *Pharmacist's Act* applies to complaints in the disciplinary process and therefore only three of the alleged complaints were within time; and
- The imposed penalties were beyond the Board's jurisdiction.

_____

BROWNE J.