CITATION: DGN Truck & Forklift Driving School v. Ontario Superintendent of Care 2024 ONSC 5604
DIVISIONAL COURT FILE NO.: 083/24
DATE: 20241011

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, McCarthy and Myers JJ.

BETWEEN:	
DGN Truck & Forklift Driving School Ltd. o/a Highway Truck & Forklift Driving School and London Truck and Forklift Driving School Inc. o/a London Truck and Forklift Driving School Applicants	David W. Levangie and Alexander Evangelista, for the Applicants
– and –	
Ontario Superintendent of Career Colleges Respondent	Andrea Huckins, for the Respondent
	HEARD at Toronto: October 3, 2024

REASONS FOR JUDGEMENT

SACHS J.

Introduction

[1] The Applicants are career colleges. They each offer a program that is meant to satisfy the minimum education requirements for graduates to qualify for the Class A commercial driver licence examinations.

[2] On September 27, 2023, the Respondent, the Superintendent of Career Colleges (the "Superintendent") issued a Revocation of Program Approval to the Applicant, DGN Truck & Forklift Driving School Ltd. ("DGN") and on October 11, 2023, the Superintendent

issued a Revocation of Program Approval to London Truck and Forklift Driving School ("London Truck"). The Applicants seek judicial review of both decisions on two grounds – they were made in a manner that breached procedural fairness and they are unreasonable.

[3] On June 14, 2021, and March 17, 2022, the Superintendent sent letters addressed to registered career colleges at large that were offering programs to prepare graduates for Class A driver's licensing examinations reminding them of their obligation to ensure that their programs were compliant with the Ministry of Transportation's Standards (the "General Notices"). These letters were not specific to the Applicants or their programs.

[4] In June of 2023, investigators on behalf of the Superintendent conducted investigations of both Applicants' programs. Reports were prepared of these investigations and forwarded to the Superintendent. As a result of these reports the Superintendent issued the Revocations of Program Approval that are the subject of this proceeding. No notice was sent to the Applicants that the Superintendent was considering revoking their program approvals, the Applicants were not provided with a copy of the reports that formed the basis for the revocations (or a summary of same) and they were not given an opportunity to respond to the concerns raised by the investigators.

Motion for Fresh Evidence

[5] Before discussing whether the decisions at issue were made in a procedurally fair manner, I am going to deal with the Applicants' fresh evidence motion. In *Association of Universities and Colleges of Canada and the University of Manitoba v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297, Stratas J. reviewed the recognized exceptions to the general rule against a court receiving evidence in an application for judicial review. The concern about receiving such evidence rests in the demarcation between the roles of the administrative tribunal and the reviewing court. As put by Stratas J. at para. 19, "this Court cannot allow itself to become a forum for fact-finding on the merits of the matter." One of the recognized exceptions is when the evidence is necessary for the court to assess any alleged procedural defects in the process used by the decision maker. The fresh evidence sought to be introduced in this case is necessary for us to assess the issue this application will turn on: whether the Superintendent breached her duty of procedural fairness. Specifically, the evidence speaks to facts that are relevant to a number of the factors that must be assessed in this regard, namely the importance of the decision to the Applicants, the impact of the decision on them and whether they had a legitimate expectation that was breached unfairly. Therefore, to the extent necessary to discuss the issue of procedural fairness, the fresh evidence has been admitted.

Procedural Fairness

[6] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada set out the factors that are to be considered in assessing whether the duty of procedural fairness has been set out in a specific set of circumstances. I will consider each of these factors and discuss them in terms of the facts at issue in this case:

(a) The nature of the decision being made, and the process followed in making it: As put in *Baker*, at para. 23:

> The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.

In this case, the Superintendent was performing the function of deciding two things: whether the programs in question complied with provincial standards and, if not, what remedy should be invoked for non-compliance. Neither that function nor the determinations that must be made to fulfill that function requires a process that resembles the trial model. This stands in contrast to the process where the registration to operate a career college is being revoked. However, that does not mean that the procedure employed was adequate.

(b) The nature of the statutory scheme and the terms of the statute pursuant to which the body operates: The statute does not set out specific requirements that the Superintendent must follow to revoke a career college's approval to provide a specified vocational program. All that is required is that the Superintendent give the registrant notice of the revocation. The statute does not provide an appeal right from the Superintendent's decision. The lack of an appeal right is a factor that militates in favour of greater procedural protection.

(c) The importance of the decision to the individual(s) affected: As put in *Baker*, at para. 25, "The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated." In this case the Applicants were only offering the programs that the Superintendent has revoked. As a result, the Applicants have lost all of their business and have had to refund all students the fees that they had paid. The financial impact on the Applicants has been considerable, as has the impact on their reputation that would result from having to immediately cancel all their programs and refund all student fees paid. In *Baker* at para. 25, the Supreme Court quotes with approval the following statement from Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113: "A high standard of justice is required when the right to continue in one's profession or employment is at stake." While the Applicants have not lost their "employment", they have lost their only source of income.

(d) The legitimate expectations of the persons affected: If the administrative body has made promises or has regular practices that it has adopted "it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according to significant procedural rights": *Baker*, at para. 26. The Superintendent has adopted a Progressive Model, which provides direction on how the Superintendent should take enforcement actions based on the registrant's compliance history, risk and behaviours.

According to the Applicants, they had a legitimate expectation that the Superintendent would have regard to the Progressive Model Matrix when choosing the mechanism for enforcement. Under that Matrix, a college without prior history of complaints or cautions would not be subject to program revocation. The investigator's report to the Superintendent took the position that the Applicants had been cautioned through the General Letters, and that the inherent public safety concerns posed by improperly trained Class A truck drivers justified imposing revocation for the infractions noted. The Superintendent adopted the same position before us. The General Letters were not a caution. They were not specific to the Applicants and did not outline any concerns that the Superintendent had with the Applicants' program.

(e) Choice of procedure by the decision-maker: There is a need for the court to take into account the choice of procedure that the Superintendent made, especially since that choice did not violate the provisions of the statute. However, this factor is not determinative and must be weighed with all the other factors.

[7] Given the importance of the decision to the Applicants, the severe impact the decision has had on them, the lack of appeal right and the legitimate expectation that the Applicants had that any discipline action would be a progressive one, I find that the Superintendent breached the Applicants' procedural fairness rights when she issued the Revocations of Program Approval without providing the Applicants with notice of her concerns and an opportunity to respond to those concerns. In coming to this conclusion, I reject the suggestion by the Respondent that public safety concerns justified immediate revocation. For example, the program materials that the inspector found to be substandard were materials that the Superintendent had reviewed prior to granting the Applicants approval for their programs. Moreover, inspectors from the Superintendent had reviewed these materials on previous occasions without noting any problems. While this does not mean that the Superintendent cannot change its standards, it does undermine any suggestion that these materials pose such serious safety concerns that the Applicants had to immediately cease providing any instruction.

Conclusion

[8] For these reasons, the Revocations of Program Approval are set aside. As agreed by the parties, the Superintendent shall pay the Applicants their costs of this application, fixed in the amount of $15,000.00.

Sachs J

I agree

McCarthy J

I agree

Myers J

Released: 20241011

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Applicants

– and –

Ontario Superintendent of Career Colleges

Respondent

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