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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

CO-EDITORS: **PAM HRICK** & **ZACHARY AL-KHATIB**

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CONTRIBUTORS


Ben Kates


Dragana Rakic


Spencer Bass

Two-stage analysis adopted for third party records applications in sexual misconduct proceedings under the *RHPA*: *Ontario (College of Pharmacists) v. Member Y*, 2019 ONCPDC 10

Facts: As of May 1, 2018, a number of amendments to the *Health Professions Procedural Code*[1] (the "*Code*") addressing circumstances of professional misconduct where the allegations are of a sexual nature came into effect pursuant to the *Protecting Patients Act, 2017*.[2] One such amendment, s. 42.2 of the Code, specifically addresses requests for third party records in the context of a discipline hearing involving allegations of sexual misconduct.

The decision in *Member Y* was the first opportunity for a Discipline Committee to comment on the framework established by s. 42.2 of the Code. In that proceeding, the Member had been referred to discipline in relation to allegations that he had engaged in a pattern of sexual abuse and sexual harassment directed at the Complainant, his former employee, who was also his patient for a period of time.

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[1] Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18.
[2] S.O. 2017, c. 11.

The Member received an initial disclosure package from the College that included ten pages of information obtained from the Complainant's family doctor, partially redacted for relevance.

Some time later, and prior to the discipline hearing, the College brought a motion seeking witness accommodation for the Complainant on the basis that she was a vulnerable witness. In the context of that motion, the Complainant telephoned a College investigator to advise that she had considered, but decided against, obtaining a letter of support from her physician.

Subsequent to this communication, the College made supplementary disclosure to the Member that included a memo drafted by the investigator. That document relayed, among other things, a statement by the Complainant that her physician told her "there are many things in her life that may have contributed to her present situation and how she is feeling, and that possibly, counsel for the pharmacist may try to blame other things."

Relying on the investigator's memo, the Member brought a motion for production of the Complainant's entire medical history. His request included third party records held by the Complainant's doctor and a therapist funded by the College's Patient Relations Program. It also included records in the possession of the College, namely unredacted versions of medical information included in his initial disclosure package.

Decision: Motion dismissed.

The panel relied on the Code's other provisions relating to sexual abuse and especially its statement of purpose at s. 1.1 to conclude that s. 42.2 should be interpreted in a manner that would encourage victims of sexual abuse to come forward and that would enhance the privacy rights of complainants in their medical and mental health records.

The Discipline Committee confirmed that s. 42.2 of the Code provides for two-stage test, analogous to the *Mills*[3] test that governs records production in cases of criminal sexual offences. As with the *Mills* test, a party requesting third party records must satisfy the panel at each stage that the record requested is likely relevant to an issue in the hearing or to the competence of a witness to testify, and that production is necessary in the interests of justice.

At the first stage, the panel will decide whether the records should be produced to it for inspection, keeping in mind the enumerated factors in s. 42.2(3). At the second stage, with the benefit of having reviewed the records, the panel will decide whether all, some, or none of the records should be produced to the Member.

The panel found, in the circumstances, that the test at s. 42.2 covered the request for both first *and* third party records. Relying in part on the French translation of the Code, the panel concluded that s. 42.2 applies to records in which a witness or complainant has a reasonable expectation of privacy, even if possessed by the College.

In applying the s. 42.2 test, the panel found that none of the records requested were likely relevant or needed to be produced in the interests of justice. The request for production was grounded in speculation and relied on the types of assertions that, pursuant to s. 42.2(1) of the Code, are not on their own sufficient to establish likely relevance (*i.e.*, that the record exists, may relate to credibility, relates to the presence or absence of a recent complaint, or was made close in time to a complaint or report).

The panel added that the Member's reliance on "the right to make full answer and defence" carried

[3] [1999] 3 S.C.R. 668.

less weight in an administrative proceeding than it would have in a criminal matter.

The panel noted in particular that, in the circumstances, production of records of a therapeutic relationship established under the College's Patient Relations Program (itself a creation of s. 85.7 of the Code) would defeat the legislative intent behind the program for funding for therapy and counselling for persons alleging sexual abuse.

Commentary: The Discipline Committee's decision in *Member Y* provides important guidance on how to approach requests for records made in RHPA proceedings involving allegations of a sexual nature. It is the first decision released under the new regime and the College took the unusual step of making this interlocutory decision public, which provides a useful benefit to practitioners and tribunal members working in this area.

The panel confirmed that s. 42.2 of the Code effectively codified a version of the *Mills* regime tailored for regulatory proceedings. Parties litigating requests under s. 42.2 of the Code can therefore rely on the body of jurisprudence that has developed pursuant to *Mills*, as modified to reflect the different considerations at work in criminal and administrative realms. Accordingly, third party records requests under the Code will place a greater priority on the interests of patients and the public relative to requests made in criminal matters.

The panel's conclusion that s. 42.2 can apply even to first party records is worth highlighting. The panel reasoned that the focus of s. 42.2 of the Code is on the privacy interest that exists in the record. The question to ask, therefore, is not who possesses the record, but rather whether that interest has been extinguished by an express waiver of the privacy protections in the Code.

The mere fact that a complainant or witness has signed a consent allowing their private records to be reviewed as part of an investigation does not amount to a total loss of any reasonable expectation of privacy in the document. Determining a third party's continuing privacy interest in a record obtained by a College involves inquiring into whether the third party knew and understood the protections afforded by the Code and explicitly waived those protections with a full understanding of the consequences of that waiver.

Board must assess redaction requests in light of privacy interests and necessity to publish; *mandamus* is appropriate where remitting would undermine confidence in the administration of justice: *Canada (Attorney General) v. Philps*, 2019 FCA 240

Facts: P was a manager at the Canada Revenue Agency (CRA). He received a 30-day suspension for inappropriate acts involving multiple younger female subordinates. P grieved this suspension and his matter was referred to the Public Service Labour Relations and Employment Board (the "Board"). The main issue before the Board was whether P had actually engaged in the alleged inappropriate acts.

As part of the Board's hearing, several non-managerial CRA employees testified on behalf of the employer. Prior to doing so, these employees were assured by the employer's representatives that their full names would not appear in the decision.

The Board rendered its decision in 2016 and dismissed P's grievance. It found that the allegations of inappropriate acts were made out. The full names of all the witnesses who testified against P appeared in this decision.

When the employer received the Board's decision, its counsel wrote to the Board and requested that it redact the names of the witnesses, and only refer to them by their initials instead. The Board refused this request, stating that it did not have the jurisdiction to amend its decision. The employer sought judicial review of this redaction issue, which the Federal Court of Appeal granted in 2017. The Court concluded that the Board clearly had jurisdiction to redact the employees' names. The redaction request was remitted to the same arbitrator to reconsider it on the merits.

On reconsideration, the Board once again refused to redact the names. The Board determined that redacting the names "would have the effect of promoting a highly undesirable and offensive practice of securing evidence through inducement resulting in biased testimony". Essentially, the Board indicated that the employer had secured "better" evidence by promising the employees anonymity, a promise that was not its to make. The Board viewed this as raising questions of bias in the testimony.

The employer again applied for judicial review of the Board's decision.

Decision: The Federal Court of Appeal granted the application and directed the Board to redact the names of the employees from the public version of the original decision.

The Court reiterated that the test for redacting decisions is the one set out by the Supreme Court in *Sierra Club of Canada v. Canada (Minister of Finance)*[4]: whether, in the circumstances, the right to freedom of expression should be comprised to preserve or promote another compelling societal interest. Such confidentiality orders should only issue where they are necessary to prevent a real and substantial risk to an important interest and reasonable alternative measures are insufficient.

The Court noted that, while the Board identified this test, it did not apply it in considering the redaction request. It should have "weighed the privacy interests of the individuals in question against any possible need to publish their names". Instead, the Board was "preoccupied" by the employer's promises of anonymity. As a result, the Board's decision was unreasonable. The Court found that the Board also acted unreasonably by minimizing the employee's privacy concerns after the Federal Court of Appeal had already determined that these concerns were legitimate. Finally, the Board failed to consider the broader public interest of whether disclosure would discourage other complainants from coming forward.

On the question of remedy, the Court concluded that, "in the unusual circumstances of this case", it was appropriate to deviate from the normal administrative law remedy of remitting the matter to the tribunal for redetermination. Given the amount of time that had passed and the fact that the Board had already had two opportunities to render a reasonable decision, the Court found that remitting the matter would undermine confidence in the administration of justice. It made the order itself that the Board should have made, redacting the names of the employees.

Commentary: In one sense, the Federal Court of Appeal's comments on the applicable test when administrative bodies receive redaction requests is not ground-breaking. The Court simply reiterated that the appropriate test is the one from *Sierra Club*, derived from *Dagenais v. Canadian Broadcasting Corp.*[5] and *R. v. Mentuck*[6]. *Sierra Club*

[4] 2002 SCC 41.

[5] [1994] 3 S.C.R. 835.

[6] 2001 SCC 76.

itself imported the *Dagenais/Mentuck* test from the criminal context to the administrative law framework, with certain modifications. In this way, the Federal Court of Appeal's decision reaffirms that this test remains relevant for boards and tribunals, subject to the provisions of the statutory scheme within which they operate.

However, in doing so, the Court admonished the Board for being "preoccupied" with the employer's promises of confidentiality and focused on whether or not such a practice was in the best interests of justice. In light of this decision, it is important for administrative bodies considering redaction requests to remain focused on weighing the privacy interests of the affected individuals against the right to freedom of expression and the openness of legal principles.

At the same time, employers and other entities appearing before administrative tribunals should be wary about promising potential witnesses that they will remain anonymous in any subsequently reported decision. While *Philips* emphasizes that boards and tribunals are not entitled to deny redaction requests simply because they disapprove of such promises, they are also not bound to fulfill the promises. The Federal Court of Appeal stressed that the tribunal must independently assess the privacy interests at stake in the particular circumstances of the case. Thus, while employers can bring redaction requests, they should be careful about making promises that are not within their power to keep.

Finally, *Philps* builds on a growing body of Federal Court of Appeal case law granting *mandamus* for "severe maladministration" or where remitting the matter would "undermine confidence in the administration of justice".[7] As the Court repeated in this case, the traditional remedy for an unreasonable decision is for the court to quash the decision and remit the matter for reconsideration. This process can extend the amount of time and resources that required to obtain a reasonable result and risks that parties may be forced to go back and forth between a tribunal and a court multiple times before their matter is finally resolved (like the employer in this case). The Court noted that, due to this process, the employees had to live with the fear of their involvement being exposed for approximately three years. In light of these issues, the Federal Court of Appeal was prepared to simply make the order that the administrative body should have made in order to preserve confidence in the administration of justice. This provides authority for the proposition that a court will not give an administrative decision-maker a third chance to render a reasonable decision where it has failed the first two times.

Ministerial directives on student fees are justiciable and must be consistent with legislation: *Canadian Federation of Students v. Ontario*, 2019 ONSC 6658 (Div. Ct.)

Facts: At Ontario universities and colleges, student associations (also called "student unions"), student newspapers, and other student groups and activities are generally funded, at least in part, by fees that each institution collects from students. Such fees are approved democratically by students at the institution through a referendum and, in many cases, are mandatory for all students to pay.

In December 2018, the Ontario Cabinet directed the Minister of Training, Colleges and Universities to direct colleges and universities to allow students to opt out of paying "fees related to student

[7] See, *e.g.*, *Garshowitz v. Canada (Attorney General)*, 2017 FCA 251, *D'Errico v. Canada (Attorney General)*, 2014 FCA 95.

associations" and other "ancillary fees". The Minister implemented this direction by issuing the "Student Choice Initiative" as a "policy directive" for colleges and a "guideline" for universities (collectively, the Directives). The Directives allow "essential" fees (including athletics, career services, and campus support) to be mandatory, but require "non-essential" fees (all fees that the Directives do *not* deem to be "essential", including student association fees) to be optional. Of note, Cabinet specifically directed that student association fees *must* be non-essential.

The Canadian Federation of Students (a national student organization of which many student unions are members) and the York Federation of Students (the student union for York University) (collectively, the Applicants) sought judicial review to quash the Directives on the basis that they were inconsistent with the statutory schemes regulating colleges and universities in Ontario. They also raised the issues of bad faith and improper purpose (based primarily on a fundraising appeal in which the Premier wrote, "I think we all know what kind of crazy Marxist nonsense student unions get up to. So, we fixed that. Student union fees are now opt-in."), as well as procedural fairness (based on lack of consultation prior to issuing the Directives).

Decision: Application allowed.

As a threshold matter, the Court rejected Ontario's argument that the Directives were not justiciable. The Directives were not immune to review because they reflect a "core policy choice", as the province submitted, based entirely on economic, social, and political considerations beyond the proper scope of the courts. Rather, the Court found that the question of whether the Directives were unlawful because they conflict with statutes governing the executive's authority is at the core of the court's role.

The Directives were also not immune to review on the basis that they were an exercise of the Crown prerogative over spending. While the Court did not delimit the scope of conditions the Crown can impose on spending, it drew on comments made by the UK Supreme Court in *R (on the application of Miller) v. The Prime Minister*[8] and previous Canadian jurisprudence to the effect that the principle of Parliamentary sovereignty limits prerogative powers, which cannot be used to alter the law of the land. It proceeded to decide this issue on the basis that the Crown cannot exercise a prerogative power in a manner contrary to legislation or where statute has displaced the prerogative explicitly or by necessary implication.

Here, the Directives were inconsistent with the legislation that prescribes governance for colleges and universities. As such, they were beyond the scope of the Crown's prerogative power and were unlawful. The Court noted, as a general matter, that there is no statutory authority authorizing either Cabinet or the Minister to interfere with student associations' internal affairs.

Concerning colleges specifically, which are not private institutions, the governing legislation precludes interference with student associations in any way that would restrict those associations from carrying out their "normal activities". The Court found the province had effectively conceded in the evidence that the effect of the college directive would be to restrict student unions from carrying out their "normal activities". Therefore, the college directive was outside the scope of the Minister's statutory authority and, as such, unlawful.

With respect to universities, which are private institutions, the Court thoroughly reviewed the history of their autonomy, democratization, and provincial funding, concluding that there is no statutory authority to interfere in the internal affairs of universities generally, the relationships between universities and student associations specifically, or with democratic decisions taken by students

[8] [2019] UKSC 41.

concerning their student association membership fees. The Court found that the independent governance structure of universities precludes the Minister from implementing the guideline for universities, as it is inconsistent with the universities' autonomous governance. The Court also noted that the Applicants had provided some evidence that due to the uncertainty of opt-out rates each semester, student associations would be unable to plan or budget or predict whether they would have the funds necessary to deliver programming or retain staff. Further, it would have a real impact on student groups and activities, such as student newspapers and legal clinics, funded through fees.

Given its conclusion that the Directives were contrary to law, the Court declined to deal with the Applicants' submissions concerning improper purpose, bad faith, and procedural fairness.

Commentary: This case contributes to the body of jurisprudence dealing with the threshold question of justiciability on judicial review. The careful scrutiny of ministerial directives here provides an important check on the power of the executive, which must respect the rule of Parliamentary sovereignty.

The issue of justiciability also arose in the recent case of *Weld v. Ottawa Public Library*.[9] There, the Divisional Court applied the Federal Court of Appeal's direction in *Air Canada v. Toronto Port Authority* to determine that the library was not acting in a public capacity when it cancelled an auditorium rental agreement due to the content of the movie scheduled to be screened during the booking. As such, the decision to terminate the contract was not subject to judicial review. Both *Weld* and *Canadian Federation of Students* provide additional guidance to actors on when their decisions may be subject to judicial review, as well as to potential applicants on when a court is likely to tell them this is not the type of matter that it will accept to adjudicate through judicial review.

Also of note is that this case seems to mark the first appearance in Canadian jurisprudence of the UK decision in *Miller*. While not relied on for any proposition that is inconsistent with the existing Canadian law on the review of prerogative powers, it will be interesting to see how and whether Canadian courts integrate that landmark decision into our jurisprudence on justiciability and prerogative powers.

As Ontario has sought leave to appeal this decision to the Court of Appeal, the final word on the lawfulness of the Directives at issue in *Canadian Federation of Students* is still to come.

Expert evidence useful for both credibility assessments and assessing underlying causes of psychological injury: *Joe Singer Shoes Limited v. A.B.*, 2019 ONSC 5628

Facts: A.B. filed a complaint with the Human Rights Tribunal of Ontario (HRTO) against her former employer and landlord, S, who was also the owner of the two corporate respondents (collectively, Respondents). She alleged S had sexually assaulted and harassed her for more than a decade, both in her home and at work, as well as insulted and demeaned her at work. She alleged this conduct continued until she went to the police. A.B. alleged discrimination with respect to employment and housing on several grounds under the Ontario Human Rights Code (Code).

Complicating this case was that a year before A.B. reported the abuse, she experienced a workplace injury from a fall. She injured her head, leading to memory problems, which were evident in the testimony she gave at the hearing.

Two experts also testified for A.B. at the hearing. Her psychologist testified that although A.B.'s

[9] 2019 ONSC 5358.

memory impairment manifested after her fall, in her opinion, the symptoms were primarily the result of sexual assault. She explained that the pain from the fall, as well as the decision to engage with the police, created the circumstances for the PTSD to emerge.

A.B.'s psychiatrist also testified. He opined that her severe PTSD resulted from sexual trauma, as well as cognitive defects from her head injury, including memory loss, and that she continued to suffer from PTSD symptoms. He testified that her story had remained consistent over the years and that her symptoms were consistent with having experienced sexual assault.

The HRTO found the respondents jointly and severally liable for some, but not all, of the violations of the Code A.B. had alleged. It found that while A.B.'s evidence was not always reliable, it was credible, and that S's evidence was not. The HRTO awarded A.B. a record $208,736 plus $50,000 in interest.

The Respondents sought judicial review in the Divisional Court, submitting that the HRTO's approach to A.B.'s credibility was unreasonable; that it had subjected S's evidence to greater scrutiny than A.B.'s; and that it had unreasonably relied on S's demeanor during the hearing as evidence he had created a poisoned work environment.

Decision: Application dismissed.

The most notable issue the Court dealt with was the submission that the expert testimony constituted oath-helping, *i.e.* that the Tribunal used the expert evidence as proof of the truth of A.B.'s testimony, which the Respondents alleged was unreliable because of her memory issues. Moreover, the Respondents claimed that the experts had inappropriately opined on the very matter before the Tribunal – whether A.B. had suffered the trauma she alleged – and that their opinions were based solely on A.B.'s own statements to them. As such, it was unreasonable for the Tribunal to rely on those opinions as the basis of its finding that A.B.'s allegations had been made out.

The Court disagreed. While it recognized that one witness's opinion that another witness is being truthful is generally inadmissible, it also relied on precedent to state that such evidence may sometimes be admitted where it relates to matters in issue other than credibility. For instance, experts are often called to opine on the cause of physical wounds, based on the physical features they observe. While the admissibility of expert evidence as to the cause of various physical injuries is a relatively straightforward matter, authority was divided on the admissibility of expert evidence as to the cause of *psychological* injuries.

When it comes to sexual assault, expert evidence could generally serve two purposes. The first is to show that behaviours such as delayed disclosure, inconsistent versions of the incidents, inability to recall peripheral matters and lack of avoidance of the perpetrators are not inconsistent with sexual abuse having occurred (the "credibility purpose"). The second is to show that certain behaviours or symptoms (such as those that manifest in PTSD) are, in fact, consistent with sexual abuse (the "causation purpose").

Some past cases have suggested that only the first use is allowed[10], while others have suggested that *both* uses are allowed.[11]

However, despite suggesting that it would have been open to the HRTO to use the expert evidence in A.B.'s case as positive evidence that she had

[10] *E.g. R. v. K. (A.)* (2000), 45 O.R. (3d) 641 (C.A.).
[11] *R. v. Llorenz* (2000), 35 C.R. (5th) 70 (Ont. C.A.); *R. v. Burns*, [1994] 1 S.C.R. 656.

been sexually assaulted or harassed, the Court found that this was not actually what it had done. Rather, based on a careful parsing of the impugned paragraphs in context, the Court held that the HRTO "relied upon the expert evidence in refutation of the [Respondents'] argument that Ms. B.'s memory problems made her evidence of sexual harassment less likely to be true" (para 71). That is, it had only used the expert evidence for the "credibility purpose", which was legally uncontentious.

The Court also rejected the Respondents' related submission that the HRTO had engaged in circular reasoning by using the fact of A.B.'s delayed disclosure and her memory issues as positive indications that she had been abused. The Court held instead that the relevant paragraphs, when read in their full context, merely demonstrated that A.B.'s behaviour and memory, when viewed in light of the expert evidence, refuted the Respondents' argument that A.B.'s behaviours made her evidence of sexual harassment less likely to be true.

Commentary: This case highlights the importance of properly using expert testimony in administrative proceedings. Practitioners and adjudicators must take care to ensure that expert evidence is not relied on in such a way as to support the general proposition that another witness is telling the truth; however, it can be used to rebut presumptions, based on certain behaviours, that a witness is not credible or not reliable.

The "credibility" exception to the oath-helping rule makes sense. Certain behaviours or traits of testimony might be mistaken, because of historical biases or false logic, as more- or less-probative of truthfulness. For instance, as a result of expert research and opinion, we are thankfully past the point where a complainant's delay in bringing an allegation of sexual assault can be relied on as conclusive proof that she consented to the abuse.[12] It remains helpful for experts to point out that things like a continued relationship with an alleged abuser should not be used to discredit the complainant.[13]

What this case adds to the jurisprudence is consideration of how expert evidence on the impact of trauma may be used in where there are gaps in a complainant's memory. In this case, the evidence was properly accepted to rebut the suggestion that the memory problems made A.B.'s testimony *less likely* to be true.

More contentious, though, is whether experts should be allowed to opine on whether certain psychological symptoms are *more likely* to have been caused by a sexual assault rather than something else, such as (in A.B.'s case) a physical fall. However, it is suggested that there is a critical difference between this use of expert testimony and inappropriate oath-helping.

As the Court pointed out, there is a parallel between expert testimony in this realm and the situation of physical wounds. A psychiatrist who has interviewed a complainant numerous times may reasonably, on the basis of knowledge and experience, conclude that the features of her interviews point to a greater likelihood of sexual abuse than falling down the stairs. This is based not on her *saying* that she suffered sexual abuse, but rather on comparing the features of her interview with those of numerous other people who allege sexual abuse and have *not* suffered it, as well as numerous others who have. It remains open to the decision-maker to believe or disbelieve the expert - just as it remains open to the decision-maker to find that a sexual assault took place, but not by the person against whom the complaint has been

[12] *R. v. D.D.*, 2000 SCC 43.
[13] *R. v. A.R.D.*, 2017 ABCA 237, aff'd 2018 SCC 6.

made. That is, while an expert may be useful in determining that certain exhibited psychological trauma is indicative of a sexual assault, they cannot say by *whom* it took place – unlike an oath-helper, who merely asserts that the witness is being truthful at large. As the Court noted, however, authorities are divided on whether expert evidence may be permitted for this purpose and, as such, both practitioners and adjudicators should exercise caution on this issue.

Finally, while the Court found that the Tribunal didn't engage in circular reasoning, it is difficult to read the impugned paragraphs without coming to that conclusion. On one hand, tribunals must be careful not just to caution themselves against such reasoning, but to not *actually* engage in such reasoning. On the other hand, this decision indicates the extent to which Courts may be reluctant to interfere with decisions that engage in such reasoning under a reasonableness analysis.

Test for consolidating judicial reviews and actions; consolidated proceedings can be certified as class actions: *Brake v. Canada (Attorney General)*, 2019 FCA 274

Facts: In 2008, Canada and the Federation of Newfoundland Indians entered into an agreement that recognized the Qalipu Mi'kmaq First Nation Band under the *Indian Act*, created criteria for membership in the Band, and established a process to assess membership applications. In 2013, after receiving an unexpectedly high number of membership applications, the parties entered into a supplemental agreement that introduced more stringent membership criteria.

B applied for judicial review of the decisions to reject his and all other membership applications based on the 2013 agreement. Wishing to seek both administrative law remedies and damages, B brought motions seeking to have his judicial review application "converted" into an action and seeking certification of a class proceeding. The Federal Court dismissed both motions. B appealed to the Federal Court of Appeal.

Decision: The Court of Appeal unanimously allowed B's appeal of the certification decision and made a series of procedural orders directing a consolidated action and application for judicial review to progress as a class proceeding. The Court's reasons, authored by Stratas J.A., address several aspects of the procedure for seeking administrative law remedies and damages for losses caused by an administrative decision in the same proceeding, including where that proceeding is a class proceeding.

First, the Court affirmed that litigants who seek both administrative law remedies and damages based on the same factual context must commence both an application for judicial review and an action for damages. The concurrent proceedings can then be consolidated under Rule 105 of the *Federal Courts Rules*. Each proceeding thereafter retains its character as a distinct form of proceeding seeking distinct relief, but they progress together following a shared procedure.

Second, the Court confirmed that consolidation is available for class proceedings. An application and an action that have been consolidated under Rule 105 may be certified as a class proceeding under Rule 334.16(1) of the *Federal Courts Rules*. Alternatively, a class action and a class application may be consolidated under Rule 105

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Third, the Court identified and evaluated three procedural approaches described in the Federal Courts' jurisprudence for seeking administrative law remedies and damages in the same proceeding, including a class proceeding.

- On the "*Hinton* approach," the litigant commences an application for judicial review and a separate action for damages.

The two are then consolidated and the consolidated proceeding may be certified as a class action.

- On the "*Paradis Honey* approach," the litigant commences an action seeking both administrative law remedies and damages for administrative misconduct. In this scenario, the pleading commences a consolidated action and application from the outset. Certification of the action as a class action may be sought.

- On the "*Tihomirovs* approach" — which B followed — the litigant commences an application for judicial review and then brings a motion under s. 18.4(2) of the *Federal Courts Act* to permit the application to be prosecuted as an action. The resulting proceeding may then be certified as a class action based on a proposed statement of claim filed at the time of the certification motion.

The Court approved of the first two of these approaches. By contrast, the Court found the *Tihomirovs* approach unsatisfactory, including in its misunderstanding of the effect of s. 18.4(2) of the *Federal Courts Act* and its reliance on a draft, unissued statement of claim on the certification motion. The Court held that, absent a submission from the parties to that effect, it was precluded from holding that *Tihomirovs* should not be followed. However, the Court set out a revised version of the approach, which it followed in resolving B's appeal, and advised future litigants in B's position to follow one of the other two approaches instead.

The Court then addressed the substance of B's certification motion, finding that the Federal Court had erred in dismissing it. The Court certified the proceeding, ordered that B's application for judicial review be consolidated with an action to be commenced forthwith, and that the consolidated proceeding be prosecuted as if it were an action.

Commentary: This decision provides practical guidance to litigants who wish to seek administrative law remedies and damages in a single proceeding in the Federal Court, though the Court notes it addresses the same issues as may arise in proceedings in other jurisdictions. It clearly directs litigants to follow either of two procedural approaches described in the decision — the *Hinton* and *Paradis Honey* approaches — while warning litigants away from a third approach — the *Tihomirovs* approach followed in B's case. While the Court tweaks the *Tihomirovs* approach to address some its shortcomings, its treatment of the approach suggests it is best viewed as a method for salvaging proceedings already in the system, rather than a blueprint for future litigation.

The Court describes the *Paradis Honey* approach as the simple route for litigants to follow. While this may be true in the sense that the *Paradis Honey* approach requires only one originating document, the approach appears to be a novel one and the details of its application may therefore remain to be worked in future cases. Notably, the *Paradis Honey* approach is described in *Brake* as involving a statement of claim that seeks damages and administrative law remedies and thereby serves to commence both an application for judicial review and an action. However, in *Paradis Honey* itself, the plaintiffs did not seek administrative law remedies, instead limiting their claim to damages. Indeed, Stratas J.A. in *Paradis Honey* had suggested that if it had been otherwise, the plaintiffs could have followed the *Hinton* approach.[14]

The *Brake* decision also provides helpful guidance on the operation of s. 18.4(2) of the *Federal Courts Act*. The decision clarifies that an order under this

[14] 2015 FCA 89 at para. 151.

provision does not convert an application into an action but, rather, makes the procedural rules relating to actions available to the parties to an application.

Finally, while the *Brake* decision is, strictly speaking, limited to the Federal Courts context, the Court noted that uncertainty in the law relating to simultaneous judicial reviews and actions is not limited to the federal jurisdiction. Thus, litigants seeking to pursue such proceedings in other jurisdictions may find *Brake* a source of inspiration for creative solutions to the procedural complexities that arise in this realm.

CO-EDITORS

Pam Hrick
416.593.2491
pamh@stockwoods.ca

Zachary Al-Khatib
416.593.1669
zacharya@stockwoods.ca

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