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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

CO-EDITORS: **ANDREA GONSALVES , JUSTIN SAFAYENI & DRAGANA RAKIC**

IN THIS ISSUE

CONTRIBUTORS

Karen Bernofsky

Gillian Moore

Judicial review and limited statutory appeal rights: *Yatar v TD Insurance Meloche Monnex*, 2022 ONCA 446

Facts: Y was injured in a motor vehicle accident in February 2010. At the time, she was insured by TD Insurance. She submitted an application for various categories of benefits pursuant to the *Statutory Accident Benefits Schedule*.[1]

TD initially paid the benefits, but later denied her application for three categories of benefits as a result of her failure to submit a completed disability certificate within the applicable time frame. Y then attended two examinations by TD's chosen assessor, after which TD denied her claim for two of the benefits for which she had applied. TD initially confirmed that she was eligible for the third form of benefits, income replacement. However, a few months later TD deemed Y ineligible for income replacement benefits too.

Y initiated various forms of dispute resolution that were available at the time under the SABS and the *Insurance Act*[2]. In 2018, and following

[1] Accidents on or After November 1, 1996, O Reg. 403/96 ("SABS")

[2] RSO 1990, c I.8

extensive amendments to the *Insurance Act* and the SABS, Y made an application to the Licence Appeal Tribunal. The Tribunal dismissed the application, finding that it was statute-barred because it had been commenced more than two years after TD denied benefits. The same adjudicator dismissed Y's request for reconsideration.

Y appealed the Tribunal's decision to the Divisional Court under a statutory appeal provision permitting appeals on questions of law. She also applied for judicial review. The Divisional Court dismissed the appeal and the judicial review application. The Court of Appeal granted leave to appeal.

Decision: Appeal dismissed (per Lauwers, Nordheimer and Zarnett JJ.A.).

The main issue in the appeal was whether the Divisional Court was correct in holding that where there is a statutory appeal from a Tribunal decision about SABS, the Court would exercise its discretion to consider a judicial review application only in exceptional circumstances. While the Court of Appeal agreed with the point the Divisional Court was making, it did not endorse the language of "exceptional circumstances".

The Divisional Court was correct in concluding that the existence of an adequate alternative remedy is a valid reason for the court not to exercise its discretion to hear and decide a judicial review application. Various factors direct that result, including legislative amendments evidencing an intention to greatly restrict resort to the courts to resolve disputes over SABS, and the fact the legislature limited statutory rights of appeal to questions of law only, leaving the Tribunal to determine issue of fact or mixed fact and law (subject to the right to request reconsideration).

The remedy of judicial review was available to Y. That right is recognized in the *Insurance Act*,[3] the *Judicial Review Procedure Act*,[4] and *Canada (Minister of Citizenship and Immigration) v Vavilov*.[5]

Judicial review is a discretionary remedy. When the Divisional Court said it would exercise its discretion to hear and determine a judicial review only in exceptional circumstances, it was attempting to communicate that the remedy of judicial review would be exercised only in rare cases, given the legislated scheme for resolution of disputes over SABS, which includes a right to reconsideration by the Tribunal and a statutory right of appeal on questions of law. There would have to be something unusual about the case to warrant resort to judicial review.

The Divisional Court's decision recognizes the legislative intent to limit access to the courts regarding these disputes. This analysis is consistent with the principles regarding the centrality of legislative intent expressed in *Vavilov*. It also recognizes certain realities

[3] RSO 1990 c I.8, s. 280(3): No person may bring a proceeding in any court with respect to a dispute described in subsection (1), other than an appeal from a decision of the Licence Appeal Tribunal or an application for judicial review.

[4] RSO 1990, c J.1, s. 2(1): "[a] court may, despite any right of appeal, by order grant any relief" by way of judicial review.

[5] 2019 SCC 65, paras 24 and 52.

regarding the judicial review remedy, including that it is a discretionary remedy, that the court is entitled to refuse to grant relief, and that the existence of an adequate alternative remedy is itself a reason to refuse to hear a judicial review application. The court's discretion with respect to judicial review applies to its decision both to undertake review and to grant relief.

Although judicial review is always available, the discretion to hear and decide such applications should be restricted to those rare cases where the alternative remedies of reconsideration and a limited right of appeal are insufficient to address the particular circumstances of a given case. What constitutes such a rare case is for the Divisional Court to determine on a case-by-case basis.

As a matter of practice, if a party intends to exercise both their right to appeal and their right to seek judicial review, then the proceedings must be brought together. A party cannot first exercise their right of appeal and then, if unsuccessful, bring a judicial review application. Once both proceedings are commenced, a motion must be brought for the two proceedings to be heard together with a single appeal book/application record and factum covering both proceedings. The difficulties associated with concurrent proceedings can be minimized through appropriate Practice Directions from the Divisional Court and/or the co-operation of counsel.

Commentary: The Court of Appeal's decision brings welcome simplicity and clarity to an issue that was touched on but not developed in *Vavilov*, and has subsequently challenged lower courts: the availability of judicial review where there is a limited statutory right of appeal.

The decision makes a handful of basic points that are grounded in well-established principles: judicial review is a discretionary remedy and the discretion includes whether to hear the application on its merits altogether, and whether to decide the case and grant a remedy; legislative intent is central and an intent to restrict access to the courts should be respected; judicial review is always *available*, in the sense that an applicant has the right to make an application—but the court 's discretion remains; where there is a limited appeal right and a right of reconsideration, the availability of those adequate alternative remedies means that only in rare cases will the court exercise its discretion to hear and decide the application.

The simplicity and clarity of the Court of Appeal's approach contrasts with the Federal Court of Appeal's reasons in *Canada (Attorney General) v Best Buy Canada Ltd*,[6] dealing with the same issue of whether judicial review is available where there is a limited appeal right. The Federal Court of Appeal panel produced two sets of reasons, coming to opposite conclusions, both of which involved extensive discussions of the history, theory and evolution of substantive judicial review.

By affirming that judicial review remains *available* notwithstanding a limited right of appeal, the Ontario Court of Appeal's decision in *Yatar* may well lead to an increase in the

[6] 2021 FCA 161

number of cases where a party brings a judicial review application concurrently with an appeal. Discouraging such applications may have been part of the Divisional Court's motivation in saying that the court would exercise its discretion to hear and determine judicial review applications only in "exceptional circumstances" if a right of appeal also exists. Apart from the practical difficulties addressed in the Court of Appeal's reasons, such concurrent applications also increase demand on court and judicial resources, and drive up costs for litigants. However, the Court of Appeal's caution that the court will exercise is discretion to hear and decide a judicial review only in "rare" cases, if borne out by experience in the Divisional Court, should over time reduce the instances of concurrent proceedings.

'Patent unreasonableness' means review on a reasonableness standard: *Ontario (Health) v. Association of Ontario Midwives*, 2022 ONCA 458

Facts: In 2013, the Association of Ontario Midwives ("AOM") brought a human rights complaint on behalf of more than 800 midwives, alleging systemic gender discrimination by the Ministry of Health and Long-Term Care, which funds Ontario's midwifery program. The AOM challenged the Ministry's compensation practices back to 1994, when Ontario midwives were regulated, and sought compensation back to 1997.

The Human Rights Tribunal of Ontario divided its decision into two periods: 1993 to 2005, and 2005 to 2013. The Tribunal found there was insufficient evidence of discrimination for the period from 1994 to 2005, due to the existence of equitable compensation principles to which the parties had agreed ("1993 Principles"). The Tribunal found the situation changed after 2005, as the Ministry gradually withdrew from the 1993 Principles, leaving the midwife profession exposed to the well-known effects of gender discrimination on women's compensation. The Tribunal held that sex was more likely than not a factor in the adverse treatment midwives experienced after 2005, and that the Ministry was liable for discrimination under the *Ontario Human Rights Code*.[7]

In a separate decision, the Tribunal made remedial orders, including granting a compensation adjustment of 20% back to 2011, ordering compensation for injury to dignity, feelings, and self-respect in the amount of $7,500 per eligible midwife, and requiring ongoing compliance with the *Code*.

The Ministry applied to the Divisional Court for judicial review of both decisions. Its application was dismissed. The Ministry's application for leave to appeal to the Court of Appeal for Ontario was granted. At issue was the applicable standard of review in light of s. 45.8 of the *Code*, which provides that "a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable."

Decision: Appeal dismissed (per Fairburn ACJO, Roberts JA and Van Melle J (*ad hoc*))

[7] R.S.O. 1990, c. H.19

The Court of Appeal held that the Tribunal's decisions were reviewable on a reasonableness standard and that both decisions under review were reasonable.

In *Dunsmuir v New Brunswick*,[8] the Supreme Court merged the patent unreasonableness standard of review with reasonableness. The result was that in the judicial review context there were now only two common law standards of review: correctness and reasonableness. Subsequently, in *Shaw v. Phipps*[9], the Divisional Court identified reasonableness as the appropriate deferential standard of review on an application for judicial review of a decision of the Tribunal.

The Court concluded that the Divisional Court's approach to the interpretation of s. 45.8 in *Shaw* is consistent with *Canada (Minister of Citizenship and Immigration) v Vavilov*.[10] Under the *Vavilov* framework, the reasonableness standard applies in all cases except where the legislature clearly indicates an intention that a different standard should apply or the rule of law requires a correctness standard.

The Court explained that the goals of patent unreasonableness can be achieved through the application of the reasonableness standard. Assimilating patent unreasonableness to the reasonableness standard does not undermine legislative intent. *Shaw* is also consistent with *Vavilov*'s stated desire to bring greater coherence and predictability to this area of law, by avoiding the practical and theoretical difficulties of distinguishing between patent unreasonableness and reasonableness that were identified in *Dunsmuir*.

Both *Shaw* and *Vavilov* recognize that reasonableness must take into account the relevant "colour" or "constraints", including the expertise of the Tribunal and the existence of a privative clause in s. 45.8 of the *Code*. In practice, this means that when reviewing a decision of the Tribunal, judges are to apply reasonableness with the appropriate measure of judicial restraint that respects the distinct role of administrative decision-makers.

Accordingly, the Court held that the standard of review of the Tribunal's decisions remains reasonableness, although the application of the reasonableness standard is now informed by the guidance provided in *Vavilov*.

In this case, the Court found that the Tribunal's reasons, read holistically, revealed a logical chain of analysis grounded in the record and the relevant jurisprudence sufficient to support her conclusions. The decisions on both liability and remedy bore the hallmarks of reasonableness, and were justified in relation to relevant factual and legal constraints.

Commentary: The Court of Appeal's decision affirms what many practitioners understood following *Vavilov*: that the Supreme Court's endorsement of legislative intent as the "polar star" of judicial review does not revive the patent unreasonableness standard, long put to rest at common law in *Dunsmuir*. Indeed, as

[8] 2008 SCC 9
[9] 2010 ONSC 3884 (Div Ct), aff'd 2012 ONCA 155
[10] 2019 SCC 65

far back as the 2009 decision in *Canada (Citizenship and Immigration) v Khosa* the Supreme Court noted that a statutory standard of review of patent unreasonableness "will necessarily continue to be calibrated according to general principles of administrative law".[11]

Dunsmuir identified fundamental theoretical and practical difficulties distinguishing between the patent unreasonableness and reasonableness standards. Those difficulties do not cease to exist simply because the patent unreasonableness standard is set by legislation rather than under the old common law 'pragmatic and functional approach'. It would be a step backwards in the law to reintroduce those difficulties based on the primacy *Vavilov* places on legislative intent, when *Vavilov* also emphasizes the need for coherence, clarity and a principled approach to standard of review.

The "patent unreasonableness" standard of review in s. 45.8 of the *Code* was enacted in 2006, at a time when the common law recognized patent unreasonableness as one of three standards of review. No doubt, it reflects a legislative reaction to that law. It is appropriate to interpret the provision in light of the evolution in the common law since that time. Under the *Vavilov* framework, what we can take from s. 45.8 is a legislative intention of deference that is useful in a contextual application of the reasonableness standard. A significant benefit of the *Vavilov* framework is that the reasonableness standard of review and the constraints it imposes on an administrative decision are sufficiently flexible to adapt to context. The Court of Appeal's decision in *Association of Ontario Midwives* demonstrates that point in action.

But not all jurisdictions have followed the Court of Appeal's approach. The British Columbia Court of Appeal, for example, has held that the patent unreasonableness standard of review set out in s. 58 of B.C.'s *Administrative Tribunals Act* is "unaffected by the common law standard of reasonableness" set out in *Vavilov* and "continues to mean what it meant when the [*ATA*] came into being".[12] In B.C., courts routinely rely on pre-*Dunsmuir* "patent unreasonableness" jurisprudence in applying that standard, justifying this approach by reference to *Vavilov*'s instruction that "where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law".[13] At some point, the Supreme Court likely will be called upon to resolve these differing approaches to how a statutory standard of patent unreasonableness is properly interpreted and applied.

Criminal findings of guilt can be relied on in professional conduct proceedings following discharge: *Jha v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 769 (Div. Ct.)

Facts: In 2015, J, a member of the College of Physicians and Surgeons of Ontario ("College") pleaded guilty to one count of assault and one

[11] 2009 SCC 12, at para 19

[12] See, for example, *Beach Place Ventures Ltd v Employment Standards Tribunal*, 2022 BCCA 147 at para 16

[13] *Ibid.* at paras 16-17

count of mischief under $5,000, contrary to the *Criminal Code*. The offences were committed in 2013 in relation to J's then-fiancée. In July 2016, J received an absolute discharge in relation to the offences.

In 2014, after being notified of the criminal charges, the College commenced an investigation into J's conduct. As part of its investigation, the College received a certified copy of the criminal court information and a copy of the transcript of J's guilty plea and finding of guilt.

In February 2019, an allegation that J had committed an act of professional misconduct under s. 51(1)(a) of the *Health Professions Procedural Code*[14] ("*Code*") was referred to the College's Discipline Committee ("Committee"). Section 51(1)(a) provides that a member has committed an act of professional misconduct if the member "has been found guilty of an offence that is relevant to the member's suitability to practise." The allegation was that J had committed professional misconduct because he had been found guilty of the 2013 offences and these offences were relevant to his suitability to practise.

J brought a preliminary motion before the Committee seeking to quash the notice of hearing on the basis that s. 51(1)(a) of the *Code* was unconstitutional on division of powers grounds. The Committee dismissed J's preliminary motion; found that J had committed professional misconduct, as alleged; imposed a penalty consisting of a reprimand and a three-month suspension of J's certificate of registration; and ordered that J pay costs to the College in the amount of $51,850.

J appealed to the Divisional Court from the Committee's finding of misconduct and its penalty and costs orders.

Decision: Appeal dismissed (per Perell, Sheard, and Copeland JJ.).

The main issue on appeal was the constitutionality of s. 51(1)(a) of the *Code*. J argued, as he had before the Committee, that s. 51(1)(a) is unconstitutional on division of powers grounds because it is in operational conflict with and/or frustrates the purpose of s. 6.1 of the federal *Criminal Records Act* ("*CRA*"). Section 6.1 of the *CRA* places restrictions on the disclosure of the fact of or records related to criminal discharges beyond specified time limits (one year in the case of absolute discharges and three years in the case of conditional discharges) and requires the removal of references to discharges from the RCMP's automated criminal conviction records database after the expiry of those time limits.

The Court dismissed J's constitutional challenge to s. 51(1)(a) of the *Code*. Relying on the text, legislative history, and prior judicial interpretation of s. 6.1 of the *CRA*, as well as a consequential analysis of J's proposed interpretation, the Court concluded that the purpose and effect of s. 6.1 was narrower than that urged by J: s. 6.1 restricts disclosure of the fact of, and records relating to, a discharge *by federal departments and agencies* once the statutory time has run. Because the purpose

[14] Sched. 2 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18.

and effect of s. 6.1 is not to prohibit disclosure or use of records in the hands of private parties, provincial entities, or entities regulated under provincial law, there is no operational conflict or frustration of purpose arising from a professional misconduct prosecution that is based on a finding of guilt for a criminal offence for which a discharge was granted, even after the statutory time period in s. 6.1. has elapsed. Following from this finding, the Court also rejected J's argument that the Committee erred in admitting into evidence at the professional misconduct hearing the criminal information and transcript of the guilty plea and finding of guilt.

The Court also dismissed J's argument that the Committee erred in finding that the offences of which J had been found guilty were "relevant to [his] suitability to practise," pursuant to s. 51(1)(a) of the *Code* because, in J's submission, they happened "in his private life." It is well-established that "actions of members of a profession in their private lives may in some cases be relevant to and have an impact on their professional lives – including where the conduct is not consistent with the core values of a profession and/or where there is a need for a regulated profession to maintain confidence of the public in the profession and not be seen to condone certain types of conduct by its members."[15] Discipline committees of regulated health professions in Ontario have held that findings of guilt in relation to domestic violence are relevant to the suitability to practise including because such conduct displays "poor judgment, lack of self-control, and capacity for violent acts"[16]; because "in some medical specialties, physicians will be called on to treat victims of domestic violence, and must be sensitive to issues related to domestic violence"[17]; and because of the need for the profession "to demonstrate to the public that acts of domestic violence by physicians, who stand in a position of trust towards patients, are not condoned by the profession."[18] Even accepting, for the purposes of the appeal, that a discipline committee must consider the particulars of a finding of guilting in deciding whether it is relevant to suitability to practise, the Committee in this case had done just that.

The Court also rejected J's other arguments: that the Committee had made an error in principle with respect to its penalty decision, and that the Committee did not have jurisdiction to order costs for two days of preliminary motions (which were heard by a different panel of the Committee). The Court concluded that s. 53.1 of the *Code*, which grants a Committee authority to award costs to the College following a finding of professional misconduct, includes the authority to order such costs for preliminary motions related to the same notice of hearing, including where the motions were heard by a differently constituted panel than the liability portion of the hearing.

Commentary: The Court's constitutional analysis with respect to s. 51(1)(a) of the *Code* is important in at least two respects.

[15] At para. 119.

[16] At para. 121.
[17] At para. 122.
[18] At para. 122.

First, and most obviously, the Court's rejection of J's constitutional arguments makes clear that health professions regulatory bodies can pursue prosecutions for professional misconduct under s. 51(1)(a) of the *Code* based on a finding of guilt where the criminal consequence of the finding was a discharge rather than a conviction, even after the statutory timelines referred to in s. 6.1 of the *CRA*. This holding is of practical importance not only to professional regulators considering prosecutions in such cases or individuals defending against them, but also to members of regulated health professions facing criminal charges and considering the potential professional consequences of a guilty plea where a discharge is available. The Court did note that, as a practical matter, s. 6.1 of the *CRA might* create practical hurdles for regulatory colleges if they do not investigate in a timely way and are consequently faced by a refusal by the Crown and/or police to provide records following the time periods set out in that provision. However, that issue was not before the Court in this case as the College received the relevant documents within one year of the imposition of J's discharge. Investigators would do well, however, to move in a timely way to obtain criminal court documents relevant to a potential misconduct investigation where they become aware of findings of guilt or a criminal discharge in relation to a member.

The Court's constitutional analysis is also notable for the Court's comments relating to the nature of the s. 51(1)(a) inquiry. While it did not engage in a comprehensive discussion of the interpretation of s. 51(1)(a), the Court rejected the premise of J's argument that s. 51(1)(a) called for an inquiry into a member's character, finding instead that the provision "is concerned with the nature of the offence that a member was found guilty of, and whether the nature of the offence is relevant to the member's suitability to practise." The Court noted that the "fact that a person has been found guilty of an offence may or may not also reflect on member's character (depending on the offence, and on factors such as the passage of time, and the member's efforts at rehabilitation). But character is not the concern of s. 51(1)(a) of the *Code*."[19]

Apart from the constitutional issue, the Court's decision is also significant with respect to the interpretation of s. 51(1)(a) in that it confirms the regulated health profession tribunal jurisprudence holding that findings of guilt in relation to domestic violence offences can be relevant to the suitability to practise. The Court did not find that such findings of guilt would *always* be relevant and indeed, it accepted, for the purposes of the appeal, that a discipline committee must consider the particulars of a finding of guilt in deciding whether it is relevant to suitability to practise. However, the Court noted that it *may* be open to a discipline committee in future to conclude "that some categories of offences are so serious that they could be found to always be relevant to suitability to practise" and suggested that offences such as murder or aggravated sexual assault may fall into this category. However, not being necessary to decide that issue, the Court ultimately left it for another day.

[19] At para. 68.

Declining to exercise judicial review jurisdiction where human rights complaint more appropriate: *Michalski v McMaster University*, 2022 ONSC 2625 (Div Ct)

Facts: The Applicants are students at McMaster University and devout Christians. They each requested an exemption from McMaster's mandatory COVID-19 vaccination policy based on creed, contending they hold a sincere belief that taking the vaccine is immoral and contrary to their religious faith. The Applicants' exemption requests were denied after McMaster's decision-makers (the "Validation Team") concluded that the Applicants were using their sincerely held religious objections to abortion as a pretext to avoid taking vaccines to which they personally object on non-religious grounds. McMaster then unenrolled the Applicants from courses until such time as they complied with the vaccination mandate, or the mandatory policy ceases to apply.

The Applicants brought an application for judicial review seeking a court order quashing McMaster's decisions and remitting the exemption requests back to McMaster for reconsideration.

As originally framed, the Notice of Application sought a broad range of relief, including for declarations that McMaster violated the *Charter* and the *Human Rights Code*. The application was subsequently amended to remove the *Charter* claims and the requests for declaratory relief, leaving only a narrow application focused whether McMaster breached the duty of fairness and that its decisions were unreasonable.

Following the abandonment of their *Charter* and *Code*-related claims, much of the voluminous Application Record (which contained multiple expert opinion evidence on religious and medical/COVID-related issues) was rendered irrelevant and inadmissible. The Applicants conceded that the evidentiary record for judicial review should be restricted to what was before the Validation Team.

Decision: Application dismissed (per Corbett, Broad and Petersen JJ).

The decisions of the Validation Team being challenged in this application are not a "statutory power" because there is no statute specifically conferring a power to make such exemption decisions; accordingly, those decisions cannot be challenged under s. 2(1)2 of the *Judicial Review Procedure Act*.[20] However, the Court has jurisdiction to quash the impugned decisions because the application raises questions of a public nature with public dimensions, and the relief sought (*certiorari*) is one of the prerogative writs set out in s. 2(1)1 of the *Judicial Review Procedure Act*.

The exercise of that jurisdiction is discretionary. Despite both parties urging the Court to exercise its discretionary jurisdiction to review the Validation Team's decisions, it is not appropriate to do so in this case. While the

[20] RSO 1990, c. J. 11. Paragraph 2(1)1 states that a court may, in a judicial review application, "grant any relief that the applicant would be entitled to in… proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power."

Applicants withdrew their claim that McMaster violated their rights under the *Human Rights Code*, an allegation of creed-based discrimination with respect to services lies at the heart of their arguments about why the impugned decisions are unreasonable. Framing these arguments in terms of an "unreasonable" decision—and eventually abandoning the declaratory relief sought in respect of the *Code*—does not change the fundamental nature of the Applicants' position, which is that McMaster discriminated against them based on creed, in violation of s. 1 of the *Code*. The Applicants are effectively asking the Court to rule on whether the Validation Team correctly interpreted the meaning of "creed" under the *Code*.

One of the discretionary grounds for refusing to undertake judicial review is the existence of an adequate alternative forum. Here, that forum is the Human Rights Tribunal of Ontario. Several factors point to the Tribunal being a more appropriate forum for adjudicating the Applicants' claims including (i) the nature of the alleged errors (i.e. a misinterpretation of the meaning of "creed" in the *Code*); (ii) the relative expertise of the Tribunal in matters of religious freedom and discrimination based on creed; (iii) the capacity of the Tribunal to grant a remedy comparable to what the Applicants are seeking (now abandoned their requests for declaratory relief); (iv) the economical use of judicial resources; and (v) the Tribunal's ability to receive and consider the voluminous expert evidence that had to be excised from the Application Record, as compared to the relatively limited record before the Court.

The delay inherent in pursuing a Tribunal process is a relevant factor for consideration, but it does not offset the other factors in this case. There is an avenue for obtaining an expedited hearing before the Tribunal, and the Tribunal's *Rules of Procedure* permit a request for an interim remedy.

Another consideration is the fact that the Applicants rely on procedural unfairness in seeking their remedy of *certiorari*, and in that sense raise issues that fall squarely within the Court's exclusive jurisdiction on judicial review. In the circumstances of this case, that is not a sufficient reason to engage in judicial review on the merits of the Validation Team's decisions: the procedural fairness arguments lack merit and are not a basis for this Court to adjudicate claims that should be made before the Tribunal. The nature of the duty owed to the Applicants was one with only rudimentary procedural requirements. They were given notice of the potential consequences, and were not entitled to further disclosure or instruction from McMaster on how to support their exemption requests. There was no reasonable apprehension of bias on the part of the Validation Team and the written reasons they provided were adequate.

Commentary: This case illustrates the potential pitfalls of pursuing a broad application that raises not only traditional judicial review-type arguments and requests for relief, but many other additional claims and types of relief as well. Although the application may have met the same end fate regardless of how it was initially framed, the reasons certainly leave the impression that some of the strategic decisions made at the outset—in terms of the grounds

raised, relief requested and evidence adduced in respect of the original application—highlighted the foundational problems with the application that ultimately led to its dismissal.

More generally, this case is an important reminder that judicial review is discretionary and that courts may decline to exercise that jurisdiction even where both parties urge it do so (as they did here) and even where part of the claim in question is within the exclusive jurisdiction of the Court (as was the case with the procedural fairness arguments here). For applicants, it is especially dangerous to frame "unreasonableness" arguments in terms that are essentially identical to a claim or application that could be made before an expert administrative decision-maker, such as the Tribunal, even if that decision-maker does not have exclusive jurisdiction. In particular, the Court's reasoning in this case suggests that it may not be willing to review substantive arguments that are fundamentally rooted in misinterpretations or misapplications of the *Code*. Such applications are vulnerable to being dismissed on the basis that an adequate alternative forum exists.

Adequate reasons in the context of a pure credibility dispute: *Caine v Ontario College of Teachers*, 2022 ONSC 2592 (Div Ct)

Facts: The Discipline Committee of the Ontario College of Teachers ("**Committee**") found C engaged in misconduct by abusing two students. The finding was based on evidence from the two students who made the allegations. C appealed the Committee decision to the Divisional Court on the grounds that the Committee's reasons were inadequate, that they conflated his legal theory and evidence, that the Panel used inconsistent tests for assessing his credibility and the students' testimony (i.e. by unfairly subjecting C's evidence to more searching scrutiny), and that the Committee assumed that the students had no motive to lie.

Decision: Appeal dismissed (per Swinton, Backhouse and Mandhane JJ.).

The Committee's reasons on the issue of witness credibility were adequate. The reasons set out how the Committee reached its conclusion that the students' evidence was more credible than C's evidence. The Committee considered the possible motives of the students, the fact that one student gave a consistent prior statement to the police and the minor inconsistencies in one student's testimony (which, the Committee concluded, did not hurt that student's credibility). The Committee's analysis also noted that C had provided no alternative explanations for these events; he merely denied they happened.

The test to assess adequacy of reasons is whether they allow for meaningful appellate review. In the context of this case—where the decision came down entirely to credibility—reasons are adequate as long as the reasons generally demonstrate that where the complainant's evidence and the respondent's evidence conflicted, the trier accepted the complainant's evidence. Finding the evidence of one party credible may well be conclusive of the issue because that evidence is inconsistent with that of the other party.

With respect to C's remaining grounds of appeal, the Committee did not err by holding the students' evidence to a different standard than C's evidence. The Committee was only required to demonstrate in the decision that they considered every aspect of the evidence. The mere failure to mention something in reasons does not constitute an error of law. Therefore, it was open to the Committee to find C's explanations were not credible without expressly listing every factor that led to that finding. To successfully make the argument that he was held to a higher standard than the students, C needed to show that it was clear that the Committee applied a different standard in assessing his evidence, compared to the assessment of the evidence of the students, either by pointing to something in the reasons or in the record. In the absence of this evidence or a palpable and overriding error, the Committee's assessment of credibility was entitled to deference.

Finally, the Committee applied the correct burden of proof. Appellate review does not call for a word-by-word analysis; rather, it calls for an examination to determine whether the reasons, taken as a whole, reflect reversible error. The task is to assess the overall, common sense meaning, not to parse the individual linguistic components. Reasons do not have to be perfect and should not be scrutinized on a standalone basis.

Commentary: This decision reinforces just how high appellate courts set the threshold for overturning the decisions of lower courts or tribunals on the basis that they reflect inadequate reasons. If the reasons allow for meaningful appellate review when read in their entirety and in the context of the entire record, including the submissions made by the parties, then they will be adequate. Only rare cases will fall below this standard. Indeed, Justice Doherty expressed his scepticism of this ground of appeal in *LSUC v Neinstein*,[21] saying that arguments framed in the language of inadequate reasons usually "are, in reality, arguments about the merits of the fact finding made in those reasons" where a party hopes to avoid the stringent "palpable and overriding" standard of review.

Credibility-driven decisions are often those where tribunals run into the most trouble on appeal or judicial review: such assessments can be difficult to undertake and just as hard to clearly express in writing. Still, this case is an important reminder that the standard for adequacy remains a relatively modest one even in the credibility context: a tribunal need only make it clear that it prefers one party's evidence to the other where the two conflict. Of course, the best practice remains for tribunals to explain the reasons for that preference with some clarity, having regard to the guidance from the well-developed body of jurisprudence addressing how to weigh questions of credibility.

This decision also demonstrates the difficulty of arguing that the trier of fact applied different standards of scrutiny to evidence given by different witnesses. Such an argument will not succeed in the abstract: it requires the party making it to point to something specific in the reasons or in the record that would justify such

[21] 2012 ONCA 193 at para 4

a conclusion. Rarely will such a justification exist.

CO-EDITORS

Andrea Gonsalves
416.593.3497
andreag@stockwoods.ca

Justin Safayeni
416.593.3494
justins@stockwoods.ca

Dragana Rakic
416.593.3496
draganar@stockwoods.ca

THE NEWSLETTER

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