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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Availability of judicial review with limited statutory appeal right: *Smith v The Appeal Commission*, 2023 MBCA 23

Facts: S applied for compensation under Manitoba's Compensation for Victims of Crime Program for medical cannabis she was prescribed to treat PTSD she suffered as a result of a sexual assault.

S's physician attempted to treat her PTSD with various pharmaceutical drugs but they were ineffective and produced negative side effects. The physician then prescribed medical cannabis, which was supplied to S by a licensed dispensary. S's physicians considered that medical cannabis was a significant help to her in dealing with her PTSD.

Pursuant to the *Victims' Bill of Rights*[1] and *Victims' Rights Regulation*, the director may pay compensation to a victim who is injured by a crime for medical expenses and prescription drug expenses incurred as a result of the injury. The parties agreed S was eligible for compensation under the Program. When it came to whether S would actually receive compensation for medical cannabis, however,

[1] CCSM c V55 ("*VBR*")

the director rejected S's application based on the advice of the director's medical advisor. The medical advisor opined that there is a lack of clear scientific evidence from controlled clinical studies supporting the efficacy of medical cannabis to treat PTSD and that the use of medical cannabis to treat S's PTSD "would not be evidence informed and, therefore, the risk/benefit ratio is considered to be not favourable." The medical advisor had no direct contact with S and was never asked to clinically assess her (despite the director having the power to require S to be examined by a healthcare provider).

The director denied S's request for reconsideration. The Appeal Commission upheld the director's decision on appeal.

Under s. 67 the *VBR*, S had a right to appeal the Commission's decision to the Court of King's Bench on a question of law or jurisdiction only. S brought an appeal together with an application for judicial review challenging the Commission's decision as being unreasonable. The Court of King's Bench dismissed the appeal and application, finding that the limited scope statutory appeal provision excluded judicial review. S appealed.

Decision: Appeal allowed (*per* Cameron, Mainella and Pfuetzner JJA) . Decision of the Appeal Commission set aside and decision of the director rescinded. Order made for the applicant to be reimbursed for her medical cannabis prescription drug expenses.

The question on appeal was whether s. 67 operates essentially as a privative clause to prohibit judicial review of the Commission's decision on questions of fact or mixed fact and law, which fall outside the scope of the statutory right of appeal.

The Court first discussed the nature of privative clauses and statutory appeal rights. Privative clauses seek to ensure finality of an administrative decision by excluding court review. As a result of *Vavilov*, privative clauses serve no function in identifying the standard of review on judicial review. Appeal provisions, on the other hand, signal a legislative intent for courts to have some role in supervising administrative tribunals.

In *Vavilov*, paras. 45 and 52, the majority explained that a circumscribed statutory right of appeal does not, by itself, oust the right to judicial review of an administrative tribunal's decision on grounds that fall outside the scope of the appeal right. Section 67 does not expressly and clearly restrict a party's right of judicial review on questions of fact or mixed fact and law.

The respondent argued that the modern approach of the Manitoba Legislature was to imply restrictions on judicial review every time it creates a limited right of appeal. The Court rejected this argument. First, the submission is irreconcilable with paras 45 and 52 of *Vavilov*. Second, the right to challenge an administrator's decision by way of judicial review has constitutional dimensions and it should not be presumed that the Legislature intended to derogate individuals' rights to judicial review without clear and express language to that effect. Third, the circumstances do not show that the Legislature had an intention to implicitly extinguish all

judicial review rights when it created a statutory appeal right. It is not supported by any legislative statement of purpose in the *VBR* or in any other legislation. Moreover, express private clauses continue to exist in Manitoba in legislation that also includes statutory appeal provisions. Those privative clauses would be redundant if the respondent's argument were correct.

Presumptively, S had the right to judicially review all aspects of the respondent's decision on a standard of reasonableness. The statutory right of appeal on questions of law or jurisdiction displaced the standard of review on those questions to the standard of correctness. The mere fact that S could appeal some, but not all, questions under s. 67, does not, by itself, impugn her right to judicially review the decision of the respondent on questions of fact or mixed fact and law. It was incumbent on the application judge to sort the questions into those properly the subject of the statutory appeal and those properly the subject of judicial review and apply the correct standard of review to each.

The Court endorsed the procedure followed by S of combining her appeal and judicial review application in a single proceeding given the Court of King's Bench had jurisdiction over both. Admittedly, matters would be more complicated where the statutory appeal list to the Court of Appeal while judicial review is before the King's Bench, but that is a matter for the Legislature to address.

On the merits, the Court held that the director unreasonably denied S's application for compensation through reliance on the medical advisor's opinion. On the key question of whether medical cannabis was necessary to manage the applicant's PTSD, the applicant provided evidence to that effect from herself and her physicians. The medical advisor went too far in stating that the risk/benefit ratio of prescribing medical cannabis would not be "favourable" for S because of the uncertain scientific evidence, generally, about the effectiveness of medical cannabis to treat PTSD. That part of his opinion required a proper evidentiary foundation, which was absent . Further, the admissible evidence was uncontroverted that compensation for medical treatment was required as a direct result of S's injury and was necessary to address a disability or continuing pain resulting from the injury.

As to remedy, the Court concluded that it would be pointless to send the matter back to a differently constituted panel of the Commission. Instead, in addition to setting aside the administrative decisions, the Court found S was entitled to compensation for her medical cannabis prescription.

Commentary: This decision is the latest from an appellate court to consider the availability and scope of judicial review where the statutory scheme provides a limited appeal right. These cases focus on the meaning and implications of paragraphs 45 and 52 of *Vavilov*. The appellate judges across the country who have considered the issue have not taken a consistent approach.

In *Yatar v TD Insurance Meloche Monnex*,[2] the Court of Appeal for Ontario unanimously held that where a statutory appeal right is limited to questions of law or jurisdiction, the court has jurisdiction to entertain judicial review in respect of questions of fact or mixed fact and law, but should exercise that discretion only in rare cases, in recognition of the legislative intent that court involvement in the statutory scheme should be limited to issues of law or jurisdiction.

In *Canada (Attorney General) v Best Buy*, [3] two judges of the Federal Court of Appeal found that jurisdiction to conduct judicial review always exists in respect of residual issues that are not covered by the circumscribed appeal right, while one judge found that such jurisdiction does not exist.

The approach of the Manitoba Court of Appeal in *Smith* aligns with the majority in *Best Buy*. It is unfortunate that these decisions do not give more consideration to the reviewing court's broad discretion to decline to exercise its judicial review jurisdiction where there is a limited statutory appeal right, as the court did in *Yatar*. It seems to be correct, in light of the jurisprudence, that judicial review jurisdiction will always *exist* as a general constitutional imperative, but respect for the legislature's institutional design choices may favour not *exercising* that jurisdiction in most cases. The approach in *Smith* and *Best Buy* will likely lead to judicial review applications being brought routinely in matters where a deliberate legislative choice was made to limit appeals to certain types of questions.

The Court's decision in *Smith* may have been driven by the view that the director's decision was manifestly unjust to the applicant—as illustrated by the exceptional remedy the Court granted in ordering that she receive compensation. However, the same result could have been achieved by holding that judicial review jurisdiction will be exercised where the administrator's decision is unreasonable in a way that is manifestly unjust to an individual. This would be compatible with the court's approach to exercising its discretion to grant judicial review remedies generally, while also ensuring that courts will permit judicial review beyond the scope of a limited appeal right only in rare cases.

Reviewing Court Can Consider Practical Realities and Context Known to the Decision Maker: *Ali v. Peel (Regional Municipality)*, 2023 ONCA 41

Facts: A applied to the Regional Municipality of Peel (the "Region") to be given special priority status on the waitlist for subsidized housing pursuant to regulations under the *Housing Services Act, 2011*.

According to the regulations, special priority status is open to individuals who have been subject to abuse and are seeking to leave abusive households. The regulation specifically includes individuals who are "financially dependent" on their abusers.

[2] 2022 ONCA 446. This case was reviewed in Issue No. 33 of this newsletter.
[3] 2021 FCA 161. This case was reviewed in Issue No. 31 of this newsletter.

A worked as a caregiver and lived with her employer and his family. During her employment she was subjected to controlling and abusive behaviour from her employer until he eventually forced her to leave the home. A then moved into a shelter for abused women and applied for special priority status for subsidized housing.

The Region denied A's request. By way of a letter from the Housing Programs Manager, the Region determined that she did not meet the criteria for special priority status because she was in a business relationship, not a family relationship, with her abuser, who was her employer.

A applied to the Divisional Court for judicial review of the Region's decision. The Divisional Court dismissed her application, holding that the Region's decision restricting special priority status from individuals who were abused by employers was reasonable. In its decision, the Court noted that the Region is required to ration scare resources among people with competing interests by apportioning spots on the lengthy waitlist for subsidized housing.

A appealed to the Court of Appeal.

Decision: Appeal dismissed (per Zarnett, Coroza and Favreau JJA).

The standard of review is reasonableness. The Region's interpretation of the criteria for special priority status was reasonable.

The Region decided that employer/employee relationships are not the types of relationships that are meant to be given special priority status, even if abuse is present. This interpretation was reasonable given the legislative context and purposes of the regulations.

It "would have been open" to the Region to accept that the regulation's inclusion of abuse in relationships of "financial dependence" encompasses employer relationships, especially given the vulnerability of live-in caregivers (para. 41). However, the role of the reviewing court is not to undertake its own interpretation of the regulation. Rather, the court must focus on whether the Region's interpretation was reasonable in the context of the legislation and the facts of the case.

Here, the Region's interpretation was reasonable based on the historical context and the purpose of the special priority status. The Region can consider the purposes and "practical realities" of the housing priority scheme, which includes the fact that subsidized housing is a scarce resource for which those most in need must be prioritized.

Further, the Divisional Court did not err in referring to the number of people on the waitlist for subsidized housing or that this scarce resource must be apportioned amongst people with competing interests. In doing so, the Divisional Court did not improperly amplify or supplement the Region's reasons. The court did not provide a different rationale or take a different analytical route than the Region. Instead, the Divisional Court simply referred to facts that would have been known to the Region and which were part of the factual and legislative context "that would have been self-evident to the Region" (para. 51).

Reasons do not need to be perfect and they must be understood in their context. Decision makers draw on their expertise to understand this context. They do not need to expressly spell out the details of that context in every single decision. In assessing the reasonableness of the decision, the reviewing court can consider the legislative and factual context in which the decision is made, beyond the specific rationale provided by the decision maker. That is all the Divisional Court did in this instance.

The Region's decision was reasonable and the Divisional Court did not err in dismissing the application for judicial review.

Commentary: The Court of Appeal's application of the reasonableness standard in this case is notable for a few reasons.

First, the Court seemed to expressly recognize that the applicant's proposed interpretation of the regulatory scheme was reasonable. They explain that it would have been open to the decision maker to accept her arguments. Nevertheless, that was not sufficient for the judicial review application to succeed as the question was whether the decision maker's interpretation was *unreasonable*. This is a clear application of the longstanding principle in administrative law that it is the administrative body that is entitled to choose between two reasonable interpretations.[4]

Secondly, the Court of Appeal has explicitly directed reviewing courts to consider the "practical realities" of the administrative regime in considering the reasonableness of a decision. The Court relied on language from *Canada (Minister of Citizenship and Immigration) v Vavilov*[5] to the effect that a decision that appears odd or counter-intuitive may "nevertheless accord[] with the purposes and practical realities of the relevant administrative regime and represent[] a reasonable approach given the consequences and the operational impact of the decision". The Court of Appeal takes this to mean that the practical realities of the regime can support the reasonableness of the decision, even where they are not expressly relied on by the decision maker. In this case, the Court found that the scarcity of subsidized housing could support the reasonableness of the decision that took a more restrictive approach to eligibility for special priority status on the waitlist.

For lawyers seeking to challenge or uphold the decision of an administrative body, consideration should be given to how the practical realities on the ground might support the impugned decision. The reviewing court is entitled to take these into account to uphold the decision.

Finally, the Court of Appeal provided some guidance on when reviewing courts can permissibly "supplement" the reasons of the decision maker in order to uphold them. This is an important issue given the Supreme Court's renewed focus in *Vavilov* on the reasons actually given and its rejection of the idea that courts can reformulate decisions and uphold

[4] See, for example, *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 33.

[5] 2019 SCC 65 at para 93.

them based on the "reasons that *could* have been offered, in an abstract sense".[6]

Here, the Court of Appeal explained that reviewing courts can rely on the context of a decision, even when the decision maker does not explain this context itself. It emphasized that reasons do not need to be perfect to be reasonable and the decision maker does not have to explicitly lay out the relevant legislative context in every decision. In the end, the Court of Appeal held that it was permissible for the Divisional Court to rely on points that were not explicitly mentioned by the decision maker since it "did not give a different rationale or arrive at the outcome through a different analytical route" (para 51). Further, the points in issue "would have been known" or "would have been self-evident" to the decision maker (para 51).

In the context of this case, one can accept that the Region would have been well aware of the fact that subsidized housing is a scarce resource with a long waitlist. It is also understandable, perhaps, that the decision-maker here — a municipal manager, rather than any sort of adjudicator — might not have produced exemplary or detailed reasons for their decision. However, the Court of Appeal's generous approach may not extend as far in other situations, where it is less clear what facts would have been known to the decision maker or would have been self-evident. Further, it may be difficult to draw the line between the reviewing court impermissibly amplifying the impugned decision by relying on a "different rationale" from the decision maker as opposed to permissibly relying on aspects of the legislative and factual context that would have been apparent to the decision maker through operation of its expertise. Depending on how it is applied moving forward, the Court of Appeal's decision could be viewed as a slight reopening of the door that *Vavilov* attempted to close in terms of allowing reviewing courts to uphold decisions based on facts or reasoning not contained in the reasons.

[6] *Vavilov* at para 98.

Another example of correctness review for concurrent first-instance jurisdiction: *Simcoe Muskoka District Health Unit v Ontario Nurses Association*, 2023 ONSC 248 (Div Ct)

Facts: The Ontario Nurses Association filed a grievance against the Health Unit, alleging violations of its collective agreement. The grievance went before an arbitral Tribunal. The key issue was whether the violations of the collective agreement were permitted by virtue of the *Emergency Management and Civil Protections Act* and O. Reg. 116/20 passed thereunder. Section 2 of the regulation authorized the Health Unit to take any reasonably necessary measure "with respect to work deployment and staffing" in order to respond to, prevent and alleviate the outbreak of COVID-19.

On November 23, 2020, the Health Unit sent out an email to Health Unit staff regarding compensating time or "comp time" (i.e. time in excess of seven hours of employer-assigned work per weekday). Rather than abiding by the requirements in the collective agreement relating to comp time, the email presented staff with various alternative options, including having some time paid out as if it were regular

time (rather than at the normal elevated rate) or carried over into the next year.

The arbitral Tribunal unanimously found the email was a violation of the collective agreement. A majority of the Tribunal found that the legislative scheme—and s. 2 of the regulation, in particular—did not authorize the Health Unit to take steps to alleviate the cost consequences of measures necessary to address the COVID-19 outbreak. The majority also found that, in any event, the evidence did not establish a concern that the cost consequences of adhering to the collective agreement when it came to comp time would have had a direct impact on the provision of public services.

The dissenting Tribunal member found that the options imposed in the November 23 email were authorized under the statutory scheme.

With respect to remedy, the majority ordered the Health Unit to pay damages equal to an additional half day of wages for 14 affected Association members. The dissenting Tribunal member stated that even if a breach of the collective agreement was not authorized under the statutory scheme, he would have limited the remedy to a declaration.
The Health Unit sought judicial review of the arbitral award.

Decision: Application dismissed (per Backhouse, Stewart and Matheson JJ).

The Health Unit challenged the award on two grounds: (i) it is incorrect and unreasonable because it is based on a misinterpretation of the *Act* and the regulation; and (ii) the award of damages is unreasonable. The parties agreed that the standard of review on the second issue (remedy) is reasonableness.

With respect to the first issue, the standard of review is correctness. When it comes to the *Act*, it is broad, general legislation that applies to many sorts of emergencies. It is of central importance and requires consistent, final and determinative answers in respect of powers that may be exercised in an emergency. Correctness applies under *Vavilov*.[7]

While the regulation is narrower and more specific than the *Act*, it still applies to both unionized and non-unionized employees. Moreover, labour arbitrators do not have exclusive jurisdiction under either the *Act* or the regulation: the same issue could be answered differently through two routes (i.e., the arbitration route for unionized employees and a lawsuit in court for a non-unionized employee). The Supreme Court's reasoning in *SOCAN* with respect to correctness review in cases where courts and administrative bodies have concurrent first instance jurisdiction over legal issues in a statute apply here, even though the overlap in the copyright regime discussed in *SOCAN* is starker.[8]

The majority of the Tribunal erred in its interpretation of the legislative scheme, which does speak to the financial consequences of measures, including the terms and conditions

[7] *Canada (Ministry of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
[8] *SOCAN v ESA*, 2022 SCC 30 at paras 33-37. This case was discussed in Issue 34 of this newsletter.

of payment of people providing services. However, to be authorized under the regulation, the measure in question had to be "reasonably necessary" to respond to the COVID-19 outbreak. The majority found that, as an evidentiary matter, the record did not establish that the measures set out in the email met this standard. There is no reason to interfere with this finding. Despite certain legal errors, the majority's conclusion that the Health Unit's conduct was not authorized by the regulation is correct.

The remedy ordered by the majority was not unreasonable. It accords with general principles of labour law under which a monetary remedy may be awarded to a union where the conduct at issue undermined the union's position as the exclusive bargaining agent for these employees.

Commentary: The Divisional Court's approach in this case sheds some light on how far the so-called "*SOCAN*" category of correctness review might extend.

In *SOCAN*, a majority of the Supreme Court held that the rule of law requires that correctness review be applied where courts and administrative decision-makers have concurrent first instance jurisdiction over a legal issue in a statute. In that case, the issue involved the interpretation of provisions in the *Copyright Act*, which could decided both by the Copyright Board in a tariff proceeding or by the provincial superior court or the Federal Court in infringement proceedings. While the Supreme Court cautioned that "[s]uch situations are rare" and "seem to appear only under intellectual property statutes",[9] the true limits of the *SOCAN* correctness category have not yet been tested.

Indeed, the Divisional Court's decision illustrates that the definitional bounds of *SOCAN* correctness—concurrent first instance jurisdiction over a legal issue in a statute—could encompass an array of circumstances that were perhaps not anticipated by the majority in *SOCAN*. Here, for example, the mere fact that both courts and labour arbitrators could be faced with interpreting the same legal questions in the *Act* and the regulation was found to be sufficient to ground correctness review.

Other courts have been more hesitant to find that cases fall within the *SOCAN* correctness category. In one recent example, the British Columbia Supreme Court found that although a specialized Civil Resolution Tribunal and provincial superior courts both shared first instance jurisdiction over legal issues in the *Strata Property Act*, the requirements for correctness review were not engaged because the applicant's "arguments actually raise mixed questions of fact and law" rather than "pure matters of statutory interpretation… that might pose an extricable question of law".[10] That line might be a thin one to draw in many cases. At the very least, the British Columbia example suggests that there is another entire collection of cases that could potentially—depending on the nature of the question raised—attract correctness review under the *SOCAN* category.

[9] *SOCAN v ESA*, 2022 SCC 30 at para 39.
[10] *Dolnik v The Owners, Strata Plan LMS 1350*, 2023 BCSC 113 at paras 52-53.

A final point worth highlighting is the Divisional Court's conclusion that questions about the interpretation of the *Act* fell into the category of "general questions of law of central importance to the legal system as a whole". The Divisional Court's conclusion in this regard is open to criticism. In *Vavilov*, the Supreme Court explained that this category applies to questions of law that are "of fundamental importance and broad applicability, with significant legal consequences for the justice system as a whole or for other institutions of government."[11] It is rare for questions of law to fall in this category—and rarer still for such questions to arise from the interpretation of a specific, strictly provincial statute with no similar counterparts in other jurisdictions. Still, given the broad ramifications of the *Act*, the serious consequences and powers it authorizes in emergency situations, and its implications across different provincial sectors, it not altogether surprising that the Court reached this conclusion.

Use of template or boilerplate reasons may run afoul of reasonableness standard: *Zibadel v. Canada (Citizenship and Immigration)*, 2023 FC 285

Facts: T, an 8-year-old child from Iran, applied for a study permit under s. 216(1) of the *Immigration and Refugee Protection Regulations*. Her mother applied for a temporary resident visa on the basis that she would come to Canada to help T settle in.

Both T and her mother had their respective applications refused by a visa officer on March 20, 2022. With respect to T's application, the officer did not believe that the purpose of her visit was reasonable since she could pursue similar educational programs, at a fraction of the cost, closer to her place of residence. The officer also noted that the purpose of the visit did not make sense given T's socio-economic status. Ultimately, the officer was not satisfied that T would leave Canada at the end of any approved stay.

The officer did not provide additional reasons for their refusal of the mother's application because they claimed that it was entirely dependent on the outcome of T's study permit.

T and her mother sought to set aside the officer's decisions as unreasonable. They also submitted that the decision with respect to T's study permit deprived her of procedural fairness.

Decision: Application allowed (*per* Little J).

The Court dealt with three issues in relation to T's study permit application.

First, the Court rejected the applicants' submission that the officer did not consider evidence of their financial situation to reach their conclusion about the unreasonableness of the educational expense. The officers' notes indicated that they assessed the "documentation on file in support of the parent's [sic] level of economic establishment". However, the documentation did not include

[11] *Canada (Ministry of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 59.

the parents' liabilities, and the officer was entitled to find as they did.

However, the Court accepted the applicants' submission that the officer did not provide sufficient reasons for their conclusion about the availability of similar educational programs near T's place of residence. The Court noted that the reasons were template statements found in other study permit decisions. While the inclusion of such template statements was permissible, necessary modifications to those reasons had to be made to show the officer's thought process in an intelligible manner and to pass muster under the post-*Vavilov* conception of reasonableness review.

Here, T's parents wanted her to study in Canada precisely because the educational experience in Canada would not be similar to the educational experience in Tehran. The Study Plan detailed the ways in which the schooling would be different, yet the officer came to the opposite conclusion without any explanation. The Court held that the officer failed to look at the contents of the Study Plan and to engage with the submissions made.

The Court also accepted that the officer's failure to mention the applicants' ties to Iran "is a factor that contributes to a loss of confidence in the[ir] decision" (para 52). According to the Court, the applicants' ties to Iran were "obviously relevant" to the question of whether they would leave Canada at the end of their stays.

Commentary: *Zibadel* offers a cautionary tale for the use of boilerplate reasons in adjudicative decisions. While the template language can serve as a useful starting point for the drafting of reasons, *Zibadel* affirms that to survive a reasonableness review, they must be adapted to respond to the specific evidence and submissions at the core of each individual case. Otherwise, the decision will not provide the justification, transparency, and/or intelligibility contemplated in *Vavilov* and could be deemed "unreasonable" upon judicial review.

The Federal Court of Appeal has previously used the record to supplement gaps in reasons where the record left "no doubt" about the line of reasoning undertaken by a decision-maker.[12] Here, however, the record did not allow for such an approach. *Zibadel* consequently tells us that the modification of template language should not only be done as a matter of course to ensure transparent and intelligible decision-making, but also clarifies that this step is essential where the record does not provide a clear indication of any other, unwritten parts to the reasoning process.

Ultimately, since Court could not rely on the reasons and the record to discern the basis for the officer's decision, the end result of allowing the application was faithful to the principles of reasonableness review, as articulated in *Vavilov*.

[12] *Zeifmans LLP v Canada*, 2022 FCA 160 at para 11

Adequacy of investigations: *Kastner v. Health Professions Appeal and Review Board*, 2023 ONSC 629

Facts: A group of doctors complained anonymously to the College of Physicians and Surgeons of Ontario (CPSO) that Dr. Marko Duic, the emergency department chief at two hospitals, refused to hire female doctors, was openly hostile to female doctors, and pressured doctors in his department to fill out unnecessary forms for the purpose of generating fees. In support of their complaint, the complainants submitted a detailed Globe and Mail article about Dr. Duic's behaviour, an email sent by Dr. Duic about the unnecessary forms, and a list of twelve witnesses who refused to speak to the complainants but who would speak with the CPSO.

A CPSO investigator interviewed Dr. Duic, who denied the allegations and offered his own explanations. The CPSO's Inquiries, Complaints and Reports Committee (ICRC) also engaged an assessor who reviewed some of Dr. Duic's forms. The assessor concluded that there were six forms she would not have completed, but she was satisfied with Dr. Duic's explanation for why he did complete them. The ICRC also reviewed an internal report from one of Dr. Duic's two hospitals that purported to explain why there were so few female doctors in Dr. Duic's department.

The investigator never spoke to any of the witnesses that the complainants named or who were named in the Globe and Mail article.

On the basis of this investigation, the ICRC declined to refer the matter to the discipline committee. It also noted in its decision that it did not have jurisdiction to address complaints about discrimination.

The complainants appealed to the HPARB. The HPARB disagreed that the discrimination complaint was outside the CPSO's jurisdiction. However, it found that the ICRC's investigation was adequate, because the complainants' witnesses' evidence would not have changed the outcome. The HPARB concluded that the ICRC's decision not to refer the complaint to the discipline committee was reasonable.

The lawyer for the complainants sought judicial review on their behalf, in his own name, of the HPARB's decision.

Decision: Application granted (*per* McWatt ACSCJ, Sachs and LeMay JJ). The ICRC's investigation was not adequate and therefore the HPARB's decision was not reasonable. ICRC's decision quashed.

The investigation was inadequate for three reasons.

First, the ICRC should have contacted the complainants' witnesses. The Panel distinguished this case from *MJS v Heath Profession Appeal and Review Board*.[13] *MJS* held that, given its role of screening complaints, the ICRC is required to make "reasonable efforts" to consider the records and documents that it considers relevant. However, it is *not* required to examine documents or conduct interviews. The Divisional Court in *Kastner* expanded on this

[13] 2022 ONSC 548

by saying that there are some circumstances, like this case, where it would be unreasonable not to interview witnesses. In this case the complainants were all anonymous. Instead, they provided the names of witnesses with direct knowledge who were statutorily required to assist the CPSO (their regulator). The Complainants did not know and could not tell the ICRC what witnesses would say. In these circumstances, the public interest may require that the ICRC take active steps to inquire of those witnesses to see if there is any support for the allegations. However, that the ICRC still has broad discretion to conduct its own investigations and, there may still be situations where it is clear the allegations will not be proven even if the witnesses are contacted.

Second, the ICRC should not have relied solely on the internal report from one of Dr. Duic's hospitals as refuting some of the allegations. The panel noted that the author, an administrator at the hospital, might be concerned about the hospital's liability for Dr. Duic's actions and may not have conducted a thorough independent investigation. Further this report only addressed the allegations about one of the two hospitals at which Dr. Duic was a chief and it did not address allegations about his hostility to female doctors.

Third, the assessor only assessed a small sample of forms completed by Dr. Duic himself. The assessor did not address the complaints about Dr. Duic pressuring other doctors to complete unnecessary forms. The Panel noted that this oversight was particularly problematic because the complainants had produced an email from Dr. Duic which raised concerns that Dr. Duic was encouraging other physicians to abuse Ministry of Transportation forms. By failing to investigate *all* of the allegations, the investigation was inadequate.

The Complainants had also argued that the ICRC was required to give the complainants an opportunity to respond to Dr. Duic's evidence. The Divisional Court did not opine on this issue. Since the Applicants had the opportunity to respond at the HPARB, if this was a defect, it had already been cured.

Commentary: This decision helps to clarify (or perhaps cloud) the obligations of a regulator when investigating a complaint against a member. It expands on *MJS*, which says the regulator must make "reasonable efforts" and clarifies that what is "reasonable" is dependent on the factual circumstances. Ultimately, this decision leaves the discretion in the hands of the investigator to decide what will qualify as reasonable efforts in a given circumstance. However, with this variable standard for investigators, this decision may spur other regulated professionals to judicially review decisions based on the unreasonableness of the investigation to test its boundaries. If so, more court decisions may help clarify the scope of what will and will not be a reasonable ICRC investigation.

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