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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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ONCA divided on use of *Charter* values in judicial review: *Gehl v Attorney General of Canada*, 2017 ONCA 319

FACTS: In 1985, amendments were made to the *Indian Act*[1] to repeal discriminatory provisions that had deprived G's ancestors of their Indian status. The amendments retroactively restored their status. G's paternal grandmother became a status Indian as a result of the amendments. The identity of G's paternal grandfather is unknown.

G brought an application to register as an Indian. Under the Act, the Registrar for Aboriginal Affairs and Northern Development Canada determines eligibility for registration. Under the "two-parent rule", G had to prove that both her paternal grandmother and her paternal grandfather had status (i.e. that her father had full rather than partial status). The Registrar had developed a policy which set out five types of evidence of paternity that the Registrar would accept for such determinations. The policy was an internal departmental guideline; it is not expressly contemplated by the Act and it is not a regulation. Applying the policy, the Registrar determined that G had not proved that her paternal grandfather had status. The version of the policy considered in this case was marked as a "draft" and was not published or made available to the public at the time.

G protested the Registrar's decision and then appealed to the Superior Court. She later started

[1] RSC 1985, c I-5

an application for *Charter* relief. G did not pursue her initial challenge to the constitutional validity of the relevant provision of the Act, but she challenged the reasonableness and adequacy of the policy and argued that, on the evidence she presented and a proper application of the Act, it was unreasonable to deny her status. Thus, the issue that ultimately came before the Court of Appeal was whether the Registrar should have accepted the kind of evidence submitted by G as to the paternity of her grandfather as sufficient to establish status.

DECISION: Appeal allowed. Declaration granted that G is entitled to be registered (*per* Miller and Lauwers JJA; Sharpe JA concurring).

Justice Sharpe followed a "*Charter* values" approach to analysing the issues in the appeal. He held that the policy is properly characterised as an exercise of administrative discretion (at least at the time the Registrar dealt with G's protest). It was adopted by the Registrar to assist departmental officials and was administrative rather than legislative in nature. Relying on *Doré v Barreau du Québec*,[2] it is a basic proposition that in their exercise of their discretion, administrative decision-makers must act consistently with the values underlying the discretion granted to them, including *Charter* values. Provided the decision-maker has properly balanced the *Charter* rights at issue with the statutory objectives, the decision will be found to be reasonable.

For Sharpe JA, the relevant *Charter* value in this case was equality. The denial of Indian status constitutes denial of the benefit of the law. The determination of entitlement to registration on the basis of the entitlement of both parents is, on its face, a gender-neutral rule. However, the Registrar was required to guard against an exercise of discretion that results in substantive inequality. While there can hardly ever be doubt about maternity, there may be considerable doubt about paternity. A mother may have good reason for her reluctance or inability to disclose the identity of her child's father. By imposing a relatively strict burden of proof as to paternal identify based upon documentary evidence, the policy falls short of what is required to address the circumstances that make proof of paternity problematic for many women. This failure perpetuates the long history of disadvantage suffered by Indigenous women, which is inconsistent with the *Charter*'s promise of equality.

While the identity of G's paternal grandfather is unknown, there is some evidence to support an inference that he had Indian status and there is no evidence that he did not have status. The evidence is capable of supporting an inference that G's father had full status. For the policy to impose a strict burden of proving paternity fails to take into account and reflect the equality-enhancing and remedial purposes of the 1985 amendments. Those purposes would be frustrated if some allowance were not given for the difficulty in establishing the identify of G's grandfather, born over 80 years ago on a reserve to an Indigenous woman who herself had been wrongly deprived of status through a discriminatory regime.

For Lauwers and Miller JJA, the appeal could be resolved on straightforward administrative law grounds on the basis that the Registrar's decision is simply unreasonable. There is no need to resort to *Charter* rights or *Charter* values. For the majority, the wrong in the Registrar's decision is caused by the application of a categorical evidentiary rule that denies registration and status to an individual who cannot identify a relevant ancestor by *name*. In some cases only circumstantial evidence of Indian status of an ancestor will be available – his or her actual identity will be unknown and unknowable. The application of the rule requiring proof of identify is unreasonable because denies the benefit of registration to some persons whom the Act entitles to registration solely because they cannot

[2] [2012] 1 SCR 395

prove identity – which is not mandated by the Act. In a historical claim such as this one, it is sufficient for the claimant to provide some evidence capable of giving rise to the inference that an unknown father may have had status. That is sufficient proof of paternity for the purposes of the legislation, in the absence of any evidence to the contrary.

That analysis is sufficient to decide the appeal. A *Charter* values analysis would unnecessarily inject subjectivity and uncertainty into the legal analysis, without adding anything to the substantive analysis. The role *Charter* values can play in judicial reasoning has been carefully circumscribed – and for good reason. An appeal to *Charter* values risks pre-empting a *Charter* rights analysis and risk subordinating *Charter* rights. Further, *Charter* values lend themselves to subjective application because there is no doctrinal structure to guide their identification or application. They are not a discrete set, like *Charter* rights. The identification of *Charter* values has been *ad hoc*, sometimes tracking the language of an enumerated right and sometimes formulated at a much higher level of abstraction. Numerous problems can arise with respect to the operation of *Charter* values in judicial reasoning, including a lack of clarity about the relationship of *Charter* values to rights, and their uncertain relationship to each other and other constitutional and common law principles. Absent ambiguity, *Charter* values have no role to play in statutory interpretation.

The Registrar is owed no deference because he was not exercising discretionary power in refusing G's registration request. The Registrar's obligation is to administer legislation that determines the question of G's entitlement. The Registrar must get it right in accordance with the statutory criteria and is subject to an appeal to the Superior Court on a standard of correctness. The Registrar (or officials working under the Registrar) might develop some "field sensitivity" and facility in researching historical records, but the Registrar does not exercise discretionary power or any special expertise in determining entitlement. The court does not owe deference to the Registrar and does not need to invoke *Charter* values to overcome deference.

COMMENTARY: The disagreement between the majority and Sharpe JA as to the role of *Charter* values in what is substantively a judicial review exercise is perhaps the most interesting aspect of this case. Justice Sharpe's reasons make an effort to be faithful to the prevailing approach to review of administrative decisions that implicate *Charter* rights and values, as set out by the Supreme Court[3] and in the Court of Appeal's own recent decisions. That approach has been harshly criticised in academic circles as confusing, unhelpful and unworkable, and there are hints that some judges of the Supreme Court may themselves be uncomfortable with the approach.[4] However, the reasons of Lauwers and Miller JJA are the first we are aware of in which judges of an appellate court so strongly question the utility of a *Charter* values approach. Their criticisms reflect some of the problems with "*Charter* values" expressed by both practising lawyers and academics. The fact that two appellate judges have now entered the debate indicates that the law is still some way away from being settled on the role of *Charter* values in court review of administrative decisions.

The decision is noteworthy in other aspects as well. While purporting to decide the appeal on "straightforward administrative law grounds", the majority's reasons seem to run contrary to many of the fundamental principles of administrative law regarding substantive review of decisions.

First, it is unorthodox for the majority to have found that the Registrar was owed no deference

[3] See ***Doré v Barreau du Québec***, [2012] 1 SCR 395

[4] See, for example, the concurring reasons of McLachlin CJC and Moldaver J in ***Loyola High School v Quebec (Attorney General)***, [2015] 1 SCR 613, which do not apply or even mention a *Charter* values approach.

without conducting the usual standard of review analysis and without being entirely clear on what standard of review applies. To find no deference owed suggests a correctness standard, yet the majority concludes that the Registrar's decision was unreasonable – suggesting an application of the deferential reasonableness review standard – rather than incorrect.

In addition, the majority recognised no expertise on the part of the Registrar in making eligibility determinations, yet courts almost always assume some degree of expertise on the part of decision-makers that administer discrete statutory regimes, particularly when interpreting their home statutes.

Finally, the majority's finding that the Registrar did not exercise a discretionary power when deciding whether G was entitled to status under the Act is at odds with deep-seated understandings about how administrative decision-makers carry out their mandates and potentially opens up much more space for judicial interference in administrative decisions. ⚖

Citizenship revocation provisions violate the Canadian *Bill of Rights*: *Hassouna v Minister of Citizenship and Immigration*, 2017 FC 473

FACTS: The *Strengthening Canadian Citizenship Act*[5] amended the provisions of the *Citizenship Act*[6] dealing with revocation of citizenship on grounds of fraud or misrepresentation in the citizenship application process.

The amended *Citizenship Act* ("Amended Act") provides two different procedures for revocation cases involving fraud or misrepresentation: a judicial model for "complex cases" and an administrative system for "non-complex cases" (the "Administrative Model"). Under the new Administrative Model, the Minister of Citizenship and Immigration (or his delegate) is empowered to revoke the citizenship of a Canadian who obtained citizenship by fraud, misrepresentation or knowingly concealing material information without an oral hearing and without providing full disclosure of the evidence relied upon in support of revocation. The Minister has the discretion to allow an oral hearing when certain prescribed circumstances are met. However, in most cases, the person subject to the revocation proceeding will be limited to making written submissions.

These amendments marked a drastic departure from the previous regime. Under the previous legislation, a decision to revoked a person's citizenship could only be made by the Governor in Council, based on a report prepared by the Minister. Prior to issuing the report, the Minister was required to notify the affected individual of the intention to revoke, and outline the grounds for revocation. The affected individual could then exercise a right to have the matter referred to the Federal Court. The Minister would bring an action in the Federal Court for a declaration that the person obtained Canadian citizenship by fraud or misrepresentation. The procedure before the Federal Court provided for an oral hearing and full disclosure of relevant materials in the Minister's possession. If the Federal Court was satisfied that citizenship had been obtained by fraud or misrepresentation, the Minister could issue his report to the Governor in Council, after giving the person affected the opportunity to review the report and make written submissions in response. A final determination would be made by the GC, who could consider all equitable circumstances, including humanitarian and compassionate grounds, in rendering a decision.

H and seven other individuals who were all subject to revocation proceedings under the Administrative Model, brought an application challenging the amendments. The applicants argued, among other things, that the new

[5] SC 2014, c 22
[6] RSC 1985, c C-29

Administrative Model is fundamentally unfair and violates ss 7 and 10 of the *Charter* and ss 1(a) and 2(e) of the *Canadian Bill of Rights.*

DECISION: Application granted.

The provisions of the Amended Act allowing for administrative revocation do not violate the *Charter.* Revoking a person's citizenship by reason of fraud or misrepresentation does not, *per se*, interfere with or violate that person's right to liberty or security of person. However, the provisions do violate s 2(e) of the *Bill of Rights* because they deprive those affected of the "right to fair hearing in accordance with the principles of fundamental justice for the determination of [their] rights and obligations."

Section 2(e) of the *Bill of Rights* is engaged when four conditions met: (a) the applicant is a "person" within the meaning of s 2(e); (b) there is a "hearing" for the determination of the applicant's rights and obligations; (c) the hearing process violates the principles of fundamental justice; and (d) the alleged defect in the hearing process arises as a result of a "law of Canada" that has not been expressly declared operative notwithstanding the *Canadian Bill of Rights.*

The first and fourth condition were easily met in these cases.

The court was satisfied that the second condition also was met. Relying on *Authorson v Canada (Attorney General)*,[7] the court held that the determination by the Minister (or his delegate) is a "hearing" for the purpose of s 2(e) -- it involves an application of the law (s 10 of the *Citizenship Act*) to the applicants' individual circumstances in a proceeding before a court, tribunal or similar body. Further, the Minister's determination involves a decision concerning the applicants' rights, namely the right to citizenship. The court rejected the argument that citizenship is a privilege and not a right, holding that citizenship is a privilege only when it has not yet been granted. Once acquired, the rights flowing from citizenship have vested, and those rights would be lost if citizenship were revoked.

Finally, the court held that the Administrative Model violates the principles of fundamental justice because it does not provide the appropriate level of procedural fairness to those whose rights are affected by the legislation. Based on *Baker v Canada (Minister of Citizenship and Immigration)*,[8] a high degree of procedural fairness is owed when an individual's citizenship is at stake. For the revocation process to be procedurally fair, those subject to it ought to be entitled to: (1) an oral hearing before a court or an independent administrative tribunal where there is a serious issue of credibility to be determined; (2) a fair opportunity to state their case and know the case to be met; and (3) an impartial and independent decision-maker. None of those protections are guaranteed in the Amended Act.

Further, given the importance of Canadian citizenship and the consequences that could result from its loss, the principles of fundamental justice require a discretionary review of all circumstances in the case, including humanitarian and compassionate grounds. The Amended Act violated this principle of fundamental justice because it did not specifically state that the decision-maker ought to consider the affected individual's personal situation when humanitarian and compassionate grounds are at stake.

Thus, the relevant provisions of the Amended Act were declared inoperative as they violate section 2(e) of the *Canadian Bill of Rights* in a way that can not be avoided by interpretation. The notices of intent to revoke the applicants' citizenship were null and void and were quashed because they violate section 2(e) of the Canadian Bill of Rights and were therefore of no force or effect. The court suspended the effect of its judgment

[7] 2003 SCC 39

[8] [1999] 2 SCR 817

for 60 days and certified several questions of general importance.

COMMENTARY: This decision is noteworthy because it is a rare example of the court applying the *Bill of Rights* to render federal legislation inoperative. As noted by the court, the *Bill of Rights* lost most of its importance after the adoption of the *Charter* in 1982 because most of the freedoms guaranteed in the *Bill of Rights* are also guaranteed by the *Charter*. However, this case is a reminder that the *Bill of Rights* still has an important role to play in safeguarding human rights in administrative proceedings before tribunals whose powers are derived from federal legislation. When representing a client in administrative proceedings where a determination of the client's rights or obligations will be made, counsel should consider whether the legislative process provides inadequate procedural protections such that 2(e) of the *Bill of Rights* is engaged. The decision also reaffirms the critical importance of oral hearing where a decision-maker must make credibility findings.

Those practising in immigration law should also take note of this decision, not only because of its implications with respect to the revocation process under the *Citizenship Act,* but also because of the court's important findings that citizenship, once acquired, is a right not a privilege, and that a high level of procedural fairness is owed to those whose right to citizenship is being affected.

The government has 30 days to appeal the decision, which was rendered on May 10. A notice of appeal has yet to be filed, and it is questionable whether the government will do so. The Senate has already passed an amendment to Bill C-6, *An Act to Amend the Citizenship Act,* which seeks to amend the SCCA by that incorporating many safeguards that are designed to conform with the Federal Court's decision. The amended bill is currently before the House of Commons for consideration. ⚖

Judicial review of a discipline body's credibility findings: *Richmond v The Discipline Committee of the Certified General Accountants Association of Ontario*, 2017 ONSC 1765 (Div Ct)

FACTS: R is a certified general accountant and member of the respondent, the Professional Conduct Tribunal of the Certified General Accountants Association of Ontario (the "CGAO").

R was the subject of six complaints to the CGAO, five from clients and one from a fellow member of the CGAO. After a six-day hearing in 2014, R was found by the Professional Conduct Tribunal to have committed professional misconduct. He appealed to the Appeal Tribunal of the CGAO, but his appeal was dismissed. He then sought judicial review.

DECISION: Application granted; matter remitted to the Tribunal (differently constituted) for a rehearing.

R argued that the misconduct decision was unreasonable because it was not "justified, transparent and intelligible". The court agreed, finding that "the Liability Decision is formulaic, repetitive and incomprehensible"; describing it as "largely a cut-and-paste job" of the Rules allegedly breached and the particulars in the Notice of Hearing. The court stated that "nowhere is there any analysis of the evidence in relation to the allegations" and that, where there is a purported finding of misconduct, it is "conclusory without any analysis".

The court's "biggest concern", however, was how the Tribunal assessed credibility. It observed that the credibility assessment paragraph for each of the six complainants in the Liability Decision was identical to the others except for each complainant's name, calling this "clearly and problematically formulaic". Similarly, the

paragraph for the assessment of R's credibility "is virtually the mirror opposite of [the] complainants' credibility assessment. Again, it is formulaic and conclusory." R in his testimony explained some allegations and denied others. The Tribunal failed to consider the conflicts between R's evidence and the complainants', and failed to consider the explanations R gave.

Ultimately the court found that "it is simply not possible to understand how [the Tribunal] came to its decision concerning the facts… Simply put, the Liability Decision does not lend itself to meaningful judicial review."

The Court decided that it was not appropriate to uphold the outcome as reasonable even though the reasons for arriving at the decision were deficient: because the Tribunal failed to address credibility in any meaningful sense, it is not open to a reviewing court to do so on the basis of a paper record. Rather than deciding the liability issue itself, the Divisional Court remitted the entire matter to a differently constituted Tribunal for a rehearing on all or some of the allegations, as the Discipline Committee determines.

COMMENTARY: This case is a good reminder of the importance of careful credibility assessments in reasons for decision. This means more than summarizing the allegations, the applicable rules and the evidence, and then "picking a winner". It requires some meaningful analysis. Where there is a conflict between the evidence of witnesses, some credibility assessment is required. And that requires more than boilerplate comments on the "forthright manner" in which witnesses gave evidence, or vague reference to the "inconsistencies" in the evidence of another. A failure to meet this standard will often carrying the expensive and inconvenient consequence of an order for a new hearing.

Lay tribunals may have difficulty crafting written credibility assessments according to the standards and expectations of some courts and challenges to credibility findings are often raised on judicial review.[9] In *Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services*[10] the Divisional Court suggested that tribunals consider the following in assessing credibility:

- The appearance and demeanour of the witness, and the manner in which he testified. Did the witness appear and conduct himself as an honest and trustworthy person? It may be that he is nervous or confused in circumstances in which he finds himself in the witness box. Is he a man who has a poor or faulty memory, and may that have some effect on his demeanour on the witness stand, or on the other hand, does he impress the tribunal as a witness who is shifty, evasive and unreliable?
- The extent of his opportunity to observe the matter about which he testified. What opportunities of observation did he in fact have? What are his powers of perception?
- Has the witness any interest in the outcome of the litigation?
- Does the witness exhibit any partisanship, any undue leanings towards the side which called him as a witness? Is he a relative, friend, an associate of any of the parties in this case, and if so, has this created a bias or prejudice in his mind and consequently affected the value of his testimony?
- It is always well to bear in mind the probability or improbability of a witness' story and to weigh it accordingly. That is a sound common sense test. Did his evidence make sense? Was it reasonable? Was it probable? Does the witness show a tendency to exaggerate in his testimony?

[9] See, for example, ***Stefanov v College of Massage Therapists of Ontario***, 2016 ONSC 848 (Div Ct) and the commentary on that decision in Issue 4 of this Case Review.

[10] (1985) 51 OR (2d) 302.

- Was the testimony of the witness contradicted by the evidence of another witness, or witnesses whom the tribunal considered more worthy?
- Does the fact that the witness has previously given a statement that is inconsistent with part of his testimony at trial affect the reliability of his evidence?
- After weighing these matters and any other matters that the tribunal believes are relevant, it should decide the credibility or truthfulness of the witness and the weight to be given to the evidence of that witness.

While the *Pitts* decision is more than 30 years old, it has withstood the test of time and continues to offer valuable guidance to tribunals called upon to assess credibility, which may avoid the kind of outcome that occurred in *Richmond*.

A rare case of "true jurisdiction" in the post-*Dumsuir* era: ***Belaire v Ontario Aboriginal Housing Corporation***, 2017 ONSC 2893 (Div Ct)

FACTS: This appeal stems from a decision of the Landlord and Tenant Board ("the Board").

R, a landlord, applied to the Board for an order evicting A for non-payment of rent. A resisted the application on the basis that the rent charged was unlawful. The property in question was a "rent-geared-to-income premises", and his rent had been substantially increased despite the fact that his monthly income had actually gone down. R provided no explanations for these increases. The result was that A accumulated rental arrears.

The Board ruled that it did not have the jurisdiction to determine the amount of rent that R could lawfully charge under s. 203 of the *Residential Tenancies Act* ("RTA"). This provision states that the Board cannot make determinations regarding: (i) eligibility for "rent-geared-to-income" assistance as defined in s. 38 of the *Housing Services Act, 2011* ("HSA") or the amount of such rent payable under the HSA; or (ii) eligibility for, or the amount of, any prescribed form of housing assistance".

Before the Board, R argued that as A was receiving "rent-geared-to-income" assistance, s. 203 of the RTA applied and prevented the Board from making any ruling with respect to rental arrears. Ultimately, the Board accepted this argument. It found it had no jurisdiction to deal with A's arguments that the rent charged was unlawful and granted the eviction order requested by R.

DECISION: Appeal allowed.

With respect to the standard of review, the Court acknowledged many decisions suggesting that the standard applicable to appeals of decisions of the Board is reasonableness. However, the Court found that the applicable standard in this case was that of correctness.

The rationale for this decision was two-fold. First, the Board was not merely interpreting the RTA, but also the HSA. As the Board has no specialized expertise regarding the HSA, the Court held that its decisions involving that statute were entitled to no deference.

In addition, the Court determined that this matter gave rise to a "true question of jurisdiction" identified in *Dunsmuir*, to which the correctness standard applies. Specifically, the Court held that the Board was called upon to determine whether the statutory grant of power in the RTA gave it jurisdiction to decide whether the rental increases were lawful.

Having concluded that the standard was correctness, the Court allowed A's appeal. It noted that the Board's interpretation was inconsistent with the remedial purpose of the RTA. It also held that its interpretation of s. 203 of that statute was wrong on its face. Specifically,

the Court found that this provision prevented the Board from determining: (i) eligibility for rent-geared-to-income assistance under the HSA; or (ii) the amount of rent-geared-to-income assistance an individual is entitled to under the HSA. However, because A was paying rent pursuant to the RTA, neither aspect of the provision applied.

COMMENTARY: This decision is significant because the Court found that a "true question of jurisdiction" existed – what the Supreme Court of Canada described in *Alberta Teachers Association* as a "exceptional" and "narrow" category of correctness review.[11] Going even further in its *obiter* comments, the Supreme Court of Canada suggested that a true question of jurisdiction may not even exist at all.[12]

This case is a helpful reminder that the category does exist, even if counsel frequently try to stretch its contours beyond its principled limits. The Divisional Court's approach is consistent with that endorsed by the Ontario Court of Appeal, which has cautioned counsel to avoid the "jurisdiction trap" while recognizing that "[g]enuine questions regarding the boundaries of administrative authority under statute do arise."[13]

The Court's emphasis on the Board's interpretation of the HSA (in addition to the RSA) suggests that the 'true question of jurisdiction' category may have greater resonance where the jurisdictional line engages a tribunal's interpretation of, or powers under, a non-home statute (rather than a tribunal simply determining whether it can consider a line of inquiry under its home statute).

Looking forward it will be interesting to see whether this decision breathes additional life into an exceptional category of correctness review that has been on life support since *Alberta Teachers Association*.

Exceptions to the bar of prematurity on judicial review: *Toronto Police Services Board v Briggs*, 2017 ONSC 1591 (Div Ct)

FACTS: On June 9, 2011, W, a police officer, and his partner stopped B while he was driving his car. They questioned him about whether he was driving while his licence was under suspension. This questioning led to three charges being laid against B under the *Compulsory Automobile Insurance Act* ("*CAIA*") and the *Highway Traffic Act* ("*HTA*").

When B appeared for trial, the matters were not on the docket and the Crown did not proceed. Then, in December 2011, B made a freedom of information request for the police officers' notes from the traffic stop. Subsequently, W re-laid the two charges under the *CAIA*, but not the charge under the *HTA*, as the limitation period for the latter had expired.

On May 18, 2012, B commenced an application with the Human Rights Tribunal ("Tribunal") against W and the Toronto Police Services Board (the "Applicants") alleging discrimination under the *Human Rights Code* ("*Code*") on the basis of race, colour and ethnic origin. He also alleged reprisal, claiming the charges were re-laid as retaliation for his request for the officers' notes.

The *Code* proceeding was deferred pending the disposition of the *CAIA* charges before the Ontario Court of Justice ("OCJ"). At his trial, B brought a *Charter* application for the exclusion of evidence based on the allegation that the traffic stop had been the result of racial profiling in

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[11] ***Alberta (Information and Privacy Commissioner) v Alberta Teachers Association*** 2011 SCC 61 at paras 33 and 39

[12] *Ibid.,* at para 34

[13] ***Toronto Hydro-Electric System Ltd v Ontario Energy Board***, 2010 ONCA 284 at para 20

violation of B's *Charter* rights. Following a blended *voir dire*, the OCJ concluded no racial profiling had occurred and dismissed the *Charter* application. B was convicted and did not appeal.

The Tribunal granted B's request to re-activate his deferred *Code* application after the trial.

The Applicants subsequently applied to the Tribunal for an order dismissing the application pursuant to s. 45.1 of the *Code*. This provision allows the Tribunal to "dismiss an application, in whole or in part…if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application."

The Tribunal rejected the Applicants' request on the grounds that the *Code* application contained more allegations regarding W's conduct than were addressed in the decision in the *CAIA* proceeding, in addition to the allegations of reprisal; that the different purposes of the two proceedings favoured permitting the *Code* proceeding to continue; and that dismissing cases like B's could have significant consequences for strategic and other decisions made by other accused in criminal or quasi-criminal trials.

The Applicants sought judicial review of this decision, submitting that the application fell within the category of "exceptional circumstances" where review of interlocutory orders is permitted.

DECISION: Application allowed.

The Divisional Court unanimously found that the application fell within the exceptional circumstances exception to the prematurity doctrine. It proceeded to find the Tribunal's decision was unreasonable, though the Court's analysis of this issue is outside the scope of this case comment.

The general rule is that courts will not entertain applications for judicial review of interlocutory decisions of administrative tribunals, save where "exceptional circumstances" are present. For example, a court may intervene to prohibit the continuation of a proceeding that is fatally flawed due to a denial of procedural fairness, or to review certain types of orders that cannot be adequately corrected in a later review.

This matter presented exceptional circumstances in light of the principles that underlie s. 45.1 of the *Code*: issue estoppel, preventing collateral attack, and abuse of process. To preclude judicial review of the Tribunal's decision at this stage of its proceedings would defeat the purpose of s. 45.1. Neither parties, nor the Tribunal, should be forced to incur the time and expense of determining an application if the issue has been "appropriately dealt with" in another proceeding.

It is also undesirable for there to be inconsistent findings on important issues, such as the motivation for the vehicle stop, and there was a serious prospect of that occurring here. There would be no way to remedy this in an application for judicial review at the conclusion of the Tribunal's process.

Further, the Tribunal's decision, if followed, would have broad implications for other cases that raise overlapping issues in human rights and criminal proceedings. Its conclusion that it is, as a general proposition, unfair to dismiss a human rights application dealing with the same allegations that were considered and rejected in a criminal proceeding was based on an improper application of the Supreme Court's jurisprudence.

Finally, the Tribunal had made a decision to hear all allegations in the *Code* application, despite the merits of the racial profiling issue having been determined by the OCJ.

The Divisional Court also noted that this was not a case where delay would be likely to result from hearing the application for judicial review, as the Tribunal's merits hearing was not set to commence for several months. This was another indicator that exceptional circumstances existed,

warranting the Court's intervention in the Tribunal's ongoing process.

COMMENTARY: Prematurity is a discretionary bar to entertaining judicial review applications. Courts have been clear and consistent in emphasizing the narrowness of the "exceptional circumstances" exception to its application.[14]

This case is an interesting contribution to the jurisprudence on this issue in two respects. First, though not quite as elusive as the "question of true jurisdiction" in administrative law, cases falling into the category of "exceptional circumstances" are a rare find. This decision will provide concrete guidance to litigants and courts to assist them in identifying where such circumstances exist, emphasizing a purposive approach to the exercise.

Second, *Briggs* sets a relatively strong precedent for the Court to entertain judicial review of a decision of the Tribunal made under s. 45.1 of the *Code*, at least where there appears to be cause to doubt the reasonableness of that decision. Parties before the Tribunal who have grounds to request dismissal of an application under that provision would be well advised to put their best foot forward before the Tribunal, with the knowledge that *Briggs* provides persuasive authority to permit immediate review of an adverse decision. ⚖

Supplementing insufficient reasons: ***Harrison v Association of Professional Engineers***, 2017 ONSC 2569 (Div Ct)

FACTS: H is a professional engineer and the principal of Longhill, an HVAC provider. Limestone, a school board, retained Downey to renovate a school in Kingston. Downey awarded a subcontract to Allen, which in turn contracted with Longhill to supply four heading, ventilation and air-conditioning units.

Allen's contract with Longhill was subject to the approval of certain shop drawings. Downey rejected the drawings submitted by Longhill, prompting Allen to cancel its purchase order with Longhill. Allen issued a new purchase order to Engineering Air, a Longhill competitor.

H filed a complaint with the Complaints Committee ("Committee") of the Association of Professional Engineers of Ontario ("APEO"), alleging that Downey colluded with Engineering Air to reject Longhill's shop drawings.

The Committee declined to refer the complaint to the Discipline Committee. In a summary finding, the Committee concluded that "there was no evidence of professional misconduct of a significant nature on the part of Downey…"

H applied to judicially review a decision of the Committee, submitting that it dismissed his complaint without addressing his allegations or providing reasons as to why they did not constitute professional misconduct.

DECISION: Application denied.

Having regard to the scheme set out in the *Professional Engineers Act*, the Court found that the Committee did all that was required of it in disposing of H's complaint. Given that this was not a case in which there was a failure to give reasons, challenges to the decision were subject to a reasonableness analysis.

The Court found that the reasons were defective because they state the Committee's central conclusion without explaining why it thought this to be the case. Accordingly, they lacked transparency. However, the Court held that the adequacy of reasons is not a stand-alone basis for quashing the decision.

Instead, the Court recognized that it must first seek to supplement the reasons before

[14] See, for example, ***Canada (Border Services Agency) v C.B. Powell Limited***, 2010 FCA 61 at para 33.

subverting them. This involves looking to the record that was before the Committee to see if the decision falls within the range of possible, acceptable outcomes, defensible in fact and law. When looking at the material before the Committee, it is clear that it was open to it to accept Downey's version and decide that the conduct in question did not merit a referral to the Discipline Committee.

In *obiter*, the Court emphasized the APEO is expected to issue appropriate reasons. It added that while the Court can look to the record to supplement a set of reasons, the record will not always be sufficient to do so. The Court cannot uphold a decision by writing reasons and substituting them for defective reasons.

The Court went on to comment that independent legal counsel advising the Committee could have provided advice concerning the adequacy of the reasons in a legally appropriate way.

COMMENTARY: This case is yet another example of courts navigating the sometimes muddy waters between permissibly attempting to supplement inadequate reasons (as per the Supreme Court's instructions[15]) and impermissibly taking a "carte blanche" approach to rationalizing and saving a tribunal's error.[16]

In this case, the Court supplemented the Committee's perfunctory reasons by finding that the conclusion reached was reasonably available on the basis of the record before the adjudicator. The issues were simple enough to allow for this result. At the same time, the Court's comments in *obiter* indicate that it does not wish to be relied upon as a backstop for inadequate reasons, emphasizing that "[t]he Complaints Committee is expected to issue appropriate reasons."

In short, tribunals that issue perfunctory reasons run a real risk of having the inadequacy of reasons bleed into an unreasonable result.

The Court's brief reference to independent legal counsel is a helpful reminder that ILC's mandate properly includes offering advice on the adequacy of tribunal reasons. ⚖

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[15] ***Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)***, 2011 SCC 62

[16] ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association***, 2011 SCC 61 at para 54