ISSUE No. 20 • DECEMBER 2018

ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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FCA comments on standard of review, deference and statutory appeals: *Bell Canada v 7265921 Canada Ltd*, 2018 FCA 174

Facts: In 2015 the Canadian Radio-television and Telecommunications Commission (CRTC) made an order requiring programming undertakings (entities that create television content) and broadcasting distribution undertakings (entities that transmit programs through cable, satellite or broadband networks) to comply with certain terms and conditions in the contracts between them. Those terms and conditions are set out in a Wholesale Code. Bell appealed the order under the *Broadcasting Act*[1] and argued that the Wholesale Code and the order are *ultra vires* the CRTC's powers insofar as they affect its interests as a programming undertaking. Whether the CRTC had the authority to issue the Wholesale Code and the order turned on the interpretation s 9(1)(h) of the *Broadcasting Act* which permits the CRTC in furtherance of its objects to "require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission".

Decision: Appeal allowed (Rennie JA dissenting).

[1] SC 1991, c 11

Justices Rennie and Woods agreed that the reasonableness standard of review applied to the CRTC's decision to issue the Wholesale Code and order. Justice Rennie found the decision to be reasonable while Justice Woods concluded that it was unreasonable. Justice Nadon held that the question of the CRTC's authority to issue the order so as to give effect to the Wholesale Code should be reviewed on the correctness basis and that s 9(1)(h) of the Act does not grant that authority.

Justice Rennie discussed at length the standard of review. Bell had argued that the correctness standard applied because the question of whether the Code is authorised by s 9(1)(h) is jurisdictional. The respondents argued that the question is a matter of the CRTC's interpretation of its home statute, which attracts reasonableness review. After reviewing some of the Supreme Court's recent jurisprudence on jurisdiction questions, Rennie JA concluded that the issue did not need to be decided in this case because in a previous case the Federal Court of Appeal had already determined that the reasonableness standard of review applies to orders made under s 9(1)(h)[2] and that should be followed. However, in some cases there is only one reasonable outcome and as result, correctness and reasonableness review merge and become indistinguishable. Courts should not be distracted by categorisation and instead should focus on legislative intent according to the principles of interpretation.

Justice Rennie was critical of the "stark choice" between reasonableness and correctness review for both parties and courts. It leads to lengthy and arcane debates about the standard of review, which have little to do with the merits of the case, and "the compelling points of law and legal policy encompassed by the standard of review that is rejected are jettisoned, in their entirety". However, in his view reasonableness grants reviewing judges a broad discretion to choose the intensity of scrutiny to be applied in reasonableness review. He then reviewed some indicia that may point to intense scrutiny and a narrowing of reasonable outcomes. The following markers inform the degree of scrutiny the Court should apply to the question whether the Wholesale Code and order are authorised by s 9(1)(h): s 31(2) of the Act grants an applied to the Court "on a question of law or jurisdiction"; the question is one of statutory interpretation involving the text, context and purpose of the Act, and does not involve the review of an adjudicative decision; whether the provision being interpretation is unique to the tribunal's expertise or is equally capable of consideration by courts; prior decisions on standard of review; and the potential conflict in this case between the Act and the *Copyright Act*.[3] He then went on to interpret s 9(1)(h) of the Act and held that it encompasses the power to issue the order and the measures in the Wholesale Code.

Before reaching that conclusion, Rennie JA offered some interesting comments on the role of expertise in the standard of review analysis. Rather than the current framework under which deference is a presumption applied across the board to all decision makers in all types of decisions, Rennie JA proposed that if deference is the result, it should arise only as a consequence of a close analysis of the statute, the question before the court and its consequences. In answering the question whether the CRTC can affect programming undertakings under s 9(1)(h), there are no indicia that the CRTC has any greater expertise than does the Court. Justice Rennie shared the view of the dissenting judges in *Edmonton East*[4] that the assumption of unlimited inherent expertise including on matters of interpretation risks transforming the *presumption* of deference into an irrebuttable rule. Instead, an analysis of the substantive legal issues in the case will indicate the correct division of responsibilities between

[2] *Bell Canada and Bell media Inc v Attorney General of Canada*, 2017 FCA 249

[3] RSC 1985, c C-42.

[4] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47

the court and the agency. If deference is viewed as part of the context, rather than as a pre-determined rule, it dissolves the antagonism between the rule of law and parliamentary supremacy.

Justice Rennie also observed that if the presumption of expertise-based deference extends to a tribunal's determination of the limits of its own jurisdiction, then s 9(1)(h) and similar provisions amount to unfettered discretion. Deference, which originated in the *application* of the law, has migrated to the *interpretation* of the law. Approached in that way, deference will collapse into a doctrine of non-justiciability, leaving areas of agency decision-making invulnerable to legal challenge. This is inconsistent with the objective of promoting legislative supremacy. The requirement to defer should arise only when and to the extent that the statute indicates that deference is warranted. That analysis necessarily encompasses and gives considerable weight to provisions giving appeal rights on questions of law or jurisdiction.

Justice Rennie reasons were endorsed by Woods JA, except his finding that the CRTC's interpretation of s 9(1)(h) was reasonable.

Justice Nadon applied the correctness standard based on his reading of the Supreme Court's decision in *Cogeco*;[5] were it not for that decision, he would have agreed with Rennie JA that the reasonableness standard applied. Justice Nadon then went on to offer his own comments about the state of the law on standard of review. He noted that judicial review is in "an incoherent and confused state which undermines the predictability of outcomes" and undermines the rule of law. The question of the applicable standard of review in a case has almost taken precedence over the substantive issues. The Court's efforts in this case should not be focussed on determining what the standard of review is but on the true meaning of s 9(1)(h) of the Act. It should be self-evident that that question should be decided on a correctness basis especially since s 31(2) of the Act grants appeals on questions of law or jurisdiction. That is an unequivocal signal that such questions can only be decided a standard of correctness. The only possible interpretation of that appeal provision is that Parliament intended the courts to provide answers to the questions of law raised before them. For the court to defer to the CRTC's interpretation of s 9(1)(h) requires disregarding clear legislative intent.

Justice Nadon observed that legislation only has one meaning. There are no multiple answers to the meaning of legal provisions, although there may be ambiguity. Because in most cases there are not multiple possible answers to the meaning of legislation, a reasonable interpretation must also be correct. If it is not correct, it must be unreasonable.

Commentary: This decision was released in early October and the comments of Rennie and Nadon JJA on standard of review anticipate the Supreme Court's general reconsideration of the framework for substantive review in the "trilogy" of cases that were heard in early December. It is not difficult to imagine that these judges may be offering their views on the problems with the current law and potential avenues for improvement in the hopes they will be heard by the Supreme Court.

Two areas of discussion stand out in the reasons of Rennie and Nadon JJA: the role of expertise in judicial review, and the need to give proper effect to statutory appeal provisions. As to the former, Rennie JA joined company with some Supreme Court judges[6] who have questioned the prevailing assumption of expertise on the part of all statutory decision makers arising

[5] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168,* 2012 SCC 68 (*Cogeco*).

[6] See, for example, *Edmonton East*, *supra*, at para 85 *per* Côté and Brown JJ, dissenting.

from the mere fact of a legislative choice to give that official or agency first-instance decision making authority, and the use of that assumption of expertise as a justification for blind deference. There is good reason to adopt a nuanced application of deference as a principle of judicial review, as Rennie JA urges. Absent clear legislative direction – such as a privative clause – that a reviewing court must defer to an agency's decision on a question of law, there is little if any compelling reason for a court to show such deference. Presumed notions of expertise do not provide a persuasive reason, particularly where the legislation grants a right of appeal on questions of law. A proposed alternative approach is that, in the absence of a privative clause, the court should have the final say on questions of law, but the court's view of the correct answer could be informed by the views of a decision maker who has demonstrated expertise in answering the legal question, whether by their reasons or otherwise.

Finally, both judges emphasised the need for reviewing courts to pay specific attention to the intent of the legislature as reflected in the words of the statute. Recent standard of review case law could be criticised for placing too much weight on judicially-created categories and factors, and insufficient weight on the words of the statute – the best evidence of legislative intent. There has been growing support for the view that statutory appeal provisions should be given effect according to their terms, and not treated simply as a factor potentially having weight in the standard of review analysis. Thus, where (as in s 31(2) of the *Broadcasting Act*) a provision gives a right of appeal on a question of law or jurisdiction, it indicates a legislative intent that the court should provide the answer without deferring to the agencies decision. Under this approach, no standard of review exercise is needed.

Some of the points made by Rennie and Nadon JJA featured in some of the arguments made before the Supreme Court in the trilogy as certain themes emerge around areas of dysfunction and potential reformation in the approach to substantive review. Readers can expect more commentary on these issues from the bench, the bar and the academy in the months to come.

Inadequate reasons that do not permit for reasonableness review: *Sharif v Attorney General of Canada*, 2018 FCA 205

Facts: S is an inmate at the Warkworth Institution. He was charged with the offence of "fight[ing] with, assault[ing] or threaten[ing] to assault another person" under paragraph 40(h) of the *Corrections and Conditional Release Act*.[7] More specifically, it was alleged that S was "given several direct orders to enter [a] food line from the rear" but was "physically uncooperative", refused "direction" and bumped a corrections officer "several times with his chest". Such offences must be proven beyond a reasonable doubt.

The Chair of the Warkworth Institution Disciplinary Court convicted S. The Chair's only factual findings related to S's conduct were that S was "attempting to keep [his meal] tray out of the [corrections] [o]fficer's reach" and away "from the [o]fficer" – conduct that "invite[d] physical contact either by [S] or by the [o]fficer." In short, the Chair found that S keeping his meal try out of the officer's reach in a manner that invited physical contact amounted to fighting with, assaulting or threatening to assault another person within the meaning of the *Act*.

S brought an application for judicial review of the Chair's decision. The application was dismissed. S appealed to the Federal Court of Appeal.

Decision: Appeal allowed. Decision of the Chair quashed and charge against S ordered dismissed.

[7] SC 1992, c 20.

Writing for a unanimous bench, Stratas JA identified the standard of review as reasonableness, but found that a "narrower margin of appreciation" applied, requiring a "relatively strict" intensity of review. This conclusion was based on the fact that the decision at issue was important to the affected person (including impacting their liberty) and drew upon legal standards rather than executive policy.

The Chair's decision was not reasonable. The Chair failed to explicitly analyze or interpret paragraph 40(h) of the *Act* at all; instead, based on his findings of fact, it must be deduced that the Chair implicitly viewed "fight" or "assault" under paragraph 40(h) as capturing conduct of any sort that could invite physical contact. This interpretation is way too broad to be reasonable.

The respondent's position that S's conduct was "aggressive" is not based on any findings made by the Chair in his reasons. Although the Chair's reasons must be read in light of the record before him, the Chair's factual findings cannot be replaced with the Court's own findings. The Court cannot speculate about what was in the Chair's mind.

The Chair's reasons are so deficient that they do not allow a court to conduct reasonableness review of central aspects of the Chair's decision. For example, the Chair failed to advert to the "beyond a reasonable doubt" standard, leaving the reviewing court with no idea as to whether he was aware of the standard and applied it. The Chair also gave no reasons in support of the sanction and none can be discerned from the record, leaving a reviewing court unable to determine whether the Chair followed the "mandatory legislative recipe for imposition of a sanction". Where a reviewing court cannot review an administrative decision for reasonableness, that decision must be quashed.

In terms of remedy, while the usual remedy is to quash the Chair's decision and remit the matter for redetermination on the merits, reviewing courts have the discretion to order a different remedy where appropriate. In this case, no purpose would be served by a redetermination of the charge on its merits. That is an accepted basis for declining to remit a matter for redetermination.

In addition, the charge remains before the Chair but given that a conviction under paragraph 40(h) is not possible, the Chair has no choice but to dismiss the charge. In such situations, *mandamus* lies, and thus the Chair is ordered to dismiss the charge.

Commentary: The Court of Appeal's decision highlights a number of important points about judicial review.

First, it is a transparent example of the Federal Court of Appeal's approach to calibrating the intensity of reasonableness review. The Supreme Court of Canada frequently reminds us that reasonableness is "contextual", but offers little in the way of concrete guidance as to *how* context impacts the range of reasonable options. Perhaps out of necessity, the Federal Court of Appeal's jurisprudence provides some practical direction on this point, recognizing a number of different factors as impacting the degree of scrutiny that ought to be afforded to a particular type of decision under reasonableness review. Here, two of those factors – the impact on an individual, and the nature of the decision (interpreting legal standards vs exercise of policy-making/discretion) – militated firmly in favour of a more exacting form of reasonableness.

Second, this case demonstrates the key principle that just as deficient reasons may preclude the ability of an appellate court to conduct appellate review, they may also frustrate a reviewing court's capacity to conduct judicial review. And while the record may be of some assistance in discerning a decision-maker's logic in certain cases, the Federal Court of Appeal makes it clear that there are limits and that reviewing courts cannot guess as to what might have been motivating a certain decision (or

substitute their own reasons). Following in the footsteps of the Supreme Court's decision in *Delta Air Lines Inc v Lukàcs*[8], this case can be seen as a further retrenchment from the notion that courts should be quick to defend decisions based on what reasons "could have been offered" by the decision-maker.

Finally, with respect to remedy, the Court of Appeal's decision to quash the matter without remitting it for redetermination is an important reminder that this remedial option may succeed in the right case, even if such cases are rare. (It is worth noting that the Attorney General in this case conceded that redetermination would serve no purpose). Still, on the right set of facts, counsel may be well advised to attempt to secure what is perhaps the fullest form of victory when judicially reviewing an administrative decision – quashing the decision and *not* ordering a new hearing on the merits.

Municipal decision to remove political ads must comply with *Charter*: *Christian Heritage Party v City of Hamilton*, 2018 ONSC 3690 (Div Ct)

Facts: The Christian Heritage Party ("CHP"), a registered federal political party, placed advertisements on bus shelters belonging to the City of Hamilton (the "City"). The advertisements depicted a man entering a room marked "Ladies' Showers" and read:

> Where is the Justice?
> Bringing Respect for Life and Justice to Canadian Politics
> CHP Canada
> The Christian Heritage Party of Canada

About ten days after the advertisements were placed, a news outlet contacted the City to inquire about the advertisements. The City's Director of Communications, Andrea McKinney, became involved and consulted a number of City employees. The consensus view among employees was that the advertisements were offensive and/or discriminatory. Ms McKinney decided to have the advertisements removed and directed City staff to do so. After that decision was made, the City receive a formal complaint about the advertisements. The next day, City Council voted to "ensure that all of the offending ads have been removed." CHP had not been informed about the pending decision and did not have an opportunity to participate in any way. It sought judicial review. The parties to the judicial review application agreed that both the initial decision and City Council's decision to adopt it were subject to the *Charter*.

Decision: City's decision quashed.

First, the Court held that the process followed did not give the CHP a meaningful opportunity to participate. The Court assessed the level of procedural fairness required, using the factors set out in *Baker v Minister of Citizenship and Immigration*.[9] It held that the process was flawed because CHP was not consulted and had no chance to submit evidence or make arguments before the City made its decision. It also held that the decision was important to CHP because the right to political speech is significant. It was not relevant to the Court that the CHP was free to advertise elsewhere.

Second, the Court held that the City did not balance the rights at stake, as it was required to do under the '*Charter* values' framework established by the Supreme Court in *Doré v Barreau du Quebec*.[10] The relevant interests included the CHP's right to political speech. There was no evidence that the City took this into account at all in making its decision. The City did not give reasons for its decision at all.

Commentary: This decision applies the *Charter* and an "adjudicative" model of procedural fairness to municipal decision-making regarding

[8] 2018 SCC 2

[9] [1999] 2 SCR 817

[10] 2012 SCC 12

the use of private property. First, the Court holds that the *Charter* applies in a straightforward way without making any allowance for the fact that the expression at issue is on City-owned property and the City has a Policy for Commercial Advertising and Sponsorship under which it reserves the right in its absolute discretion to decide on the advertisements displayed on its property. Second, the Court requires that municipalities making this kind of decision not only balance all applicable rights but also admit "evidence", hear "argument", and issue "reasons." The decision effectively requires a municipality deciding whether to remove an advertisement to conduct a hearing, yet the procedural trappings of an adjudicative hearing appear ill-suited to decision-making of this kind. Surely in a context such as this, a rights holder can have a meaningful opportunity to be heard, and a decision-maker can adequately weigh the *Charter* interests at stake, without a full blown adjudicative hearing.

Equally striking is the Court's apparent distaste for what might be called the "political correctness" of the City's reasoning in making the decision and of its argument in defending the application. The Court dismissed the notion that the advertisements amounted to "dog-whistle" discrimination and that speech can be a form of violence, and ultimately expressed concern that "Canadian political discourse does not become a dogmatic single voice that only transmits messages with accepted content." This is a sentiment with which many would agree at a high level, however it is worth probing how far it should be taken – would an advertisement with a similar message that was aimed at a racial minority (instead of transgender people, as in the advertisements here) receive the same treatment? Arguably municipalities should not be saddled with the full-blown machinery of adjudicative decision-making – which they are not well-equipped to provide – in order to rid their private property of advertisements that are derogatory towards people that face stigma, discrimination, and violence because of who they are.

Finally, we note that the Court's analysis does not block the City from making the same decision again – it requires only that it to be supported by a process that allows the advertiser to participate and that balances its right to free expression against competing rights and interests.

Contents of a Record on Judicial Review at Common Law: *Rogers Communications Canada Inc. v. The Ontario Energy Board*, 2018 ONSC 6314 (Div Ct)

Facts: In 2015, the Ontario Energy Board (the "OEB") announced a policy review of the rates charged for telecommunications companies to attach their overhead cables and wires to utility poles owned by Ontario electricity utilities.

After the policy review announcement, the OEB established a working group, obtained a report from an economic consultant and published a draft report (the "Draft Report"). On March 22, 2018, the OEB issued a final report concluding that the charges should be increased from $22.35 to $43.63 (the "Final Report").

Immediately after the Final Report was issued, a group of telecommunications companies filed a notice of appeal, arguing that the process leading to the OEB's Final Report was unfair, the OEB failed to properly apply the burden of proof, and the OEB ignored the appellants' submissions concerning its Final Report.

The OEB disputes whether an appeal is available and maintains that the OEB's power to amend the Pole Attachment Charge is governed by s. 70(1.1) of the OEB Act, which explicitly provides that the OEB "may, with or without a hearing, grant an approval, consent or make a determination that may be required for any of the matters provided for in a licensee's licence."

Before the appeal itself was perfected, a dispute arose between the appellants and the OEB as to the content of the record to be filed in the Divisional Court for the appeal. The appellants

brought a motion for disclosure and production of certain information, including the identities of persons who prepared, reviewed and approved the Draft Report and the Final Report; documents, written submissions and oral presentations or submissions provided to the OEB members who approved the Final Report; and certain correspondence concerning the Draft or Final Report.

Decision: Motion for disclosure and production dismissed, with costs.

Associate Chief Justice Marrocco's starting point was the well-known decision in *R. v. Northumberland Compensation Appeal Tribunal*[11], where Lord Denning defined the record on judicial review as including the proceedings, the pleadings and the decision, but not the evidence.

Justice Marrocco then cited the Saskatchewan Court of Appeal decision in *Hartwig v. Saskatchewan (Commissioner of Inquiry)*[12], which held that "the parties to a judicial review application should be able to put before a reviewing court all of the material which bears on the arguments they are entitled to make." In Saskatchewan, there is no legislation setting out the contents of the record. In Ontario, section 20 of the *Statutory Powers Procedure Act* ("*SPPA*")[13] defines the record for administrative hearings, but this provision did not apply here, since no hearing had been held.

Justice Marrocco also cited a recent Ontario decision involving an application to judicially review OEB decisions, where an applicant requested an order directing the OEB to deliver further and better records of the proceedings leading to the decision at issue.[14] The motion judge in that case determined that where the *SPPA* did not apply, the record should be comprised of enough information to allow for meaningful judicial review of the impugned decision.

Applying the "meaningful judicial review" test, Marrocco ACJSC considered the information requested in the context of the appellants' complaints to determine if the information requested was required to meaningfully consider the appellants' submissions.

In making this determination, Marrocco ACJSC emphasized that the process followed, which the appellants found objectionable, was known and that a meaningful review of the complaint about the failure to apply the burden of proof to the utilities and the complaint that the appellants' submissions were ignored could be achieved by consideration of the Final Report, without the materials and submissions used in preparation of that report. In short, none of the information requested on the motion was required for a meaningful review of the appellants' complaints.

Commentary: This decision outlines an approach to the determination of the record on judicial review where s. 20 of the *SPPA* does not apply.

Historically, the record on judicial review would not include the evidence before the administrative decision-maker or the reasons, unless incorporated in the decision. However, this case, and the cases cited by Marrocco ACJSC, acknowledge that the record placed before the reviewer must reflect both the evolving standard of review and the issues raised on review.

The approach taken by Marrocco ACJSC reflects the fact that careful consideration will be given to the specific issues raised in the appeal or judicial review proceeding when determining the scope of the record before the Court. It offers a flexible and responsive – even if somewhat unpredictable – approach to the comprehensiveness of the record before a

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[11] [1952] 1 All E.R. 122
[12] 2007 SKCA 74
[13] R.S.O 1990, c. S.22
[14] *CCSAGE Naturally Green v. Director, Sec. 47.5 EPA, MNRF and OEB*, 2018 ONSC 237

reviewing court. Indeed, there may be a gulf between what one party considers to be required for meaningful judicial review, and how far the Court is willing to go in terms of ordering disclosure or production to explore a particular issue. "Meaningfulness" may well be in the eye of the beholder.

Even if a firm link between the materials requested and "meaningful judicial review" is established, however, parties seeking disclosure or production from administrative decision-makers will likely face other serious hurdles, including claims of deliberative secrecy and privilege. (The OEB had raised those arguments in this case too, but the Court did not find it necessary to consider them.) Generally speaking, courts use these doctrines and others to limit the ability of litigants to peer too far inside the inner workings of an administrative tribunal or agency.

Multiple reasonable interpretations of Tribunal's costs powers: Robinson v. College of Early Childhood Educators 2018 ONSC 6150

Facts: In this case, the Divisional Court upheld a substantial costs award as reasonable on appeal from a costs decision from the Discipline Committee (the "Committee) of the College of Early Childhood Educators (the "College").

After a hearing before the Committee, the Appellant was found guilty of professional misconduct for physically, sexually, verbally, psychologically, or emotionally abusing a child under his professional supervision. After a further hearing on penalty and costs, the Committee reprimanded the Appellant, revoked his certificate of registration, and ordered him to pay costs of $257,353.76. This amount reflected two thirds of the costs the College incurred for the hearing.

Proceedings before the Committee are governed by the *Statutory Powers Procedure Act* ("SPPA"). = Section 17.1(2) of the SPPA deals with costs, and provides that "a tribunal shall not make an order to pay costs under this section unless, (a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and (b) the tribunal has made rules under subsection (4)."

The Committee held that the Appellant had not acted in manner that was "unreasonably frivolous, vexatious or in bad faith in the conduct of the hearing." But it relied on two arguments in fixing costs against the Appellant anyway. First, the Committee cited s. 33(5)4 of the Early Childhood Educators Act (the "ECEA"), which permits the Committee to fix costs where it has found "a member guilty of professional misconduct". Second, the Committee found that the *Rules of Procedure of the Discipline Committee and of the Fitness to Practice Committee of the College of Early Childhood Educators* (the "Rules") do not restrict the ability to grant costs. (Rule 16.04 mirrors the text of the SPPA and provides that the Committee "may at any stage of the proceeding order a party to pay costs where the conduct of the party has been unreasonable, frivolous or vexatious, or a party has acted in bad faith").

The Committee also expressed concern about the College – which is funded through membership fees – bearing the cost of an individual member's professional misconduct.

The Appellant appealed the costs decision to the Divisional Court, challenging the Committee's jurisdiction to order costs, but not the quantum awarded. The main issue on appeal involved the interplay between the Committee's discretion to fix costs under s. 33(5)4 of the ECEA and rule 16 of the *Rules*, and the restrictions on a tribunal fixing costs under s. 17.1 of the SPPA.

The Appellant argued that Rule 16.04 limits the Committee's discretion to award fix costs against a party to situations where that party's conduct was "unreasonable, frivolous or vexatious, or a party has acted in bad faith." The

Appellant also noted the Committee's past practice of not ordering costs, and another tribunal decision, *Ontario College of Teachers v. Riccardi*, 2015 ONOCT 67, refusing to fix costs because the member's conduct was not unreasonable or frivolous. The Ontario College of Teachers tribunal was governed by identical legislative provisions and rules. Finally, the Appellant argued that the Committee's decision would have a chilling effect on members with valid claims who may feel the cost consequences of challenging those claims.

Decision: Appeal dismissed. The decision to award costs was reasonable.

The Divisional Court showed considerable deference to the Committee in refusing to set aside its decision on costs.
The Divisional Court held that s. 17.1 of the SPPA precludes tribunals from awarding costs unless a party's conduct was unreasonable. However, s. 33(5)4 of the ECEA allows the Committee to fix costs against a member after making a finding of misconduct, and s. 55 of the ECEA provides that its provisions prevail where there is a conflict between its provisions and the SPPA. Section 33(5)4 of the ECEA therefore prevailed over s. 17.1 of the SPPA. Moreover, nothing in the Rules expressly states that proceeding in accordance with s. 33(5)4 of the ECEA is prohibited.

The Court agreed with the Appellant that the *Riccardi* tribunal's interpretation of the Ontario College of Teacher's governing legislation and rules, coupled with the Discipline Committee's past practice, suggest that the Appellant's interpretation of the relevant provisions was reasonable. However, the Court held that the Committee's decision was also within a range of possible, acceptable outcomes. Finally, the Court also agreed that the Committee's decision may have a chilling effect on members. But the Court concluded that this is an issue for the Committee or legislature to address, rather than the Court.

Commentary: The Divisional Court's conclusion that the Committee's costs decision was reasonable suggests that similarly significant cost awards made by other administrative decision-makers will also be upheld as reasonable – so long as those decision-makers are acting pursuant to a statutory scheme that contains the same language on costs as the ECEA, and under costs rules similar to the Rules. A number of decision-makers fall into this category, including the Ontario College of Teachers Discipline Committee[15] and the Ontario College of Trades Discipline Committee.[16]

At the same time, it is important to note that the language in a tribunal's rules could dictate a very different result. For example, the Local Planning Appeal Tribunal[17] has a home statute with substantially similar language on costs as the relevant provisions of the ECEA. But its rules provide that "[t]he Tribunal may *only* order costs against a party if the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or if the party has acted in bad faith".[18] The presence of the word "only" – notably lacking in rule 16.04 of the Rules – imposes a constraint on the discretion to order costs that was not present in *Robinson*.

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[15] The Divisional Court properly notes that the scheme under the *Ontario College of Teachers Act, 1996*, S.O. 1996, c. 12 and Discipline Committee Rules are identical to that of the ECEA.
[16] Section 46(5)4 of the *Ontario College of Trades and Apprenticeship Act, 2009*, S.O. 2009, c. 22 also grants the Discipline Committee the authority to fix costs against a member, and s. 84 states the Act, its regulations, or its bylaws prevail over the SPPA in the event of a conflict. Rule 13.01(4) of the Committee's Rules states "A Panel may at any stage of the Proceeding order a Party to pay costs where the conduct of the Party has been unreasonable, frivolous or vexatious, or a Party has acted in bad faith".
[17] *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, Sch. 1, ss. 31(3) and 33(4).
[18] Rule 23.09 (emphasis added).

More broadly, the decision in *Robinson* is a dramatic illustration of the "reasonableness" standard in practice. As *Riccardi* demonstrates, different administrative bodies operating under substantially identical costs regimes have reached conflicting conclusions regarding their ability to award costs against a party in circumstances where the party's behaviour is not found to be "unreasonable, frivolous or vexatious, or a party has acted in bad faith". The Divisional Court effectively upholds both interpretations as reasonable. It is now open to decision-makers operating under similar statutory language and rules to decide which approach they wish to take in a given case. The Divisional Court has left both options on the table.

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