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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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A Proposed Methodology for Reasonableness Review: *Hillier v Canada (Attorney General)*, 2019 FCA 44

FACTS: H's claim for disability benefits was denied by the General Division of the Social Security Tribunal. The Appeal Division granted H leave to appeal but then dismissed her appeal. H applied for judicial review, arguing that under s 58 of the *Department of Employment and Social Development Act*,[1] once the Appeal Division granted her leave to appeal, it had to consider all grounds set out in the application for leave to appeal. It did not do that; instead it considered only some of the grounds H raised in her leave application.

DECISION: Application granted. Matter remitted for a new hearing before a different member of the Appeal Division.

The Appeal Division's decision to ignore and not determine some of the grounds raised in H's notice of appeal was substantive, not procedural. The decision was made purportedly under s 58 of the Act, which deals with appeals to the Appeal Division with leave. When deciding what grounds were before it on appeal, the Appeal Division must have interpreted s 58. That provision is found within the Act, a statute the Appeal Division frequently considers and with which it is very

[1] SC 2005, c 34.

familiar. The reasonableness standard of review applies.

Justice Stratas offered a methodology for reasonableness review of an administrative decision-marker's interpretative of legislation pursuant to which the court begins by conducting its own tentative examination of the provision at issue – not to create its own yardstick against which to measure the tribunal's decision, but rather to appreciate the range of interpretive options that were available to the tribunal. Sometimes, especially in cases where the legislative wording is pretty clear, the court may conclude that the range of interpretive options is narrower, perhaps even a range of one. But where the wording admits of ambiguity or invites the administrative decision-maker to draw upon its specialization, expertise or policy understandings, the court may conclude that the range is wider.

Then, mindful of the range of interpretive options, the court can assess whether the tribunal's interpretation was within the range of acceptable outcomes defensible in respect of the facts and law. The focus must be on the tribunal's interpretation, including what the tribunal invokes in support of its interpretation and what the parties raise for or against it. Maintaining that analytical focus will result in concluding reasonableness review, not disguised correctness.

The reviewing court must also acknowledge that sometimes administrators pursuing their legislative mandates are better placed than the court to appreciate the purpose behind a legislative provision – an appreciation they have acquired through daily, in-the-field work or genuine expertise. Where that appreciation is relevant and is explained or evidence, the case of leaving the tribunal's interpretation in place may gather some force.

On a tentative examination, the words of s 58 seem precise and unequivocal, leading to one acceptable and defensible result. The words support H's position. It set out the powers of the Appeal Division whether determining whether to grant leave to appeal and on what issues. It suggests that once the Appeal Division grants leave to appeal, all grounds set out in the leave application are live and before the Appeal Division to be decided. The provisions of s 58 can be seen as furthering access to justice by facilitating recourse by social security claimants to a second-level administrative review body, unless their case is completely hopeless.

The Appeal Division did not follow the accepted approach to interpreting a legislative provision nor did it explain why it did not. It failed to analyse the text of s 58 in any meaningful way. It said nothing in detail about legislative purpose. It expressed its preference for holding full hearings only on issues of substance, noting that the Act does not prevent it from picking and choosing among the grounds of appeal, and that if Parliament disagreed it should have put something in the Act. In doing so, the Appeal Division seems to have assumed that its own preference binds by default But those who apply legislation must take it as it is – their preferences do not bind and cannot amend the legislation.

Under any level of intensity of review, the Appeal Division's decision is unreasonable.

COMMENTARY: The question of how exactly a reviewing court is supposed to conduct judicial review under the reasonableness standard has never received a satisfactory answer in Canadian jurisprudence. In *Dunsmuir*, the Supreme Court described the qualities of reasonableness review and a reasonable decision, but it offered no real guidance, rules or steps for a reviewing court to follow in actually conducting reasonableness review. In other cases, the Court has tried to help by describing what reviewing courts should *not* do. For example, in *Law Society of New Brunswick v Ryan* Justice Iacobucci admonished that "when

deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been."[2] And there seems to be a consensus that reviewing courts should not engage in "disguised correctness". But there have been few efforts to articulate what a reviewing court *should actually do* to properly review a decision for reasonableness.

Justice Stratas' effort to provide a methodology for reasonableness review of an administrative decision-maker's legislative interpretation is a good first step. At least he has recognized the need for – and lack of *a* methodology – and has tried to provide one. The methodology he offers can also be commended for trying to be honest. He integrates into reasonableness review a role for the court's own assessment (or "tentative evaluation") of what the legislation means. The reality is that, for a statutory interpretation issue, judicial review on any standard is not possible unless the reviewing court forms a view of the provision. While one would fairly assume that this is always happening, it has not obviously been accepted as part of reasonableness review, forcing some courts to bury their assessment in their discussion of the decision-makers interpretation and then being criticized for engaging in "disguised correctness".

The proposed "methodology", however, does not offer much in substance to reviewing courts, apart from perhaps affirming that what they are likely already doing is acceptable.

A further critique of Justice Stratas' methodology, however, is that the court's "tentative evaluation" of the provision will inevitably be what he expressly disavows: a yardstick against which to measure the tribunal's interpretation. In his tentative evaluation of s 58, Justice Stratas applied legal principles of statutory interpretation to arrive at the conclusion that there is only one acceptable, defensible interpretation of the provision. Having formed that view, he was bound not to be persuaded by the tribunal's reasons for arriving a different interpretation. The range of reasonableness interpretations seems to be defined by the court's own evaluation, uninformed by the tribunal's reasons which are only turned to *after* the court's view of the range is more or less fixed, and the court then considers whether the tribunal's interpretation fits within that range. If that is what reasonableness review is meant to be, does it really have a defensible purpose? Would it not be better simply to have the reviewing court arrive at its own determination of what the legislation means? In arriving at that determination, the court can consider the tribunal's interpretation and any expertise it brought to bear on that interpretation, and giving that interpretation weight where the court finds it compelling. But at least it would be clear that *the court's* view of the correct interpretation is the one that must prevail.

Decision found unreasonable for failure to consider law of accommodation: *Haghier v University Appeal Board*, 2019 SKCA 13

FACTS: Dr H applied for admission to the Neurology Program at the University of Saskatchewan's College of Medicine. He did not initially disclose to the College of Medicine that he had a criminal record for shoplifting. An independent psychiatric assessment concluded that Dr H suffered from psychiatric disorders. The psychiatrist opined that his disorder was treatable and provided appropriate treatment options. Following the assessment, Dr H signed an undertaking with the College of Physicians and Surgeons that he could continue under the care and treatment of a psychiatrist and follow the psychiatrist's treatment plan.

[2] 2003 SCC 20 at para 50

Dr H signed an accommodation agreement with the director of the Neurology Program. He was then admitted to the program.

After being admitted, Dr H was accused of attempting to steal textbooks from the University bookstore. No criminal charges were laid but following a University Senate hearing, he was found responsible for attempted theft and he was disciplined. The College of Medicine then launched an investigation and he was terminated from the program. He exhausted the administrative appeals open to him and the dismissal was confirmed. His application for judicial review was dismissed. Dr H then appealed to the Court of Appeal.

DECISION: Appeal allowed. Matter remitted to the Appeal Board for rehearing.

The Committee that recommended Dr H's termination from the Neurology Program based its recommendation on his non-compliance with the accommodation plan, the fact that he reoffended despite the treatment plans he had in place, and the evidence that he engaged in criminal conduct. The Committee did not consider the law relating to accommodation of individuals with mental health disabilities.

At an oral hearing before the Appeal Board Dr H presented updated evidence from his psychiatrist and psychologist. He also provided a copy of the original independent psychiatric assessment. In the evidence, Dr H's psychiatrist opined that Dr H had not made much progress and he explained the reason for the lack of progress as well as his recommendations. In a subsequent letter, the psychiatrist indicated that following his termination from the Neurology Program, Dr H was put on new medication, resulting in remarkable improvement. The appeal board found that Dr H had started the program with a clear understanding that the continuation of his residency was conditional on his compliance with the accommodation agreement. It refused to consider the current medical evidence within the existing appeal, though Dr H could use it to reapply for admission to the program. The Appeal Board engaged in a brief analysis of whether the College had failed to accommodate Dr H, observing that Dr H did not make efforts to seek accommodation.

Dr H did not contest that the reasonableness standard of review applied.

As a preliminary matter, the Court considered whether the appeal board had erred in refusing to admit the new evidence from Dr H's psychiatrist and psychologist because it related to events after Dr H was dismissed from the program. Although the Appeal Board was not bound to observe "strict legal procedures or rules of evidence", procedural fairness would still require it to consider all relevant evidence. Whether subsequent-event evidence is admissible in the administrative context must be determined on a case-by-case basis and depends on a number of factors including the issues at play, the nature of the evidence, and the tribunal's authority. The evidence in issue might not have been relevant to the reasons for Dr H's dismissal but it could be relevant to the issue of alternative lesser remedies. However, admission of the evidence falls within the purview of the Appeal Board. .The Appeal Board's decision was reasonable and the court should not interference with it.

There is a *Code of Professional Conduct* for doctors, which requires them to practice with honesty and integrity. Dr Haghir had been convicted of shoplifting prior to his admission into the Neurology Program. When interviewed by the College of Medicine, Dr Haghir did not disclose his past criminal conduct. His failure to do so raised concerns with respect to his ethical character and trustworthiness. Dr Haghir contends his shoplifting is a result of a mental disorder. In effect, he is alleging he is unable to meet the standard of honesty and integrity required by his profession

because of that disorder. It is for that reason he required accommodation.

It is clear that Dr H had a mental health disorder. The Appeal Board did not have to determine whether accommodation should be made – the College of Medicine had already made that determination and an accommodation was granted through the accommodation agreement. The issue for the Appeal Board was whether the College of Medicine had fulfilled its duty to accommodate in light of Dr H's conduct. The Appeal Board did not address that key issue. It did not consider the law of accommodation in arriving at its decision and it overlooked or disregarded material evidence of Dr H's mental health disorder. The decision was not reasonable.

COMMENTARY: This decision demonstrates that even on reasonableness review, tribunals that deal with issues of accommodation of disability will be carefully scrutinised by reviewing courts. Many administrative bodies that are not expert in human rights law nonetheless face situations that engage human rights legal issues. Given the individual interests at stake, failing to be aware of and properly apply the law of accommodation can be a fundamental error leading the court to quash the decision and order a new hearing, even on the reasonableness standard of review. Administrative agencies and tribunals that may potentially have to grapple with matters of disability and accommodation would be well advised to seek training on the law of accommodation and to consult with legal counsel who have experience in the area when such matters arise.

Closed hearings in the context of administrative acts: *CBC v Ferrier*, 2019 ONSC 34 (Div Ct)

FACTS: The Office of the Independent Police Review Director ("OIPRD") issued an investigative report finding reasonable and probable grounds to believe that certain officers with the Thunder Bay Police Service had committed misconduct in the course of an investigation. The OIPRD further directed the Chief of Police to bring an extension application to the Thunder Bay Police Services Board under s. 83(17) of the *Police Services Act*[3] ("PSA"), seeking approval to serve a notice of hearing on the officers. Because more than six months had based since the OIPRD retained the investigation of complaints giving rise to the report, no disciplinary action could be taken against the officers under the PSA without the Board's permission.

Ferrier was appointed to hear the extension application (exercising the powers and duties of the Board). He sought the views of the parties as to whether the hearing should be *in camera*, in view of the wording of ss. 35(3) and (4) of the PSA. Together those provisions provide that Board hearings shall presumptively be open to the public (s. 35(3)), but the Board may exclude the public (s. 35(4)) if it is of the opinion that:

> (a) matters involving public security may be disclosed and, having regard to the circumstances, the desirability of avoiding their disclosure in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public; or
>
> (b) intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public.

The CBC argued that the extension application should be open to the public, and that Ferrier should apply the common law *Dagenais/ Mentuck*

[3] RSO 1990, c P.15

test[4] to guide his discretion on when to hold an *in camera* hearing. Under *Dagenais/ Mentuck,* an *in camera* order would only be justifiable if: (a) it was necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and (b) the salutary effects of the order outweigh its deleterious effects on the rights and interest of the parties and the public.

Ferrier held that the extension application would proceed *in camera* pursuant to s. 35(4)(b) of the PSA. He explained that "[t]he *Dagenais/Mentuck* line of cases have no application to a board meeting where specific statutory provisions apply, where the Board is not a Court, there is not a judicial or quasi-judicial proceeding and the Board is performing an administrative act".

DECISION: Application dismissed.

The Court reviewed Ferrier's decision on a reasonableness standard, but endorsed his ultimate conclusions as being correct.

In particular, the Court echoed Ferrier's conclusion that there was no need to reference the *Dagenais/Mentuck* test where the PSA sets out its own unique balancing approach in ss. 35(3) and (4).

The Court also endorsed Ferrier's conclusion that the "essential nature of the proceedings" were "disciplinary proceedings in an employment context" and that ultimately "the dangers inherent in making an extension application hearing open to the public overrode any benefit that would flow from doing so". Those dangers included the "potential impact of an open hearing on the reputation and privacy interests of the Respondent Officers and the other police officers who had been under scrutiny but whose conduct was not ultimately identified as being worthy of disciplinary action". Ferrier was justified in finding these considerations warranted an *in camera* order under s. 35(4)(b) of the PSA.

The Court also found that the officers had a legitimate expectation that the misconduct allegations would be processed *in camera*, based on a regular practice of extension application hearings having been conducted *in camera* by various police boards (including the Thunder Bay Police Services Board) since 1992.

COMMENTARY: This is a rare decision offering some guidance on how to interpret and apply common statutory language concerning the exclusion of the public from hearings or the making of publication bans. (Similar language is found in s. 45 of the *Health Professions Procedural Code,*[5] as well as the governing statutes of many other professional regulators.)

There are at least two different aspects of the Court's reasoning that are interesting here. The first is the suggestion that the PSA's statutory test for excluding the public ousts or overrides the common law *Dagenais/Mentuck* analysis, rather than the two tests being complementary (or at least not inconsistent with each other). The role to be played by *Dagenais/Mentuck* in the context of statutory 'closed hearing' provisions that impart some residual discretion on the decision-maker has been the subject of varying approaches by tribunals and courts alike. *Ferrier* comes down rather strongly on the side that the common law will have no role to play.

Equally as important is the Court's holding that the *Dagenais/Mentuck* analysis does not apply to

[4] Named after two Supreme Court cases in which the test was developed: *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 and *R v Mentuck*, [2001] 3 SCR 442.

[5] Schedule 2 to the *Regulated Health Professions Act, 1991*, SO 1991, c 18

"administrative" or "procedural" instances of administrative decision-making – as opposed to decisions made in the course of "judicial" or "quasi-judicial" proceedings. Here, the Court is drawing an important conceptual line in the sand, and it may be the first case to do so this clearly. Just how well that line holds up in practice and over time is difficult to say. The distinction between "administrative" and quasi-judicial/judicial decisions can be fraught and nebulous (which is what led the Supreme Court of Canada to abandon it in the seminal case of *Nicholson v Haldimand-Norfolk Regional Police Commissioners*[6]).

Ignoring part of ASF based on error of law: *Choong v College of Veterinarians of Ontario*, 2019 ONSC 946 (Div Ct)

FACTS: Acting on a tip that a certain IP address was involved in downloading and making child pornography available online through a network called "Edonkey", the police asked Rogers Communications Inc. to provide the last known customer name and address of the account holder associated with that IP address. The name provided was that of the respondent, Dr. Derek Choong. Police surveillance confirmed that the respondent lived at the address provided by Rogers.

Further police investigation found another IP address used in respect of a file suspected to contain child pornography. After checking with Rogers, that address was also found to belong to the respondent.

Relying mainly on this information, police swore an information to obtain a search warrant ("ITO"). A search warrant for the respondent's residence was issued. The warrant was executed and child pornography was found on two computers, one of which was associated with one of the suspect IP addresses.

The respondent was charged with offences related to child pornography, all of which were withdrawn. Following withdrawal of the charges, the College obtained the evidence from the police and the matter was referred to the Discipline Committee on the grounds that the allegations demonstrated the respondent engaged in professional misconduct (specifically, conduct that would be regarded as disgraceful, dishonourable or unprofessional, and conduct unbecoming a veterinarian).

The respondent brought a motion before the Discipline Committee to exclude the evidence on the basis that his s. 8 *Charter* rights were breached. In an Agreed Statement of Facts ("ASF"), the parties agreed that the police violated the respondent's s. 8 rights in three ways, including: "The police did not have a sufficient basis to conclude that [Dr. Choong's address], Ontario was the physical address where the internet service was being used as opposed to simply the address of the subscriber (*USA v. Viscomi*)."

Given the parties' agreement on s. 8, the only issue on the respondent's motion was whether to exclude the evidence under s. 24(2) of the *Charter* according to the analysis in *R v Grant*,[7] which requires considering: (i) the seriousness of the *Charter* infringing state conduct; (ii) the impact of the *Charter* breach; and (iii) society's interest in adjudicating the case on its merits.

The Committee found that the '*Viscomi*' breach was "serious", concluding that the ITO was drafted in a way that was "materially misleading" because although the IP address was assigned to the respondent, there was no proof that it was actually being used at his address. Relying on *United States v Viscomi*, 2015 ONCA 484, the Committee decided that inferring that the subscriber of an

[6] [1979] 1 SCR 311

[7] [2009] 2 SCR 353

internet account uses the internet from the address he registered with an internet service provider (like Rogers) was "an unreasonable inferential leap" that was not "legally permitted".

On the second *Grant* factor, the Discipline Committee found the respondent's privacy interests to be high and thus the impact of the breach to be significant.

On the final *Grant* factor, the Discipline Committee was "not convinced that there is a greater societal interest in a professional disciplinary proceeding than there is in a criminal proceeding in the circumstances of this case – and the Crown withdrew the criminal charges on the very same *Charter* breaches conceded by the College."

In the final weighing of the *Grant* factors, a majority of the Committee decided to exclude the evidence, effectively ending the College's case against the respondent.

The College appealed.

DECISION: Appeal granted. New hearing on the *Grant* analysis ordered before a new panel.

The Discipline Committee's decision is unreasonable for two reasons.

The primary reason is that it was unreasonable for the Committee to describe the ITO as "materially misleading", based on the incorrect assumption that *Viscomi* applied when it did not. Relying on *Viscomi* – an extradition case – in the context of an ITO is wrong in law, as explained in *R v Nguyen*.[8] A justice considering whether to issue a search warrant is permitted to draw reasonable inferences from the evidence. In *Nguyen*, the Court expressly rejected the argument that a search warrant could not be issued on the basis of subscriber information because subscriber information does not provide insight into where the internet is being used. Accordingly, the ITO here was not required to draw any conclusions as to the user of the IP address.

The Discipline Committee's error in relying on *Viscomi* unreasonably infected the *Grant* analysis. Although the parties reached on ASF in this case, the Court is not bound by an agreement where the foundation is wrong in law.

It was also unreasonable for the Discipline Committee to rely on the Crown's decision to withdraw the charges to conclude that there is no societal interest in pursuing discipline proceedings. The Committee did not know how the Crown balanced the *Grant* factors, and the charges were withdrawn before a court ever ruled on that issue. Moreover, the societal interest in proceeding with criminal charges (or not) is not strictly applicable to the disciplinary context. Even where evidence is excluded in a criminal proceeding under s. 24(2), it does not follow that the same evidence will or should be excluded in a civil or administrative proceeding.

COMMENTARY: This case is a rare but important reminder that agreements reached or concessions made by counsel – whether in the form of an ASF or otherwise – will not bind the hands of a reviewing court if premised on an error of law. Here, both parties agreed that they are bound by the ASF and neither had requested that the Court revisit the ASF's reference to and reliance on *Viscomi*. Yet the Court made it clear that it would interfere due to the underlying error of law and the significance of that error's impact on the s. 24(2) analysis. Counsel and tribunal members alike would be well-advised to take extra care when crafting or relying on agreements in matters raising difficult, nuanced and often complex areas of law, including but not limited to s. 8 *Charter* rights.

The Court's decision also emphasizes the importance of context when considering the

[8] 2017 ONSC 1341

impact of *Charter* breaches under s. 24(2). The Court makes plain that the analysis in a professional discipline context cannot be overly influenced by whatever result may have been reached on the criminal law side – particularly where no s. 24(2) analysis has been conducted before charges are withdrawn, but even if such an analysis had been conducted. Reading between the lines, the Court seemed unimpressed with the conclusion there was little societal interest in pursuing this case. Since the focus of the decision was on the *Viscomi* issue, however, we are left wondering just how the Court might frame the societal interest in pursuing a full disciplinary hearing here.

Prosecutorial discretion and the test for novel arguments: *SNC-Lavalin Group Inc. v DPP*, 2019 FC 282

FACTS: In February 2015, SNC-Lavalin was charged with bribing a foreign public official contrary to the *Corruption of Foreign Officials Act* and with fraud contrary to the *Criminal Code*.[9]

In September 2018, new amendments to the *Criminal Code* came into force, creating a regime for the administration of remediation agreements (sometimes referred to as deferred prosecution agreements). The amendments direct how remediation agreements are approved, enforced and consequences for non-compliance, and stipulate the conditions under which a prosecutor may enter into negotiations for a remediation agreement.

The purpose of the remediation regime is to hold organizations accountable for their wrongdoings while reducing the negative consequences for parties who are not responsible, like employees. According to the new provisions there are required and optional elements that may go into a remediation agreement. For example, a remediation agreement must include an admission of responsibility and an obligation to forfeit any property or benefit obtained from their wrong doing. However, a remediation agreement may require an organization to enhance compliance measures or pay costs to the prosecutor.

SNC began pursuing a remediation agreement with the Director of Public Prosecutions ("DPP") as early as April 2018. Through frequent communications, SNC sought to demonstrate how they met the criteria for a remediation regime. On September 4, 2018, the DPP communicated that she would not invite SNC to negotiate a remediation agreement. SNC continued to make submissions in an attempt to sway the DPP. On October 9, 2018, the DPP sent a letter saying she had conducted a review of documents submitted by SNC-Lavalin but "continues to be of the view that an invitation to negotiate a remediation agreement is not appropriate in this case" and that they would continue with prosecution.

SNC brought an application for judicial review of the DPP's October 9th decision not to enter into negotiations for a remediation agreement, arguing that under the remediation agreement regime prosecutorial discretion is fettered and must be exercised reasonably in accordance with the *Criminal Code*. The Attorney General brought a motion to strike the application.

DECISION: Motion granted; application struck without leave to amend.

When considering novel issues in a motion to strike, a broader analysis of the claim is necessary. Here, five factors are relevant. First, the application must be read holistically to determine its essential character. Second, the application must have no reasonable prospect of success. Third, a debateable issue that could be argued before the court should not be considered a "knock out"

[9] S.C. 1998, c. 34; RSC, 1985, c C-46

punch. Fourth, the court should err on the side of permitting novel arguments. And fifth, the reasonable prospect of success should be weighed realistically and within the law and litigation process.

In this case, a significant point of contention between the parties was whether the DPP's decision was an administrative decision or one of prosecutorial discretion. The language of the statute points in favour of prosecutorial discretion, using the word "may" when discussing a prosecutor's decision to enter into remediation agreements. In this context, "may" cannot be interpreted as "shall"; instead, the use of "may" is a strong indication of discretion. Other statutory text points in the same direction: for example, section 715.33(1) states, "[if] the prosecutor wishes to negotiate a remediation agreement" it must provide suitable notice.

Absent abuse of process, prosecutorial discretion is not subject to judicial review. Prosecutorial discretion derives its power from common law and the constitution and not the *DPP Act* or the *Criminal Code*. When exercising prosecutorial discretion, the conduct of the DPP does not fall within the jurisdiction of the Federal Court as a "federal board, commission or other tribunal" within the meaning of the *Federal Courts Act*. The *Federal Courts Act* defines "federal board, commission or other tribunal" broadly as meaning "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" (subject to certain exceptions not relevant here).

A new law does not necessarily mean that an argument will be novel, so as to avoid a motion to strike. The essence of the application was not a novel claim, but rather an attempt to re-debate the well settled principals of prosecutorial discretion. Furthermore, novel arguments do not alter the test for a motion to strike. Courts should be even more cautious when considering a novel claim so as not to over step its goal towards incremental change within the common law.

COMMENTARY: This decision is an important illustration of the limits of Federal Court jurisdiction under the *Federal Courts Act*. Decision-makers that may at first glance appear to fall within the broad definition of a "federal board, commission or other tribunal" may, on closer inspection, fall outside that definition depending on the function they are exercising. Although most administrative decision-makers will derive their authority from statute, this is not always true, particularly in the context of certain Crown or Ministerial decisions that may trace their origins back beyond any statutory framework. Thus, it is critical to examine the source of the actual power being exercised and the nature of the decision that is at issue when evaluating whether a federal decision is subject to judicial review before the Federal Courts. Here, the key factor was that the DPP's decision was one of "prosecutorial discretion", with its roots outside the statutory context – and thus beyond the purview of Federal Court jurisdiction.

Judicial review of voluntary associations: *Beaucage v Métis Nation of Ontario*, 2019 ONSC 633

FACTS: The Métis Nation of Ontario ("MNO") is a not-for-profit corporation incorporated under the *Corporations Act*.[10] It exists to represent and advocate for its members, who are referred to as "registered citizens". The MNO aspires to one day obtain governmental status. The MNO is the largest Métis organization in Ontario, though it is not the only one.

[10] RSO 1990 c C.38

The applicant sought membership in the MNO. The MNO membership criteria include a definition of "Métis". That definition was changed in 2004 in a manner that made it more difficult for the applicant to satisfy the membership criteria. He applied for membership in 2011. His application for membership was denied and he brought an application for judicial review in Divisional Court. The MNO brought a motion to quash the application for lack of jurisdiction.

DECISION: Application quashed.

Justice Matheson applied the decisions of the Divisional Court in *Trost v Conservative Party of Canada*[11] and the Supreme Court of Canada in *Highwood Congregation of Jehovah's Witnesses v. Wall*,[12] in holding that judicial review is available only in respect of state decision making. Justice Matheson rejected the applicant's argument that this case was distinguishable from *Wall* on the basis that that case involved an unincorporated association, holding that the underlying rationale applied to private organizations regardless of their legal form.

In seeking to characterize the MNO's membership decisions as being public in nature, the applicant relied heavily on the enactment by the Ontario legislature of the *Métis Nation of Ontario Secretariat Act,*[13] *2015* (the "MNO Act"). The MNO Act was intended to specifically exempt the MNO from certain governance reforms introduced by the *Not-for-Profit Corporations Act, 2010*,[14] which would have required the MNO to hold annual meetings of members to elect a board of directors, rather than its practice of holding a ballot box election of councillors every four years. Justice Matheson held that the MNO Act only affected MNO's governance and did not confer any public duties on it that would render it susceptible to judicial review. Although the governments of Ontario and Canada consulted with the MNO on public matters and relied on its membership registry as a means of establishing Métis identity, these were not exclusive means by which a member of the Métis Nation could engage in consultations or establish their identity.

COMMENTARY: Though it purports to be a straightforward application of the decisions in *Trost* and *Wall*, the decision of the Divisional Court in *Beaucage* is better understood as a significant extension of those decisions. The MNO, by its own self-description, exists as a government in waiting for the Métis Nation in Ontario. It is seeking to secure governmental status for itself through negotiations with the governments of Ontario and Canada. While membership in the MNO is not compulsory for individuals who identify as Métis (or who enjoy rights under s. 35 of the *Constitution Act, 1982* by virtue of being Métis), the advocacy efforts of the MNO will shape the future of self-government of the Métis Nation in Ontario. While the MNO Act itself may not confer public duties on the MNO, the objective of that legislation was to preserve the MNO's governance model, which is based on the election of councillors in a four year cycle, a governance structure that symbolizes the public aspirations of the MNO.

While *Wall* may have tempered some outlier cases of judicial review of decisions that were truly private in nature, *Beaucage* demonstrates that the pendulum has now swung too far in the other direction. Excluding from judicial review the decisions of bodies that act as proto-governments undermines one the main goals of judicial review, which is to maintain a basic standard of fairness when an individual is the subject of decision making by a public body.

[11] 2018 ONSC 2733
[12] 2018 SCC 26
[13] SO 2015 c. 39
[14] SO 2010, c. 15

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