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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Reasonableness review without reasons on a statutory appeal: *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47

FACTS: The taxpayer Company owns a shopping mall in Edmonton, the value of which was assessed by the City at approximately $31 million in 2011. Pursuant to the *Municipal Government Act*,[1] the Company filed a complaint with the Assessment Review Board disputing the assessment as exceeding market value, and seeking to reduce the assessed value to approximately $22 million.

In the course of responding to the Company's appeal, the City discovered what it considered to be an error in its original assessment. The City asked the Board to increase the assessed value to approximately $45 million. The Company expressed concern about the City's change in position, but did not dispute the Board's power to increase the assessment. The Board increased the assessment to approximately $41 million.

A decision of the Board may be appealed to the Alberta Court of Queen's Bench, with permission, on a question of law or jurisdiction of sufficient importance to merit at appeal. On appeal, the Court of Queen's Bench ruled that the Board did not have jurisdiction to increase an assessment following a taxpayer complaint: it can only lower or confirm the assessment. The Court set aside the Board's decision and remitted the matter back for a hearing *de novo*. The order was affirmed by the Alberta Court of Appeal. The issue before the Supreme Court of Canada was the appropriate standard of review for the Board's implicit decision that it could increase the property assessment, and whether the Board's decision ought to be upheld on that standard.

DECISION: Appeal allowed.

A five-judge majority of the Supreme Court (Karakatsanis J writing) held that the standard of

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1 RSA 2000, c M-26

review is reasonableness and it was reasonable for the Board to find it had the power to increase the assessment.

On the basis that the substantive issue in the case (whether the Board had power to increase the assessment) turned on the interpretation of the Board's home statute, the majority began from the presumption of reasonableness review. In so doing, the majority rejected the Company's argument that the issue in the case was a "true question of jurisdiction" that could rebut the presumption of reasonableness.

The Court of Appeal had concluded that the existence of a statutory right of appeal should be recognized as a category attracting review on the correctness standard because the presence of a statutory appeal right is a strong indication of legislative intent that the courts show less deference. The Supreme Court majority held that recognizing statutory appeals as a new category to which the correctness standard applies would go against the Court's jurisprudence.

The majority then turned to a contextual analysis, noting that context can rebut the presumption of reasonableness. The only specific contextual factor it referred to, however, was the expertise of the decision-maker as an institution. The majority held that the presumption of reasonableness was not rebutted by the context. The majority ended its standard of review analysis with an invitation to the legislature to specify the applicable standard of review more often.

Despite the absence of reasons from the Board explaining its view that it could increase the assessment, the majority reviewed the decision in light of the reasons that could be offered in support of it. The majority then set out its analysis leading to the conclusion that the Board's decision was reasonable. (That analysis is deeply steeped in the statutory scheme of the Act and is therefore less relevant to this Case Review.)

The dissenting judges (Côté and Brown JJ, writing together) held that the appropriate standard of review is correctness. The legislature designed certain questions of law and jurisdiction arising from decisions of the Board to be subject to appeal to the Court of Queen's Bench, while other questions are reviewed through the ordinary mechanism of judicial review. This indicates that the legislature intended correctness review to be applied to those questions of law and jurisdiction.

The dissent agreed with the majority that a statutory right of appeal is not a category of correctness review. However, the standard of review analysis does not rely exclusively on categories; it is contextual. Because context always matters, a statutory right of appeal can, in combination with other factors, lead to a conclusion that the proper standard of review is correctness. A statutory right of appeal is an important indicator of legislative intent. The wording of the statutory appeal clause in this case, in combination with the legislative scheme, points to the conclusion that the legislature intended a more exacting standard of review. In particular, the legislature's decision to enact a limited right of appeal indicates that the legislature intended those questions subject to appeal (questions of law or jurisdiction) to be reviewed by the Court of Queen's Bench for correctness.

The question at issue here does not fall within the Board's expertise. While a decision-maker is presumed to be an expert in the application of its home statute, that presumption can be rebutted and is in this case. Expertise is a relative concept and the court has superior expertise on questions of law and jurisdiction. The majority's approach risks making the presumption irrebuttable.

COMMENTARY: There are many notable aspects of this decision; we will focus on three.

First, the decision is another gust in the growing tempest surrounding standard of review at the Supreme Court of Canada. Again, there is a deep split on the Court regarding the applicable standard, with five judges finding reasonableness applies and four finding correctness does. The two sets of reasons show disagreement on two parts of the *Dunsmuir* analysis: the relevance of a statutory appeal provision and what matters fall within a tribunal's expertise. While the majority's reasons ostensibly represent a straightforward application of the Court's jurisprudence over the

past several years, it has perhaps become too convenient to simply distill a case to a question involving the interpretation of the decision-maker's home statute, trigger the presumption of reasonableness and find that it has not been rebutted. At a certain level, nearly every judicial review application can be characterised as a question involving the decision-maker's home statute – administrative decision-makers are, after all, statutory creatures that operate in a statutory landscape. And once that issue of statutory interpretation is found, it is only a small step for a court to say that the decision-maker has superior expertise. But this kind of analysis is not necessarily faithful to the goal recognized in *Dunsmuir* of trying to determine legislative intent. In that respect, the dissent's regard for the statutory appeal provision is commendable.

Second, it is notable that none of the judges recognized this case as involving a "true question of jurisdiction". The dissent felt it unnecessary to address this point, even though it found the matter here was "one of legal interpretation going to jurisdiction" (para 87) and it devoted 13 paragraphs of the "Merits" section to an "Overview of the Board's Jurisdiction". A true question of jurisdiction was defined in *Dunsmuir* as "whether or not the tribunal had the authority to make the inquiry". In theory, such questions remain alive as a category of correctness review, but the Supreme Court has not recognized any case in this category since *Dunsmuir*. One could argue that the issue here – whether the Board has power to increase an assessment – is a quintessential "true question of jurisdiction". The fact that the Court refused to recognize it as such raises further doubts about that category as a meaningful exception to reasonableness review.

Third, the majority followed the path set in previous cases[2] of reviewing the Board's decision "in light of the reasons which *could be* offered in support of it" (para 40). This approach reaches back to *Dunsmuir*, where the majority relied on Prof David Dyzenhaus's quote that deference is "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision". The quote has perhaps been misunderstood over the years since *Dunsmuir* – or has at least taken on new life that was not necessarily foreseen at the time. Nothing in *Dunsmuir* requires or predicts what the majority did in this case: on reasonableness review, "defer" to an interpretation of the legislation that has no apparent grounding in the Board's own reasons for deciding as it did. In *Dunsmuir*, the concept of deference was tied closely to the decision-maker's reasons. Where there are no reasons from the decision-maker and no proxy for such reasons,[3] there is nothing to defer to except an outcome. But reasonableness review according to *Dunsmuir* is not exclusively about outcomes. The majority does not explain why its approach is properly considered *reasonableness review* – in substance, it conducts correctness review by performing its own statutory interpretation exercise, and then labels that interpretation a "reasonable" one.

2 See, for example, *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 and *McLean v British Columbia (Securities Commission)*, 2013 SCC 67

Test and procedure for rejecting joint submissions on penalty: *R v Anthony-Cook*, 2016 SCC 43

FACTS: After serving approximately 11 months in custody, A-C pleaded guilty to manslaughter. The Crown and defence made a joint submission on sentence, proposing a further 18 months in custody with no period of probation to follow.

The trial judge rejected the joint submission on the basis of the "fitness test", which asks what would a fit and appropriate sentence be? He concluded that an appropriate sentence was two years less a day followed by a three-year probation order. The Court of Appeal unanimously dismissed the appeal.

DECISION: Appeal allowed. Sentence varied to bring it into conformity with the joint submission.

3 This distinguishes both *Alberta Teachers' Association* and *McLean*

Writing for a unanimous court, Moldaver J held that trial judges should apply the more stringent "public interest" test (and not the "fitness" test) in determining whether to depart from a joint submission. Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. The parties must have a high degree of confidence that joint submissions will be accepted. The public interest test, by being more stringent than other tests, best reflects the many benefits that joint submissions bring to the justice system and the corresponding need for a high degree of certainty in them. A proposed submission should only be rejected where it would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system.

Where the joint submission is contentious and raises concerns, the following procedures apply.

First, the trial judge should approach the joint submission on an "as-is" basis.

Second, if the trial judge is considering going above or below the joint submission, the public interest test should be applied.

Third, the trial judge may inquire about the circumstances leading to the joint submission, in particular, any benefits obtained by the Crown or concessions made by the accused.

Fourth, the trial judge should notify counsel of concerns and invite further submissions on those concerns, including the possibility of allowing for a withdrawal of the accused's guilty plea.

Fifth, if the trial judge's concerns are not met, the judge may allow the accused to withdraw his/her guilty plea.

Finally, the trial judge should provide clear and cogent reasons for departing from the joint submission.

COMMENTARY: Although decided in the criminal context, the Supreme Court's clear and concise guidance in this case applies equally to administrative tribunals that deal with joint submissions on penalty[4] – both in terms of the substantive test for rejecting joint submissions, and the proper procedure to follow when dealing with joint submissions.

Standard of review and interpreting provisions abrogating solicitor-client privilege: *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53

FACTS: In the context of an unjust dismissal claim, the Information and Privacy Commissioner of Alberta (through a delegate) ordered the production of records over which the University had asserted solicitor-client privilege. The delegate issued a notice under s 56(3) of the *Freedom of Information and Protection of Privacy Act*[5], which requires a public body to produce records to the Commissioner "despite … any privilege of the law of evidence". The University sought judicial review of the decision to issue the notice.

The Court of Queen's Bench upheld the Commissioner's decision. The Court of Appeal found that "any privilege of the law of evidence" in s 56(3) of the Act did not include solicitor-client privilege. The Commissioner appealed.

DECISION: Appeal dismissed.

A five-judge majority (Côté J writing) found that the issue of whether s 56(3) allows the Commissioner to review documents over which solicitor-client privilege is claimed is a question of central importance to the legal system as a whole and outside the Commissioner's specialized area of expertise. As such, the applicable standard of review is correctness. Solicitor-client privilege is fundamental to the proper functioning of the legal system and has acquired constitutional dimensions. The question of whether statutory language is sufficient to allow statutory tribunals

4 See, for example, *Ontario (College of Physicians and Surgeons of Ontario) v Lucas*, 2016 ONCPSD 36
5 RSA 2000, c F-25

to infringe solicitor-client privilege is one that has potentially wide implications on other statutory regimes. Further, there is nothing to suggest the Commissioner has particular expertise with respect to solicitor-client privilege. The question here is not just whether the Commissioner exercised her discretion appropriately, but whether the phrase "any privilege of the law of evidence" reflects a legislative intention to allow for abrogating solicitor-client privilege.

Applying the correctness standard, the majority held that statutory text purporting to abrogate, set aside or infringe solicitor-client privilege must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent. This approach gives effect to solicitor-client privilege as a fundamental policy of the law. But it does not support adopting the strict construction rule of statutory interpretation; it reflects the modern approach, which recognizes legislative respect for fundamental values. Applying that approach, the words "any privilege of the law of evidence" are not sufficiently clear and precise to set aside or permit an infringement of solicitor-client privilege by permitting the Commissioner to order production of documents over which such privilege is asserted. Solicitor-client privilege is both a substantive rule and a rule of evidence. If the legislature had intended s 56(3) to compel a public body to produce documents over which solicitor-client privilege was asserted, it could have used clear, explicit and unequivocal language, as it did elsewhere in the same statute.

Justice Cromwell, writing for himself, assumed without deciding that the correctness standard of review applies, and disagreed with the majority on the merits. In his view, the words "any privilege of the law of evidence" expressly provide for the abrogation of solicitor-client privilege.

Justice Abella also wrote separate reasons. In her view, the appropriate standard of review is reasonableness. The jurisprudence has consistently shown deference to information and privacy commissioners applying their specialized expertise in interpreting their own statutes, including whether solicitor-client privilege is at issue. Although solicitor-client privilege is important, the issue here was well within the statutory mandate with which the Commissioner works on a daily basis. As it is within her expertise, reasonableness applies. The Commissioner is not being asked to explain solicitor-client privilege for the whole legal system; she is simply being asked to apply it in the context of s 56(3). However, the Commissioner's decision is unreasonable because it did not sufficiently take into account how solicitor-client privilege works or why. The importance and breadth of the privilege should have framed the Commissioner's interpretation of s 56(3) to preclude disclosure, and it did not.

COMMENTARY: The majority's decision represents the second time that the Supreme Court has recognized a case falling within the correctness category of "a question of central importance to the legal system as a whole and outside the decision-maker's specialized area of expertise".[6] Five of the seven judges on the panel agreed that the standard of review was correctness on that basis. This is a strong endorsement for the continued recognition of the category, which will likely continue to play a role in the Supreme Court's standard of review jurisprudence in future case.

At the same time, Abella J continues to favour the reasonableness standard for every judicial review– a preference she articulated expressly earlier this year in *Wilson v Atomic Energy of Canada Ltd.*[7] In light of her view that the judicial review system should be reformed to adopt a single standard of reasonableness, her unwillingness to join the majority is unsurprising.

The decision usefully confirms the approach to statutory interpretation of provisions that appear to infringe solicitor-client privilege and the need for "clear and precise" wording to do so. This will be significant for administrative bodies that apply legislation granting authority to compel and review documents.

6 The first was *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16

7 2016 SCC 29 (discussed in Issue No. 6 of this Case Review)

When administrators can elect not to follow an earlier tribunal decision: *Canada (Attorney General) v Bri-Chem Supply Ltd*, 2016 FCA 257

FACTS: Three importers of goods declared certain tariff classifications for those goods. Later, as a result of audits by the Canadian Border Services Agency, the importers discovered the tariff classifications were incorrect. The importers filed a correction, and also changed the tariff treatment. If the tariff treatment did not change, the goods would have been subject to a duty.

The CBSA objected to what the importers had done, arguing that the one-year limitation period in s. 74 of the *Customs Act*[8] precluded the importers from making the correction at issue.

The Canadian International Trade Tribunal found nothing wrong with what the importers had done. The CITT held that the CBSA's argument to the contrary had been addressed and determined by the CITT's decision in the earlier case of *Frito-Lay Canada Inc*[9] (which the CBSA had appealed, but then discontinued for unknown reasons.)

The CITT also found that the CBSA had committed an abuse of process because it "embark[ed] on what appears to be a policy of outright disregard for *Frito-Lay*".

The Attorney General appealed the CITT's decision, including its finding that the CBSA committed an abuse of process

DECISION: Appeal dismissed.

The Court unanimously held that the CITT's interpretation of the relevant statutory provisions was reasonable, and that there were no grounds to interfere with CITT's finding that the CBSA's relitigation of *Frito-Lay* was an abuse of process.

On the abuse of process issue, the Court set out a number of principles that apply to tribunals (*e.g.* CITT) and administrators (*e.g.* CBSA).

With respect to tribunals, although later panels are not bound by the decisions of earlier panels, later panels should not depart from the decisions of earlier panels unless there is good reason – particularly where certainty, predictability and finality matter (such as in the context of commercial importation and international trade).

With respect to administrators, they must follow tribunal decisions, subject to at least two exceptions.

First, if an administrator is acting *bona fide* and in accordance with its legislative mandate, it can assert that an earlier tribunal decision does not apply in a matter that has different facts.

The second and more controversial exception applies where an earlier decision cannot be distinguished. The Court held that this should only happen where an administrator can identify and articulate with good reasons one or more specific elements in the tribunal's earlier decision that, in the administrator's *bona fide* and informed view, is likely wrong. The flaw must have significance based on all of the circumstances, including its probable impact on future cases and the prejudice that will be caused to the administrator's mandate, the parties it regulates, or both. In trying to persuade a tribunal that its earlier decision should not be followed, an administrator must address these issues – and not simply offer a rerun of earlier submissions.

In this case, the Court concluded that the CBSA essentially reargued the issues decided in *Frito-Lay* on virtually identical facts and law, without identifying any flaws, let alone serious ones. Although there is no evidence of malice or ill-will, a finding of abuse of process does not require either. The discontinuance of *Frito-Lay* placed a higher tactical burden on the CBSA to demonstrate its good faith and offer reasons as to why the CITT should not follow *Frito-Lay*.

8 RSC 1985, c 1
9 File AP-2012-002

COMMENTARY: This decision will be of great interest to administrators and regulatory agencies who might have thought they were 'stuck' with problematic tribunal rulings in past cases. It represents the latest, clearest and most authoritative discussion from a Canadian court on whether – and how – agencies can challenge such rulings in future cases, without committing an abuse of process. At the same time, it reaffirms the general rule that agencies should follow decisions made by the tribunals before which they appear.

An interesting aspect of the case is how the CBSA's decision to discontinue the appeal of the *Frito-Lay* case worked against them. For administrators, the message should be clear: either follow through with appealing tribunal decisions, or do not commence an appeal. Proceeding as the CBSA did only risks making it more difficult to challenge a past tribunal's ruling in a future case.

Just what kind of evidence or circumstances would satisfy the 'significance' branch of the *Bri-Chem* test remains to be seen. Further light will be shed on this issue as administrators, tribunals and courts all begin to grapple with the roadmap set out by the Federal Court of Appeal in this case.

Removal from court file of application to stay administrative proceedings: *Canadian National Railway Co v BNSF Railway Co*, 2016 FCA 284

FACTS: The applicant filed a notice of application in the Federal Court of Appeal, seeking to stay ongoing proceedings before the Canadian Transportation Agency under s 50(1)(b) of the *Federal Courts Act*.[10] That section permits the Federal Court of Appeal to enter a stay of proceedings "in any cause or matter…where…it is in the interest of justice that the proceedings be stayed". The stay application alleged that the Agency proceedings were duplicative of other proceedings. The applicant had not attempted to seek a stay from the Agency before filing its notice of application for a stay in the Court of Appeal.

DECISION: Stratas JA, sitting as a single judge panel, made an order under rule 74 of the *Federal Courts Rules*[11] ordering that the notice of application be "removed from the Court file" as it is contrary to the *Canada Transportation Act*.[12]

Stratas JA noted that in this case, a stay was being sought not as interlocutory relief pending an appeal, but as the substantive relief sought on the application. An application for a stay in these circumstances is the functional equivalent of the prerogative writ of prohibition against the Agency, and as such should be limited by the same rules that apply to extraordinary administrative law remedies. Most importantly, this means that an originating application for a stay can generally be brought only after the applicant's remedies before the administrative tribunal have been exhausted, which had not been done in this case. The applicant should have raised the matter before the Agency, and then appealed that decision if it was unsuccessful. Stratas JA noted that such an appeal would lie only on a question of law or jurisdiction, which was absent in this case. The scheme of the *Canada Transportation Act* delegated decision-making authority to the Agency. As such, it was improper for the applicant to launch premature forays to the courts.

Stratas JA favoured an expansive view of s 50(1)(b), holding that it is capable of applying to administrative proceedings and that procedurally it is possible in some extraordinary cases to bring a notice of application directly to the Federal Court of Appeal seeking a stay by way of notice of application.

COMMENTARY: This decision is a forceful reminder of the primacy of administrative decision-makers in controlling their own process. The Federal Court of Appeal continues to discourage attempts to

10 RSC 1985, c F-7

11 SOR/98-106

12 SC 1996, c 10

circumvent the authority of administrative decision-makers by direct recourse to the court, even if such a maneuver is technically available as a matter of procedure.

The decision is also significant for Stratas JA's willingness to look past the form of the proceedings and identify the functional similarity between the stay application and an order of prohibition.

Fettering discretion and a rigorous approach to the *Doré* analysis: *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423

FACTS: Trinity Western University is a private, evangelical Christian university that wants to establish a law school. TWU applied to the provincial law societies for accreditation of its proposed faculty of law. The law societies of three provinces – British Columbia, Ontario[13] and Nova Scotia[14] – declined to accredit the law school for reasons related to TWU's "Community Covenant", which forbids sexual intimacy except between married, heterosexual couples.

The Benchers (*i.e.* Board of Directors) of the Law Society British Columbia initially voted to approve TWU's law school. This decision was met with backlash from the Society's members. A Special General Meeting was requisitioned by members across the province, and a resolution was passed directing the Benchers not to approve the law school. In light of this resolution, the Benchers decided to hold a binding referendum, which would allow members to vote on a resolution that TWU's law school is not an approved faculty of law. In deciding to hold the referendum, the Benchers resolved that regardless of the results of the referendum, the implementation of the results would be consistent with their statutory duties.

In the referendum, a majority of lawyers voted not to approve the law school, following which the Benchers passed a resolution that TWU's law school is not an approved faculty of law.

TWU brought an application for judicial review. The reviewing court set aside the Benchers' decision, finding that they unlawfully delegated their decision-making powers to the members, fettered their discretion by agreeing to be bound by the results of the referendum, and failed to balance the statutory objectives of BC's *Legal Profession Act*[15] (the "Act") against the *Charter* values at play. The Law Society appealed.

DECISION: Appeal dismissed.

The Court of Appeal held that the Benchers did not unlawfully sub-delegate their decision-making power to the members. Although the Benchers considered themselves bound to pass the resolution as a result of the referendum, the actual exercise of the statutory power was undertaken directly by the Benchers.

The Benchers did, however, fetter their discretion. Even assuming that the Benchers were permitted to hold a referendum in the circumstances, the Benchers acted improperly in resolving that – regardless of the results of the referendum – following those results would be consistent with their statutory duties. It was up to the Benchers to weigh the statutory objectives of the Act against the *Charter* values at play and to arrive at a decision that, in their view, best protected the *Charter* values – without sacrificing important

13 The decision of the Law Society of Upper Canada was upheld by the Divisional Court and the Court of Appeal for Ontario: see *Trinity Western University et al v Law Society of Upper Canada*, 2016 ONCA 518. Trinity Western has sought leave to appeal to the Supreme Court of Canada. For a discussion of the Court of Appeal for Ontario's decision, see Issue No. 6 of this Case Review.

14 The decision of the Nova Scotia Barristers' Society was overturned by the Nova Scotia Supreme Court. That decision was subsequently affirmed by the Nova Scotia Court of Appeal on jurisdictional grounds and the Barristers' Society has chosen not to appeal that decision: see *Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59.

15 SBC 1998, c. 9

statutory objectives. In deferring to the results of the referendum, the Benchers failed to engage in this analysis or to make any decision at all, fettering their discretion in a manner inconsistent with their statutory duties.

Having fettered their discretion, the Court of Appeal concluded that the Benchers' decision was not entitled to deference, and so the Court examined afresh the substantive arguments put forward as to balancing the statutory objectives with *Charter* values. The evidence before the Society demonstrated that a decision not to approve the law school would severely impact TWU's right to freedom of religion because the qualifications of its graduates would not be recognized in British Columbia. Further, the practical effect of non-approval is that TWU would be unable to operate a law school. In contrast, while LGBTQ students would be unlikely to access the law school, the overall impact on access to legal education for those students would be minimal. Against this backdrop, the Court of Appeal concluded that the adoption of a resolution not to accredit TWU's faculty of law was unreasonable, as it limited freedom of religion in a disproportionate way – significantly more than is reasonably necessary to meet the Society's objectives.

COMMENTARY: The Society has applied for leave to appeal to the Supreme Court of Canada, and it is expected that leave will be granted (together with the decision of the Court of Appeal for Ontario, upholding the Law Society of Upper Canada's decision not to accredit TWU's law school).

Indeed, it is extraordinary that two respected appellate courts reached opposite results when it came to assessing the impact of TWU's quest for accreditation on *Charter* values under the *Doré* framework.[16] Part of the explanation may lie in the differing analytical approach taken by each court in applying *Doré*.

As we noted in Issue No. 6 of this Case Review, the Ontario Court of Appeal asked itself whether the Law Society of Upper Canada acted reasonably in balancing the appellants' *Charter* rights with the statutory objective of promoting a legal profession based on merit, without discrimination.[17] The BC Court of Appeal, however, asked a different question: did the decision interfere with freedom of religion no more than is necessary given the Society's statutory objectives?[18]

The difference is not simply rhetorical. Ontario's approach can more easily accommodate a wider range of reasonable decisions, because there is no need to establish that the *Charter* value is only minimally impaired. Put differently, a reviewing court could conclude that an administrative decision-maker acted "reasonably", even if it could have reached a decision that would have had less of a negative impact on *Charter* values. Not so for the more rigorous BC approach. This is likely why the Ontario Court of Appeal suggested there could be more than one reasonable result on accreditation[19], while the BC Court of Appeal concluded there could only be one.[20] Resolving these conflicting approaches to the balancing analysis in *Doré* is something the Supreme Court will have to grapple with, if leave is granted.

Administrative decision-makers should also take note of the BC Court of Appeal's comments on tribunals fettering their discretion. The Court rejected the Society's position that the Benchers did not fetter their discretion, because they decided that either of the possible results of the referendum would fall within the range of reasonable outcomes. As the Court noted, the reasonableness standard of review on judicial review does not alter the tribunal's role, which is to make the decision it considers correct.

16 *Doré v Barreau du Québec*, [2012] 2 SCR 395

17 2016 ONCA 518 at paras 118*ff*
18 Para 133
19 2016 ONCA 518 at paras 144-145
20 Para 192

Restrictions on use of "Doctor" title do not violate s 2(b) of the *Charter*: *Berge v College of Audiologists and Speech-Language Pathologists of Ontario*, 2016 ONSC 7034 (Div Ct)

FACTS: B is an audiologist and holds a doctorate degree in audiology. She is also a member of the College of Audiologists. Under s 33 of the *Regulated Health Professions Act, 1991*,[21] audiologists in Ontario are not permitted to use the title "Doctor" in the course of providing health care to individuals. B admitted that she used that title or a variant of it in the course of providing health care to individuals since 2009. As a result, a panel of the Discipline Committee of the College found that B had engaged in professional misconduct. B appealed to the Divisional Court on the basis that the legislative restriction on the use of "Doctor" breaches s 2(b) of the *Charter* (freedom of expression), among other arguments.

DECISION: Appeal dismissed.

Regarding the standard of review, the Court held that where a tribunal decides whether a legislative provision is consistent with the *Charter*, the correctness standard applies.

The Court considered several prior cases on the issue of whether restrictions on the use of professional titles and designations violate s 2(b), including decisions of the Ontario High Court of Justice,[22] the Quebec Court of Appeal,[23] and the BC Court of Appeal.[24] In each case, the restrictions were found not to infringe s 2(b). The Court also considered the decision in *Walker v Prince Edward Island*,[25] where the Supreme Court of Canada held, without explanation, that a similar restriction did not violate s 2(b). The Court expressed some discomfort reconciling that line of cases with the Supreme Court's jurisprudence consistently giving broad scope to the right to freedom of expression in s 2(b), particularly in the absence of any explanation in *Walker*. However, the Court presumed that the Supreme Court decided *Walker* while being aware of its own jurisprudence on s 2(b). Since *Walker* has not been overturned, it is binding on the Court. Thus, the restriction in the *RHPA* does not breach s 2(b) of the *Charter*.

Even assuming a breach of s 2(b), the Court concluded that it could be justified under s 1. After finding that s 33 of the *RHPA* is a limit prescribed by law, the Court noted two points providing context for the s 1 analysis: (1) the speech being regulated by s 33 is commercial speech that does not inhibit informed consumer choice; and (2) there is a power imbalance between health practitioners and patients. The Court was satisfied that s 33 has a pressing and substantial objective, namely to protect the public by minimising confusion that arises through the use of the title "Doctor" when providing or offering to provide health care services to individuals. Restricting audiologists from using the title "Doctor" when delivering health care services is rationally connected to the goal of preventing confusion as to whether an audiologist is medically trained. Since the *RHPA* does not prevent an audiologist with a doctorate from communicating that fact (by using "Au.D."), it satisfies the minimal impairment requirement. Finally, while s 33 seeks to protect a vulnerable group – those seeking health care – from being confused, with minimal effect on the audiologist, the overall effects are not disproportionate to the legislative objective.

The Court disposed of several other grounds of appeal raised by B, which were all subject to review on the reasonableness standard. B complained that the College's professional misconduct regulation was invalid due to the absence of a French version. The Court upheld the Discipline Committee's ruling that members of the College do not have an absolute right to conduct all dealings with the College in French, but only when it is "reasonable" in the circumstances. The Court also affirmed the validity of the "basket clause" definition of professional misconduct in

21 SO 1991, c 18
22 *College of Physicians and Surgeons of Ontario v Larsen* (1987), 62 OR (2d) 545
23 *Tremblay v Québec (Procureur Général)*, [1988] JQ no 2009
24 *R v Baig* (1992), 21 BCAC 59
25 [1995] 2 SCR 407

the regulation.[26] Finally, the Court found no issue with the process of the College's Inquiries, Complaints and Reports Committee to refer a matter in principle to the Discipline Committee, instruct College counsel to draft specific allegations of professional misconduct, and then decide whether to refer the draft allegations or a variation of them to the Discipline Committee for a hearing.

COMMENTARY: The s 2(b) *Charter* issue is the most interesting aspect of this case. The various cases considered by the Court, including *Walker*, do not sit comfortably with the s 2(b) jurisprudence, relied upon by the appellant, which establishes that virtually an activity that conveys or attempts to convey meaning is protected, except threats of violence or violent forms of expression. The "speech" restricted by s 33 of the *RHPA* is certainly no less deserving of protection than expressive activities found to fall within the scope of s 2(b) in other cases (such as racist incitement, speech denying the Holocaust, obscene materials and child pornography). But for *Walker*, which the Divisional Court held was binding, the tone of the decision suggests that the Court would have found a s 2(b) infringement. However, the reasons the Court gave for upholding the infringement under s 1 are compelling: there is a risk the public will be confused if those providing health care services use the title "Doctor" but are not medically trained. To avoid such confusion by prohibiting audiologists (and other health care professionals) from using the title "Doctor" while still displaying their credentials has only a minimal impact on the audiologist. Should this issue go before a higher court in this or another case, this approach – finding a breach of s 2(b) but upholding it under s 1 for the reasons articulated by the Divisional Court – may well be confirmed.

26 Section 1, para 37 of the misconduct regulation provides it is professional misconduct to "engage[e] in conduct or perform[] an act, relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional."

Test for leave to appeal decision of an administrative tribunal: *Union Gas Ltd v Municipal Property Assessment Corporation,* 2016 ONSC 7128 (Div Ct)

FACTS: The Applicant, Union Gas Ltd, sought leave to appeal to the Divisional Court from a decision of the Assessment Review Board on a question of law, pursuant to s. 43.1 of the *Assessment Act*.[27]

At issue was whether Union's "gate stations" should be categorized as industrial properties or commercial properties under the *Act* and a related Regulation. The Board determined that gate stations are industrial properties and thereby subject to a higher rate of property tax.

DECISION: Leave to appeal granted.

In granting the application, Molloy J. arguably departed from the established test for determining leave to appeal in *Assessment Act* matters. This test had been previously articulated in *BCE Place v. MPAC*[28] and required an applicant to provide some basis to doubt the *correctness* of the underlying decision.

Molloy J. held that the proper question on the leave application should be whether the applicant had established a basis to doubt the *reasonableness* of the Board decision. She explained that judicial review (or statutory appeal) of the Board's decision would be reviewable on the more deferential reasonableness standard due to the fact that the Board was interpreting its home statute. The test on a leave application should be consistent with the standard of review on the actual appeal.

After granting leave, Molloy J noted that the Divisional Court panel dealing with the appeal should address the issue of the appropriate test for leave going forward.

27 RSO 1990, c. A.31; O.Reg. 282/98.
28 (2008), 51 MPLR (4th) 314 (Div Ct).

COMMENTARY: This case serves as the latest and perhaps clearest indication that the test for leave to appeal to the Divisional Court is different (and less onerous) when it involves a tribunal decision attracting the reasonableness standard of review.[29]

Until a full panel of the Divisional Court opines on the issue, however, it would be prudent for counsel to also advance arguments for leave to appeal in terms of 'no reason to doubt the correctness' test, in case a different single judge elects not to follow Molloy J's reasoning.⚖

29 In reaching her conclusion, Molloy J drew from the Divisional Court decision in *City of Ottawa v. Ottawa Home Builders Association*, 2013 ONSC 5062, 77 OMBR 450 (Div Ct), and the decision of Lauwers J (as he then was) in *Train v. John Weir*, 2012 ONSC 5157, 299 OAC 307 (Div Ct)

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