Law Society of Ontario | Barreau de l'Ontario

Eight-Minute Administrative Law and Practice 2024

CO-CHAIRS

Jeff Cowan
WeirFoulds LLP

Margaret Leighton
Barrister and Solicitor

March 5, 2024

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Law Society of Ontario | Barreau de l'Ontario

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Eight-Minute Administrative Law and Practice 2024

CO-CHAIRS: **Jeff Cowan,** *WeirFoulds LLP*

Margaret Leighton, Barrister and Solicitor

March 5, 2024
9:00 a.m. to 12:00 p.m.
Total CPD Hours = 2 h + 15 m Substantive + 30 m Professionalism (P)
+ 15 m EDI Professionalism (e)

Law Society of Ontario
Donald Lamont Learning Centre
130 Queen St. W.
Toronto, ON

SKU CLE24-0030301

Agenda

9:00 a.m. – 9:05 a.m. **Welcome**

Jeff Cowan, *WeirFoulds LLP*

Margaret Leighton, Barrister and Solicitor

9:05 a.m. – 9:20 a.m. **Emerging Issues in Administrative Law and Practice from the Divisional Court** (5 m (P))

The Honourable Justice Shaun O'Brien, *Superior Court of Justice*

9:20 a.m. – 9:35 a.m.	**Emerging Issues in Administrative Law and Practice from the Federal Court of Appeal** (5 m P) The Honourable Justice Anne Mactavish, *Federal Court of Appeal*
9:35 a.m. – 9:44 a.m.	**What's Happened to *Doré*? What Should We Do About the *Charter*?** Justin Safayeni, *Stockwoods LLP*
9:44 a.m. – 9:53 a.m.	***Yatar* v. *TD Insurance Meloche Monnex and License Appeal Tribunal*: What Does this Case Mean to You?** Nabila Qureshi, *Income Security Advocacy Centre*
9:53 a.m. – 10:16 a.m.	**Automated Decision Making and the Use of AI before Tribunals and Courts** (10 m P) The Honourable Justice Lorne Sossin, *Court of Appeal for Ontario* Abdi Aidid, Assistant Professor, Faculty of Law, *University of Toronto* Shea Coulson, *DLA Piper (Canada) LLP* (Vancouver)
10:16 a.m. – 10:25 a.m.	**Update on the Regulated Health Professions Discipline Tribunals Pilot** Dionne Woodward, Tribunal Counsel | Tribunal Office, *Ontario Physicians and Surgeons Discipline Tribunal*
10:25 a.m. – 10:40 a.m.	**Question and Answer Session**
10:40 a.m. – 11:00 a.m.	**Break**

11:00 a.m. – 11:09 a.m.	**Hybrid Hearings: Challenges and Considerations** (3 m P) Jennifer Khurana, Chairperson, *Canadian Human Rights Tribunal*
11:09 a.m. – 11:18 a.m.	**Who Bears the Costs in Professional Discipline Matters: *Jinnah* v. *Alberta Dental Association* and Beyond** Morgana Kellythorne, Legal Counsel, *Tribunals Ontario*
11:18 a.m. – 11:27 a.m.	**Moving Forward with UNDRIP** (7 m e) Nick Leeson, Senior Counsel*, Woodward & Company Lawyers LLP*
11:27 a.m. – 11:36 a.m.	**Frivolous and Vexatious Claims - How to Deal with Challenging Litigants** (7 m P) Malcolm Mercer, Chair, *Law Society Tribunal*
11:36 a.m. – 11:45 a.m.	**Cultural Competence in Administrative Tribunals** (8 m e) Juliet Chang Knapton, Advocate-in-Residence and Part-Time Professor, Faculty of Law, *University of Ottawa*
11:45 a.m. – 12:00 p.m.	**Question and Answer Session**
12:00 p.m.	**Program Ends**

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Eight-Minute Administrative Law and Practice 2024

What's happened to *Doré*? What should we do about the *Charter*? (PowerPoint)

Justin Safayeni
Stockwoods LLP

March 5, 2024

cpd

WHAT'S HAPPENED TO *DORÉ*? WHAT SHOULD WE DO ABOUT THE *CHARTER*?

Justin Safayeni, STOCKWOODS LLP

LSO's *Eight-Minute Administrative Law and Practice 2024* (March 5, 2024)

CSFTNO v. Northwest Territories, 2023 SCC 31: ***Doré* lives on**

Background

- Group of non-rights holder parents apply to Minister for their kids to be admitted to French-language schools
- Minister denies the applications, applying criteria established in a Ministerial Directive
- NWTSC sets aside Minister's decisions, finding that Minister failed to do the requisite *Doré* analysis and failed to take into account s. 23 of the *Charter*
- NWTCA reverses, with majority finding no obligation to take s. 23 into account because families in question do not have s. 23 rights
  - Concurring judge suggests s. 23 did have to be taken into account

CSFTNO v. Northwest Territories, 2023 SCC 31: ***Doré* lives on**

Decision

- *Doré* is the proper analytical framework
- *Doré* is triggered when a decision "engages a value underlying one or more *Charter* rights" – **even if the applicant's rights aren't infringed**
  - ADMs "must always consider the values relevant to the exercise of their discretion"
- To survive *Doré* review, we must look at both reasoning and outcome
  - Decision must reflect consideration of relevant *Charter* values and the impact on affected individuals
- "Robust analysis that works the same justificatory muscles as s. 1 of the *Charter*" → proportionality = reasonableness
  - Reviewing courts can review **the weight accorded by ADMs to relevant considerations to assess whether proportionate balancing was carried out**

CSFTNO v. Northwest Territories, 2023 SCC 31: ***Doré* lives on**

Application

- Section 23 is engaged here → Decision limits underlying value of preserving and developing minority language communities
- Reasons do not show Minister "truly took into account" values at stake or "meaningfully addressed" the relevant considerations
  - Namely, benefits of admission for development of Francophone community of the NWT

Where to go from here?

- Distinction between “rights” and “values”
  - Where to draw the line?
  - What are the implications for proportionality?
    - “Considering” values vs. “respecting” rights (para 65)?
    - Here, focus was just on failure to “truly take into account” the relevant values – but not necessarily to respect/comply with a right
- Overall, a clear signal to reviewing courts that *Doré* is meant to be robust (e.g. invitation to reweigh)
  - How will this play out in practice?

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TAB 2

Eight-Minute Administrative Law and Practice 2024

Yatar V. TD Insurance Meloche Monnex, Et Al
At The Supreme Court of Canada

Nabila Qureshi
Income Security Advocacy Centre

Talia Wolfe, Articling Student, Clinic Resource Office
Legal Aid Ontario

March 5, 2024

cpd

YATAR V. TD INSURANCE MELOCHE MONNEX, ET AL. AT THE SUPREME COURT OF CANADA

Nabila F. Qureshi[1] and Talia Wolfe[2]

I. Introduction

People who live in poverty are regularly subject to administrative decisions that seriously impact their lives. Boards and tribunals determine whether they can access income assistance or keep their home – in other words, whether they have food on the table and a roof over their head. They need meaningful access to judicial review of those decisions where appeal routes are not available.

On November 15, 2023, the Supreme Court of Canada heard *Ummugulsum Yatar v. TD Insurance Meloche Monnex, et al.* ("*Yatar*") with leave from the Ontario Court of Appeal. At issue was whether a limited statutory right of appeal on questions of law restricts the availability of judicial review for non-appealable issues to "rare cases." At the time of writing, the Supreme Court has not yet released its decision.

In this paper, we argue that the existence of a statutory right of appeal has no bearing on the availability of judicial review for non-appealable issues. And, an interpretation of limited appeal clauses as restricting the availability of judicial review for non-appealable decisions would harm social assistance recipients[3] and undermine the principle of responsive justification. Our argument flows from express language in *Vavilov*, where the majority stated that "The existence of a limited right of appeal, such as a right of appeal on questions of law or a right of appeal with leave of a court, does not preclude a court from considering other aspects of a decision in a judicial review proceeding."[4]

A court's decision about whether to hear a judicial review application is always discretionary. We do not argue for an automatic right to judicial review. There is also no

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[1] Nabila F. Qureshi is a staff lawyer at the Income Security Advocacy Centre ("ISAC"), a specialty legal clinic funded by Legal Aid Ontario. She works on test cases relating to workers' rights, poverty law, and administrative and constitutional law. ISAC intervened at the Ontario Court of Appeal and Supreme Court of Canada in *Yatar v. TD Insurance Meloche Monnex, et al.* Nabila thanks Anu Bakshi and Anna Rosenbluth, her fabulous co-counsel in ISAC's intervention at the Supreme Court, who helped develop the legal positions in this paper; Talia Wolfe for their excellent assistance with researching and drafting; and her wonderful partner Mannu Chowdhury, for his support with this paper.

[2] Talia Wolfe is an articling student at the Legal Aid Ontario's Clinic Resource Office. They received a J.D. from the University of Toronto's Faculty of Law in 2023. Their legal work focuses on housing, social assistance, human rights, and the *Charter*.

[3] Social assistance in Ontario is comprised of two programs: Ontario Works and the Ontario Disability Support Program. Under both legislative schemes, individuals have the right to appeal decisions of the Social Benefits Tribunal to the Divisional Court of Ontario "on a question of law": *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sched. A ("*OWA*"), s. 36(1): "The Director and any party to a hearing may appeal the Tribunal's decision to the Divisional Court on a question of law"; *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B ("ODSPA"), s. 31(1): "Any party to a hearing before the Tribunal may appeal the Tribunal's decision to the Divisional Court on a question of law."

[4] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 45.

debate that courts cannot entirely oust the availability of judicial review.[5] These well-established principles are not the focus of this paper.

Our argument is that the Court of Appeal's finding that a statutory right of appeal should be interpreted to significantly limit the hearing of judicial review applications of non-appealable decisions is troubling. Many "discretionary bars" to hearing a judicial review application already exist and continue to be applicable (for example, where an application is premature, moot, delayed, frivolous or vexatious, etc.). The Court of Appeal effectively created a new discretionary bar. In our view, and as discussed below, this was unnecessary, unsupported by existing jurisprudence, and would detrimentally impact some of the poorest and most vulnerable people living in Ontario.

II. Background

The Appellant, Ummugulsum Yatar was injured in a motor vehicle accident in February 2010. She subsequently began to receive statutory accident benefits through her insurer, TD Insurance Meloche Monnex. They included benefits for income replacement, home maintenance and housekeeping.

In January 2011, TD Insurance halted some of Ms. Yatar's benefits, alleging that it had failed to receive an updated disability certificate form from Ms. Yatar. TD Insurance also required Ms. Yatar to attend several medical examinations to determine her entitlement to the three types of benefits, and ultimately denied her claim for all of them.

In 2018, Ms. Yatar commenced an application before the License Appeal Tribunal (LAT), the administrative tribunal in Ontario responsible for adjudicating compensatory and entitlement disputes of this kind. She claimed entitlement to income replacement, home maintenance and housekeeping benefits. The LAT dismissed Ms. Yatar's claims on the grounds that the denial of her benefits was valid and that her application was commenced after the limitation period had expired. Ms. Yatar's subsequent request for reconsideration was dismissed by the LAT.

a. The Divisional Court dismisses both Ms. Yatar's appeal and her application for judicial review

Under s. 11(6) of the *License Appeal Tribunal Act*, Ms. Yatar had a statutory right of appeal from the LAT to the Divisional Court of Ontario, but only on a question of law.[6] Ms. Yatar commenced an appeal of the LAT's reconsideration decision, but the Divisional Court dismissed it on the basis that it raised only questions of fact or mixed fact and law.

Ms. Yatar had simultaneously filed an application for judicial review of the LAT's decision, and it is that application that was the focus of the Divisional Court's decision.

The Court declined to exercise its discretion to hear the application for judicial review. It found that the availability of reconsideration at the LAT, combined with the right of appeal to Divisional Court on questions of law only, were effectively an adequate alternative

[5] *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220.
[6] *License Appeal Tribunal Act, 1999*, S.O. 1999, c. 12, Sched. G at s. 11(6).

remedy to judicial review. The availability of these processes indicated the legislature's intent that judicial review would "only be available, if it all, exceptional circumstances" on non-appealable issues.[7] As Ms. Yatar had presented no exceptional circumstances, the Court refused to hear her application for judicial review.

b. The Ontario Court of Appeal upholds the Divisional Court

ISAC was one of three interveners before the Court of Appeal, where it argued that a right of appeal on questions of law does not restrict the availability of judicial review for non-appealable issues.

The Court of Appeal for Ontario did not agree, and upheld the Divisional Court's decision. While the Court stated that the "exceptional circumstances" language used by the Divisional Court was "unfortunate", it agreed in substance that judicial review should be restricted to only "unusual" or "rare" cases for non-appealable decisions arising from the LAT.[8] In particular, it held that access to judicial review should be restricted to cases "where the adequate alternative remedies of reconsideration, together with a limited right of appeal, are insufficient to address the particular factual circumstances of a given case."[9]

c. Ms. Yatar is granted leave to appeal to the Supreme Court of Canada

The Supreme Court was asked to consider the central question of whether the legislature's decision to limit the right of appeal from LAT decisions to questions of law only, restricted the availability of judicial review for non-appealable decisions to "rare" or "unusual" cases.

III. Legal Analysis

Below, we explore five issues that arise from the decisions below, and argue that:

(i) limited appeal clauses do not demonstrate legislative intent to restrict the availability of judicial review;
(ii) a right of appeal on a question of law is not an "adequate alternative remedy" where a person seeks to judicially review a non-appealable decision. It therefore should not be a basis to refuse to hear such judicial review applications;
(iii) courts should not invent a new "test" to determine when to hear a judicial review application from a legislative scheme that contains a limited appeal clause. Existing discretionary bars constitute a sufficient "test" and a new test would further impede access to justice for vulnerable persons;
(iv) an interpretation of limited appeal clauses as restricting access to judicial review would undermine the "principle of responsive justification" articulated in *Vavilov*; and,

[7] *Yatar v. TD Insurance Meloche Monnex*, 2021 ONSC 2507 (Div Ct), at para. 46.
[8] *Yatar v. TD Insurance Meloche Monnex*, 2022 ONCA 446, at para. 42.
[9] *Ibid.*, at para. 45.

(v) such interpretation would also harm social assistance recipients, who are among the poorest and most vulnerable individuals in Ontario.

(i) Legislative Intent on the Availability of Judicial Review

The Court of Appeal interpreted a limited appeal clause to signify legislative intent to "greatly restrict resort to the courts", including on judicial review of decisions that cannot be appealed. At the Supreme Court, it was argued that by expressly limiting appeals from the LAT to questions of law only, the Ontario legislature deliberately chose to significantly limit court review of other decisions that raise issues of fact or mixed fact and law.

In our view, limited appeal clauses have no effect on the availability of judicial review for non-appealable decisions. They do not demonstrate legislative intent to restrict the availability of judicial review. Well-established principles of statutory interpretation, which require considering the text, context and purpose of the provision at issue, support this view:

- When a provision limits appeals to questions of law but contains no text restricting access to judicial review, presuming legislative intent to restrict judicial review in addition to appeal requires reading language into the text that is not there. A plain reading of a limited appeal clause indicates legislative intent for judicial scrutiny on the more probing standard of correctness for questions of law.[10] It does not, however, indicate anything about access to judicial review for questions that cannot be appealed.

- When legislatures wish to limit or restrict judicial review, they can prescribe those limits through the use of privative clauses or by setting a highly deferential standard of review. Neither of those mechanisms were employed by the Ontario Legislature in drafting or amending the *Licence Appeal Tribunal Act*, 1999 ("LAT Act").[11] Counter-intuitively, the Court of Appeal's interpretation leaves individuals subject to decisions under schemes with limited rights of appeal with *less* judicial oversight than where the legislature explicitly restricts all review of tribunal decisions by way of a full privative clause.

- When assessing legislative intent, courts should consider the statutory interpretation principle of presumed knowledge: that the legislature has vast knowledge of the law and it intends the legal effect of its provisions. A legislature creating an appeal clause must be presumed to be aware that "judicial review is available for any question not covered by a limited right of appeal".[12] Further, in Ontario, s. 2(1) of the *Judicial Review Procedure Act*[13] ("JRPA") permits courts to conduct judicial review "despite any right of appeal." Where an Ontario statute contains appeal-limiting provisions that post-date the enactment of the *Judicial Review Procedure Act*, the legislature can be presumed to have been aware of

[10] *Smith v. The Appeal Commission*, 2023 MBCA 23, at paras. 50-70.
[11] *License Appeal Tribunal Act*, 1999, S.O. 1999, c. 12, Sched. G, as amended in 2011.
[12] *Edmonton (City) v. Edmonton East*, 2016 SCC 47, at para. 78.
[13] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

section 2(1) at that time and to have intended that judicial review be available where appeal was not.

- Courts should have regard to the purpose of the statute at issue when considering whether a limited appeal clause indicates a legislative intent to restrict judicial review. This is important where the statute has a remedial purpose such as consumer protection or the conferral of benefits. Such legislation requires purposive interpretation that should not limit parties from adequate adjudication of their entitlement to benefits they need to survive.[14] Such statutes should not be interpreted to presumptively insulate from review decisions that can significantly impact an individual's dignity, health, security and life. In this context, if the legislature intended to limit parties' access to judicial review, it must do so explicitly.

Taking text, context, and purpose together, a limited right of appeal clause which makes no reference to the availability of judicial review should not be interpreted as reflecting the intention of the legislature to restrict judicial review of non-appealable issues to "rare" or "unusual" circumstances.

(ii) *Strickland* and Adequate Alternatives

In *Strickland*[15], the Supreme Court set out the discretionary nature of judicial review, noting valid grounds on which a court may refuse to hear an application for judicial review. One such ground is the existence of an adequate alternative remedy.

In *Yatar*, the existence of a *prima facie* alternative remedy played a significant role. Both the Divisional Court and Court of Appeal found that the statutory appeal mechanism, combined with the right of reconsideration at the LAT, was an adequate alternative remedy. As a result, they held that judicial review applications of non-appealable issues should only be heard in "rare" or "exceptional" circumstances. The Courts relied on *Strickland* for the proposition that the adequate alternative need not be identical to the processes or remedies available upon judicial review. Rather, courts should engage in a "balance of convenience analysis" to determine not only whether "some other remedy is adequate, but also whether judicial review is appropriate."[16]

Strickland is not the right conceptual lens to probe a case like *Yatar*. A number of decisions have recognized this. For example, in *Smith*[17], the Manitoba Court of Appeal held that a statutory appeal offers no alternative remedy for an issue that cannot itself be appealed.[18] While the Supreme Court stated in *Strickland* that "the question is not simply whether some other remedy is adequate, but also whether judicial review is

[14] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27, at para. 36; *Legislation Act, 2006,* S.O. 2006, c. 21, Sched. F at s. 64.
[15] *Strickland v. Canada (Attorney General),* 2015 SCC 37.
[16] *Ibid.,* at paras. 42-44; *Yatar v. TD Insurance Meloche Monnex*, 2021 ONSC 2507 (Div Ct), at para. 39.
[17] *Smith v. The Appeal Commission*, 2023 MBCA 23.
[18] *Ibid*., at paras. 5 and 70.

appropriate",[19] that secondary consideration of "whether judicial review is appropriate" can only make an alternative remedy "adequate" if that remedy is available to begin with.

In this case, the statutory appeal clause limited appeals from the LAT to questions of law only. For questions of fact or mixed fact and law, that appeal clause provides no recourse.

Moreover, access to internal reconsideration cannot be an adequate alternative to judicial review if it is the reconsideration decision itself being challenged, as is the case for Ms. Yatar. Adopting the below courts' approach leaves a wide array of common decisions without access to adequate review mechanisms.

(iii) A New Test for When Judicial Review is Available?

One question that arises from *Yatar* is whether the courts need to fashion a new "test" for when judicial review is available in instances where there is a limited statutory appeal right. Before the Supreme Court, some parties made this point expressly and set out factors for a new test.

In our view, a new "test" is not necessary. Moreover, the introduction of a new test could usher in conceptual tensions and be another barrier to accessing justice for vulnerable litigants.

Courts have many tools to control their processes. Those tools include well-established "discretionary bars" to the hearing of judicial review applications. When deciding whether to hear a judicial review, courts have long conformed with the interests of justice by promoting efficient dispute resolution (through the discretionary bars of prematurity[20], mootness[21], and adequate alternative remedy[22]), preventing any abuse of process (through the discretionary bars of delay[23] and waiver or misconduct[24]), and ensuring judicial intervention does not do more harm than good (through the discretion to refuse relief based on a balance of convenience[25]).

These bars to hearing a judicial review are sufficient for courts to control their processes and gatekeep where necessary. In effect, they are the existing "test" on whether and when judicial reviews should be heard.

A new test that introduces new factors the applicant must meet (such as demonstrating that the case raises issues with serious consequences on their life or liberty) would create challenges for vulnerable litigants. People who live in poverty already face countless hurdles to bringing an application for judicial review of decisions that impact their lives: inability to afford legal counsel, language and disability-related barriers, the complexities

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[19] *Strickland v. Canada (Attorney General),* 2015 SCC 37, at para. 43.
[20] *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, at paras. 35-36.
[21] *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342
[22] *Strickland v. Canada (Attorney General)*, 2015 SCC 37.
[23] *Immeubles Port Louis Ltée v. Lafontaine (Village)*,1991 CanLII 82, [1991] S.C.J. No. 14.
[24] *Homex Realty & Development Co v. Wyoming (Village)*, [1980] 2 S.C.R. 1011, 1980 CanLII 55 (SCC).
[25] *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2.

of the process, unreliable access to email, internet, phones or computers and the inability to use them without assistance.

A new test could place an additional burden on vulnerable applicants to prove that their judicial review application ought to be heard, when they already have to ensure they don't fall within the existing discretionary bars. This would mean another hurdle to overcome, and yet another hurdle to accessing justice. Many may give up, and simply choose not to pursue the review of decisions that fail to meet the standard of reasonableness articulated in *Vavilov*.

(iv) Undermining the Principle of Responsive Justification

In *Vavilov*, the Supreme Court introduced an important change in the world of administrative decision-making: the new requirement for decisions to conform with the "principle of responsive justification." Administrative decision makers are subject to a higher duty of justification with respect to decisions that impact the life, liberty, dignity or livelihood of an individual.[26] As Justice Sossin has explained, the level of justification required for an administrative decision may now depend on its impact on the affected party, particularly where that person is vulnerable.[27] A decision that fails to be adequately responsive to the individual's circumstances may be unreasonable.

Responsive justification is important because administrative tribunals "are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us."[28] As Justice McLachlin (as she then was) put it in *Cooper*, "[m]any more citizens have their rights determined by these tribunals than by the courts."[29] In Ontario, administrative bodies regularly make decisions about housing, access to income security benefits, health and capacity and the human rights of people living in the province. When these decisions significantly impact a person's life (as they often will, particularly for people living in poverty), the reasons must reflect the stakes.

An interpretation of limited appeal rights as restricting the review of non-appealable issues to "rare" cases undermines the principle of responsive justification. If judicial reviews of non-appealable issues are heard only "rarely" because of limited appeal provisions, then the principle of responsive justification may rarely be applied to administrative decision makers. Such an approach could leave some vulnerable persons without any means to challenge decisions that seriously impact their lives. And this, in turn, would remove incentives for first-instance decision makers to adopt responsive justification in their decisions.

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[26] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 133
[27] Sossin, Lorne. "The Impact of *Vavilov*: Reasonableness and Vulnerability." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 100. (2021).
[28] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 135.
[29] *Cooper v. Canada (Human Rights Commission)*, 1996 CanLII 152 (SCC), [1996] 3 SCR 854, at para. 70.

(v) Implications of *Yatar* in the Social Assistance Context

An interpretation of limited appeal clauses as restricting access to judicial review for non-appealable decisions, if upheld, would harm social assistance recipients in Ontario. Many decisions concerning their eligibility for assistance, or the amount of assistance to which they are entitled, are considered to raise questions of fact or mixed and fact law. These decisions can have serious consequences on their ability to access basic necessities of life, but would not be appealable to the Divisional Court.

Social assistance recipients live in deep poverty. To cover the entire cost of shelter and basic needs (such as food and clothing), a single individual receiving Ontario Works benefits gets only $733 per month, and a single individual receiving Ontario Disability Support Program benefits gets only $1,308 per month.[30] These amounts are well below the poverty line. Because social assistance is a last-resort source of income, when that assistance is reduced, terminated, or denied, most recipients have few (if any) other options for income support. Social assistance decisions can therefore have serious impacts on the health, dignity, and lives of poor individuals.

Many (but not all) decisions concerning social assistance in Ontario can be appealed to the Social Benefits Tribunal. Similar to the LAT, claimants before the Social Benefits Tribunal can also request a reconsideration from the Tribunal. If a claimant disagrees with the Tribunal's decision, they have a right of appeal to the Divisional Court "on a question of law."[31] On all other issues, their only option for recourse is an application for judicial review.

The trouble with the Court of Appeal's interpretation of limited appeal clauses arises with those "other issues."

For example, overpayment calculations: when Ontario Works or the Ontario Disability Support Program believes that a social assistance recipient received more assistance than they are entitled to, this is called an "overpayment". The recipient is ordinarily required to repay the overpayment. Recipients can appeal an overpayment calculation decision to the Social Benefits Tribunal[32], but they cannot appeal calculation errors beyond that. This is because the Divisional Court has stated that the accuracy of overpayments is a question of fact, not law.[33]

A requirement to pay back an inaccurate overpayment can produce devastating consequences on a person who lives in poverty. Overpayments can amount to tens of thousands of dollars, and sometimes amount to over one hundred thousand dollars. It is not uncommon for there to be errors in the calculations: in *SBT 2108-03491 (Re)*, a review of an overpayment calculation found the total was incorrect by $82,447.28.[34] In *SBT 0304-*

[30] O. Reg. 134/98 (General) under the *OWA*, ss. 41 and 42; O. Reg. 222/98 (General) under the *ODSPA*, ss. 30 and 31.
[31] *OWA*, at s. 36(1); *ODSPA*, at s. 31(1).
[32] *OWA*, s. 26; *ODSPA*, s. 21.
[33] *Volnyansky v. Regional Municipality of Peel*, 2014 ONSC 6193, at para. 6.
[34] *SBT 2108-03491(Re)*, 2022 ONSBT 4572.

03647R, the entire $143,440.10 overpayment calculation was found to be produced in error.[35]

The Court of Appeal has recognized that social assistance overpayments "occur quite frequently, often for innocent reasons", and can impose "an enormous hardship on persons already living well below the poverty line."[36] And yet, the Court of Appeal's interpretation of limited appeal clauses as restricting access to judicial review would mean that such determinations of fact would be not be reviewable. In effect, decisions with serious impacts on the poor could stand by default.

In a similar vein, a person's financial eligibility for social assistance in Ontario is considered to be a question of mixed fact and law.[37] An individual who is deemed to be financially ineligible will receive no income support at all. In *Gosselin*, Justice Arbour characterised the refusal of social assistance as engaging an individual's dignity and life interests, because it can drive applicants "to resort to other demeaning and often dangerous means to ensure their survival."[38]

Determining financial eligibility is a complex factual and legal exercise, vulnerable to the types of "failures of rationality internal to the reasoning process" outlined in *Vavilov*.[39] Should judicial review from Social Benefits Tribunal decisions be restricted to only "rare" or "unusual" circumstances, people impacted by these devastating errors will be left without a remedy.

IV. Conclusion

Administrative tribunals decide critical issues for ordinary people. From income assistance to housing, and employment to policing, tribunals make life-altering decisions every day. But these decisions are often not exclusively determinations of law and are vulnerable to error.

An interpretation of limited appeal clauses as having no effect on the availability of judicial review would be consistent with existing jurisprudence, reflect the legislature's intent, enhance accountability from administrative decision makers, and best ensure that vulnerable individuals can review the decisions that shape their lives.

[35] *SBT 0304-03647R* (14 August 2008; Reynolds).
[36] *Surdivall v. Ontario (Disability Support Program)*, 2014 ONCA 240, at para. 35.
[37] *Filipska et al v. Ministry of Community and Social Services*, 2017 ONSC 5462, at paras. 8-9.
[38] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, at paras. 371-377.
[39] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras. 101-104.

Law Society of Ontario | Barreau de l'Ontario

TAB 3A

Eight-Minute Administrative Law and Practice 2024

Automated Decision Making and the Use of AI before Tribunals and Courts

The Honourable Justice Lorne Sossin
Court of Appeal for Ontario

March 5, 2024

cpd

Federal Court | Cour fédérale

NOTICE TO THE PARTIES AND THE PROFESSION
The Use of Artificial Intelligence in Court Proceedings
December 20, 2023

The Court expects parties to proceedings before the Court to inform it, and each other, if they have used artificial intelligence to create or generate new content in preparing a document filed with the Court. If any such content has been included in a document submitted to the Court by or on behalf of a party or a third-party participant ("intervener"), the first paragraph of the text in that document must disclose that AI has been used to create or generate that content.

This Notice requires counsel, parties, and interveners in legal proceedings at the Federal Court to make a Declaration for AI-generated content (the "Declaration"), and to consider certain principles (the "Principles") when using AI to prepare documentation filed with the Court. The Court offers below an explanation of why the Declaration and Principles are in the interests of justice, the specific type of AI to which this Notice applies, and how the Court will update its approach to the use of AI at the Court in the future.

1. Declaration for AI-Generated Content

This Notice applies to all documents that are (i) submitted to the Court, and (ii) prepared for the purpose of litigation. For greater certainty, this Notice does not apply to Certified Tribunal Records submitted by tribunals or other third party decision-makers.

The Court recognizes that AI may offer substantial benefits in the preparation of documents. However, the Court also has obligations to maintain the integrity of judicial proceedings, safeguard public confidence in the justice system, and uphold the rule of law.

To ensure that the Court understands how AI has been used, any document prepared for the purpose of litigation, and submitted to the Court by or on behalf of a party or intervener that contains content created or generated by AI, must include the Declaration.

The Declaration shall be made in the first paragraph of the document in question, for instance, the first paragraph of a Memorandum of Fact and Law or Written Representations. An example of the Declaration follows:

Declaration

Artificial intelligence (AI) was used to generate content in this document.

Déclaration

L'intelligence artificielle (IA) a été utilisée pour générer au moins une partie du contenu de ce document.

2. Principles on the Use of AI

The Court recognizes that emerging technologies often bring both opportunities and challenges. Significant concerns have recently been raised regarding the use of AI in Court proceedings, including in relation to "deepfakes," the potential fabrication of legal authorities through AI, and the use of generative decision-making tools by government officials. It is incumbent on the Court and its principal stakeholders to take steps to address such concerns.

Further, the Court understands that there are both ethical and access to justice issues regarding a lawyer's use of AI when their client may not be familiar with AI and its various applications. Before using AI in a proceeding, the Court encourages counsel to consider providing traditional, human services to clients if there is reason to believe a client may not be familiar with, or may not wish to use, AI.

The following principles are intended to guide the use of AI in documents submitted to the Court:

Caution: The Court urges caution when using legal references or analysis created or generated by AI, in documents submitted to the Court. When referring to jurisprudence, statutes, policies, or commentaries in documents submitted to the Court, it is crucial to use only well-recognized and reliable sources. These include official court websites, commonly referenced commercial publishers, or trusted public services such as CanLII.

"Human in the loop": To ensure accuracy and trustworthiness, it is essential to check documents and material generated by AI. The Court urges verification of any AI-created content in these documents. This kind of verification aligns with the standards generally required within the legal profession.

3. Explanation of this Notice

Through consultations with the stakeholders, the Court has developed its Declaration and Principles concerning certain uses of AI, including large language models ("LLMs").[1] The Court will update this guidance periodically as the Court's understanding of AI evolves.

The Declaration requirement only applies to certain forms of AI, defined as a computer system capable of generating new content and independently creating or generating information or documents, usually based on prompts or information provided to the system. This Notice does not apply to AI that lacks the creative ability to generate new content. For example, this Notice does not apply to AI that only follows pre-set instructions, including programs such as system automation, voice recognition, or document editing. It bears underscoring that this Notice only applies to content that was created or generated by AI.

[1] The term "large language model" refers to a type of AI capable of processing and generating human-like text based on vast amounts of training data.

The Court recognizes that counsel have duties as Officers of the Court. However, these duties do not extend to individuals representing themselves. It would be unfair to place AI-related responsibilities only on these self-represented individuals, and allow counsel to rely on their duties. Therefore, the Court provides this Notice to ensure fair treatment of all represented and self-represented parties and interveners.

The Court recognizes both the risks and benefits of AI, including "hallucinations"[2] and the potential for bias in AI programs, their underlying algorithms, and data sets. The Court recognizes that counsel, parties, interveners and the administrative bodies whose decisions they may challenge may increasingly rely on — or be impacted by — AI.

This guidance has benefited from feedback received from various stakeholders. The Court is committed to full transparency and continuing consultations with members of the Bar and other stakeholders on the development of future iterations of this guidance and related policies.

For its part, the Court will not use AI, and more specifically automated decision-making tools, to make its decisions or render its judgments, without first engaging in public consultation. For more information, please consult the *Interim Principles and Guidelines on the Court's Use of Artificial Intelligence*.

Paul S. Crampton
Chief Justice

[2] "Hallucination" is a term used to refer to facts, citations, and other content generated by an AI that are not true, and have been fabricated by an AI in response to a prompt or request.

Canadian Judicial Council
Conseil canadien de la magistrature

Notice to Profession and Public

Ensuring the Integrity of Court Submissions When Using Large Language Models

In light of the significant concerns surrounding the potential fabrication of legal authorities through large language models (LLMs)[1], this Notice addresses the matter of legal references in submissions to the court. Our joint commitment to reinforcing the integrity and credibility of legal proceedings is critical.

Caution: The **[insert court name]** urges practitioners and litigants to exercise caution when referencing legal authorities or analysis derived from LLMs in their submissions.

Reliance: For all references to case law, statutes or commentary in representations to this court, it is essential that parties rely exclusively on authoritative sources such as official court websites, commonly referenced commercial publishers, or well-established public services such as CanLII.

"Human in the loop": In the interest of maintaining the highest standards of accuracy and authenticity, any AI-generated submissions must be verified with meaningful human control. Verification can be achieved through cross-referencing with reliable legal databases, ensuring that the citations and their content hold up to scrutiny. This accords with the longstanding practice of legal professionals.

The **[insert court name]** recognizes that emerging technologies often bring both opportunities and challenges, and the legal community must adapt accordingly. Therefore, we encourage ongoing discussions and collaborations to navigate these complexities effectively.

[1] The term "large language model" refers to a type of artificial intelligence (AI) system capable of processing and generating human-like text based on vast amounts of training data.

October 12, 2023

SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

NOTICE TO THE PROFESSION AND GENERAL PUBLIC

Ensuring the Integrity of Court Submissions When Using Large Language Models

In light of the significant concerns surrounding the potential fabrication of legal authorities through large language models (LLMs)[1], this Notice addresses the matter of legal references in submissions to the Court. The joint commitment of all participants in the justice system to reinforcing the integrity and credibility of legal proceedings is critical.

Caution: The Supreme Court of Newfoundland and Labrador urges practitioners and litigants to exercise caution when referencing legal authorities or analysis derived from LLMs in their submissions.

Reliance: For all references to case law, statutes or commentary in representations to the Court, it is essential that parties rely exclusively on authoritative sources such as official court websites, commonly referenced commercial publishers, or well-established public services such as CanLII.

"Human in the loop": In the interest of maintaining the highest standards of accuracy and authenticity, any AI-generated submissions must be verified with meaningful human control. Verification can be achieved through cross-referencing with reliable legal databases, ensuring that the citations and their content hold up to scrutiny. This accords with the longstanding practice of legal professionals.

The Supreme Court recognizes that emerging technologies often bring both opportunities and challenges, and the legal community must adapt accordingly. Therefore, we encourage ongoing discussions and collaborations to navigate these complexities effectively.

RAYMOND P. WHALEN
Chief Justice

[1] The term "large language model" refers to a type of artificial intelligence (AI) system capable of processing and generating human-like text based on vast amounts of training data.

SUPREME COURT OF YUKON

PRACTICE DIRECTION
GENERAL-29

Use of Artificial Intelligence Tools

Artificial intelligence is rapidly developing. Cases in other jurisdictions have arisen where it has been used for legal research or submissions in court. There are legitimate concerns about the reliability and accuracy of the information generated from the use of artificial intelligence.

As a result, if any counsel or party relies on artificial intelligence (such as ChatGPT or any other artificial intelligence platform) for their legal research or submissions in any matter and in any form before the Court, they must advise the Court of the tool used and for what purpose.

Duncan C.J.
June 26, 2023

USE OF ARTIFICIAL INTELLIGENCE (AI) AND PROTECTING THE INTEGRITY OF COURT SUBMISSIONS IN PROVINCIAL COURT

Friday, Oct. 27, 2023

Artificial intelligence is rapidly evolving, and it functions in practically every segment of our society. While there are tremendous benefits with its application, there are also competing consequences, see *Mata* v. *Avianca Inc*. 2003. Of critical importance for the Provincial Court of Nova Scotia is protecting the integrity and credibility of court proceedings.

Counsel and litigants are encouraged to exercise caution when relying on reasoning that was ascertained from artificial intelligence applications. Moreover, it is expected that all written and oral submissions referencing case law, statutes or commentary will be limited to accredited and established legal databases.

Any party wishing to rely on materials that were generated with the use of artificial intelligence must articulate how the artificial intelligence was used.

PRACTICE DIRECTION

COURT OF KING'S BENCH OF MANITOBA

RE: USE OF ARTIFICIAL INTELLIGENCE IN COURT SUBMISSIONS

With the still novel but rapid development of artificial intelligence, it is apparent that artificial intelligence might be used in court submissions. While it is impossible at this time to completely and accurately predict how artificial intelligence may develop or how to exactly define the responsible use of artificial intelligence in court cases, there are legitimate concerns about the reliability and accuracy of the information generated from the use of artificial intelligence. To address these concerns, when artificial intelligence has been used in the preparation of materials filed with the court, the materials must indicate how artificial intelligence was used.

Coming into effect:

This Practice Direction comes into effect immediately.

ISSUED BY:

"Original signed by Chief Justice Joyal"

_____

The Honourable Chief Justice Glenn D. Joyal
Court of King's Bench (Manitoba)

DATE: June 23, 2023

Courts and Tribunals Judiciary

Artificial Intelligence (AI)

Guidance for Judicial Office Holders

12 December 2023

Contents

Introduction

This guidance has been developed to assist judicial office holders in relation to the use of Artificial Intelligence (AI).

It sets out key risks and issues associated with using AI and some suggestions for minimising them. Examples of potential uses are also included.

Any use of AI by or on behalf of the judiciary must be consistent with the judiciary's overarching obligation to protect the integrity of the administration of justice.

This guidance applies to all judicial office holders under the Lady Chief Justice and Senior President of Tribunal's responsibility, their clerks and other support staff.

Common Terms

Artificial Intelligence (AI)	Computer systems able to perform tasks normally requiring human intelligence.
Generative AI	A form of AI which generates new content, which can include text, images, sounds and computer code. Some generative AI tools are designed to take actions.
Generative AI chatbot	A computer program which simulates an online human conversation using generative AI. Publicly available examples are ChatGPT, Google Bard and Bing Chat.
Large Language Model (LLM):	LLMs are AI models which learns to predict the next best word or part of a word in a sentence having been trained on enormous quantities of text. ChatGPT and Bing Chat use the OpenAI Large Language Model.
Machine Learning (ML):	A branch of AI that uses data and algorithms to imitate the way that humans learn, gradually improving accuracy. Through the use of statistical methods algorithms are trained to make classifications or predictions, and to uncover key insights in data mining projects.
Technology Assisted Review (TAR):	AI tools used as part of the disclosure process to identify potentially relevant documents. In TAR a machine learning system is trained on data created by lawyers identifying relevant documents manually, then the tool uses the learned criteria to identify other similar documents from very large disclosure data sets.

Guidance for responsible use of AI in Courts and Tribunals

1) Understand AI and its applications

Before using any AI tools, ensure you have a basic understanding of their capabilities and potential limitations.

Some key limitations:

- Public AI chatbots do not provide answers from authoritative databases. They generate new text using an algorithm based on the prompts they receive and the data they have been trained upon. This means the output which AI chatbots generate is what the model predicts to be the most likely combination of words (based on the documents and data that it holds as source information). It is not necessarily the most accurate answer.

- As with any other information available on the internet in general, AI tools may be useful to find material you would recognise as correct but have not got to hand, but are a poor way of conducting research to find new information you cannot verify. They may be best seen as a way of obtaining non-definitive confirmation of something, rather than providing immediately correct facts.

- The quality of any answers you receive will depend on how you engage with the relevant AI tool, including the nature of the prompts you enter. Even with the best prompts, the information provided may be inaccurate, incomplete, misleading, or biased.

- The currently available LLMs appear to have been trained on material published on the internet. Their “view” of the law is often based heavily on US law although some do purport to be able to distinguish between that and English law.

2) Uphold confidentiality and privacy

Do not enter any information into a public AI chatbot that is not already in the public domain. Do not enter information which is private or confidential. Any information that you input into a public AI chatbot should be seen as being published to all the world.

The current publicly available AI chatbots remember every question that you ask them, as well as any other information you put into them. That information is then available to be used to respond to queries from other users. As a result, anything you type into it could become publicly known.

You should disable the chat history in AI chatbots if this option is available. This option is currently available in ChatGPT and Google Bard but not yet in Bing Chat.

Be aware that some AI platforms, particularly if used as an App on a smartphone, may request various permissions which give them access to information on your device. In those circumstances you should refuse all such permissions.

In the event of unintentional disclosure of confidential or private information you should contact your leadership judge and the Judicial Office. If the disclosed information includes personal data

the disclosure should reported as a data incident. Details of how to report a data incident to Judicial Office can be found at this link: Judicial Intranet | Data breach notification form for the judiciary[1]

In future AI tools designed for use in the courts and tribunals may become available but, until that happens, you should treat all AI tools as being capable of making public anything entered into them.

3) Ensure accountability and accuracy

The accuracy of any information you have been provided by an AI tool must be checked before it is used or relied upon.

Information provided by AI tools may be inaccurate, incomplete, misleading or out of date. Even if it purports to represent English law, it may not do so.

AI tools may:

- make up fictitious cases, citations or quotes, or refer to legislation, articles or legal texts that do not exist
- provide incorrect or misleading information regarding the law or how it might apply, and
- make factual errors.

4) Be aware of bias

AI tools based on LLMs generate responses based on the dataset they are trained upon. Information generated by AI will inevitably reflect errors and biases in its training data.

You should always have regard to this possibility and the need to correct this. You may be particularly assisted by reference to the Equal Treatment Bench Book.

5) Maintain security

Follow best practices for maintaining your own and the court/tribunals' security.

Use work devices (rather than personal devices) to access AI tools.

Use your work email address.

If you have a paid subscription to an AI platform, use it. (Paid subscriptions have been identified as generally more secure than non-paid). However, beware that there are a number of 3rd party companies that licence AI platforms from others and are not as reliable in how they may use your information. These are best avoided.

If there has been a potential security breach, see (2) above.

[1] https://intranet.judicary.uk/publications/data-breach-notification-form-for-the-judiciary/

6) Take Responsibility

Judicial office holders are personally responsible for material which is produced in their name.

Judges are not generally obliged to describe the research or preparatory work which may have been done in order to produce a judgment. Provided these guidelines are appropriately followed, there is no reason why generative AI could not be a potentially useful secondary tool.

If clerks, judicial assistants, or other staff are using AI tools in the course of their work for you, you should discuss it with them to ensure they are using such tools appropriately and taking steps to mitigate any risks. If using a Dom 1 laptop you should also ensure that such use has HMCTS service manager approval.

7) Be aware that court/tribunal users may have used AI tools

Some kinds of AI tools have been used by legal professionals for a significant time without difficulty. For example, TAR is now part of the landscape of approaches to electronic disclosure. Leaving aside the law in particular, many aspects of AI are already in general use for example in search engines to auto-fill questions, in social media to select content to be delivered, and in image recognition and predictive text.

All legal representatives are responsible for the material they put before the court/tribunal and have a professional obligation to ensure it is accurate and appropriate. Provided AI is used responsibly, there is no reason why a legal representative ought to refer to its use, but this is dependent upon context.

Until the legal profession becomes familiar with these new technologies, however, it may be necessary at times to remind individual lawyers of their obligations and confirm that they have independently verified the accuracy of any research or case citations that have been generated with the assistance of an AI chatbot.

AI chatbots are now being used by unrepresented litigants. They may be the only source of advice or assistance some litigants receive. Litigants rarely have the skills independently to verify legal information provided by AI chatbots and may not be aware that they are prone to error. If it appears an AI chatbot may have been used to prepare submissions or other documents, it is appropriate to inquire about this, and ask what checks for accuracy have been undertaken (if any). Examples of indications that text has been produced this way are shown below.

AI tools are now being used to produce fake material, including text, images and video. Courts and tribunals have always had to handle forgeries, and allegations of forgery, involving varying levels of sophistication. Judges should be aware of this new possibility and potential challenges posed by deepfake technology.

Examples: Potential uses and risks of Generative AI in Courts and Tribunals

Potentially useful tasks

- AI tools are capable of summarising large bodies of text. As with any summary, care needs to be taken to ensure the summary is accurate.
- AI tools can be used in writing presentations, e.g. to provide suggestions for topics to cover.
- Administrative tasks like composing emails and memoranda can be performed by AI.

Tasks not recommended

- Legal research: AI tools are a poor way of conducting research to find new information you cannot verify independently. They may be useful as a way to be reminded of material you would recognise as correct.
- Legal analysis: the current public AI chatbots do not produce convincing analysis or reasoning.

Indications that work may have been produced by AI:

- references to cases that do not sound familiar, or have unfamiliar citations (sometimes from the US)
- parties citing different bodies of case law in relation to the same legal issues
- submissions that do not accord with your general understanding of the law in the area
- submissions that use American spelling or refer to overseas cases, and
- content that (superficially at least) appears to be highly persuasive and well written, but on closer inspection contains obvious substantive errors.

Law Society of Ontario | Barreau de l'Ontario

TAB 3B

Eight-Minute Administrative Law and Practice 2024

AI and Admin Law and Practice (PowerPoint)

Shea Coulson
DLA Piper (Canada) LLP (Vancouver)

March 5, 2024

cpd

AI and Admin Law and Practice

March 5, 2024

Shea Coulson, AI Group Lead, DLA Piper LLP

Federal Directive on Automated Decision Making

Guiding Principles

- Based on AI guiding principles adopted by leading digital nations at the D9 conference in November 2018. The principles include:
  - (1) understanding and measuring the impact of using AI;
  - (2) ensuring transparency about how and when AI is used;
  - (3) providing meaningful explanations about AI decision-making;
  - (4) remaining open to sharing source codes and relevant data while protecting personal data; and
  - (5) providing sufficient training for the use and development of AI solutions.
- Directive is part of the federal government's overarching *Policy on Service and Digital* and has the following objectives:
  - Decisions made by federal institutions are data-driven, responsible and comply with procedural fairness and due process requirements.
  - Impacts of algorithms on administrative decisions are assessed and negative outcomes are reduced, when encountered.
  - Data and information on the use of automated decision systems in federal institutions are made available to the public, where appropriate

Application

- Directive Applies:
  - to any system, tool, or statistical model used to make an administrative decision or a related assessment about a client.
  - to automated decision systems in production and excludes systems operating in test environments.
  - to all institutions subject to the Policy on Service and Digital, which is effectively all departments listed in Schedule I of the *Financial Administration Act*, R.S.C. 1985, C. F-11 (E.g. Department of Natural Resources, Department of Transport; Department of Health; Department of Employment and Social Development).

Obligations Imposed by Directive

- Algorithmic impact assessment
- Transparency
- Quality assurance
- Recourse
- Reporting

Algorithmic Impact Assessment (AIA)

- Scoring system to assess risk creation and risk mitigation to determine the level of impact (Level I (little to no impact) to Level IV (very high impact) of each automated system, focusing particularly on:
  - The rights of individuals or communities;
  - The health or well-being of individuals or communities;
  - The economic interests of individuals, entities, or communities; and
  - The ongoing sustainability of an ecosystem.

- Requires assessment of algorithmic risk, data source, data quality, privacy, procedural fairness. Will get into the 101 of how to do this later.

- Could be used in judicial review.

Transparency

- Directive requires:
  - Providing notice before decisions. Higher risk levels require more robust notice (e.g. risk impact Levels III and IV under the AIA require plain language notice to impacted parties);
  - Providing explanations after decisions (how and why the decision was made). Note here that AIA impact levels I and II do not require human involvement in the decisions but impact levels III and IV do);
  - Access to components and release of source code: i.e. allowing access to the instructions that led to the decision or the assisted decision; and
  - Documenting decisions.
- obligation on a decision-maker to have the ability to explain how an automated decision system works in relation to the decision being rendered and the impact it has on that decision.

Quality Assurance

- Directive requires:
  1. Testing and monitoring outcomes: the data and information used by the automated decision system and the underlying model must be tested for bias and unintentional outcomes prior to deployment.
  2. Data quality: Data collected for, and use by, the automated decision system must be validated as relevant, accurate, up-to-date, and in accordance with the Policy on Service and Digital and the Privacy Act.
  3. Data governance: establishing measures to ensure that the data used and generated by automated decision systems are traceable, protected and accessed appropriately, and lawfully.
  4. Peer review: consulting qualified experts to review automated decision systems.
  5. Gender-based Analysis Plus: these assessments must be completed during the development or modification of an automated decision system.

Quality Assurance

- Directive requires:
  - 6. Employee training: providing adequate employee training in the design, function, and implementation of the automated decision system to be able to review, explain and oversee its operations.
  - 7. IT and business continuity management: strategies and plans to support IT and business continuity management.
  - 8. Security: security assessments will be part of the AIA.
  - 9. Legal: consultation with the institution's legal services from the concept stage of an automation project to ensure that the use of the automated decision system is compliant with applicable legal requirements.
  - 10. Ensuring human intervention: As noted above, certain AIA risk levels will require human intervention in decisions.

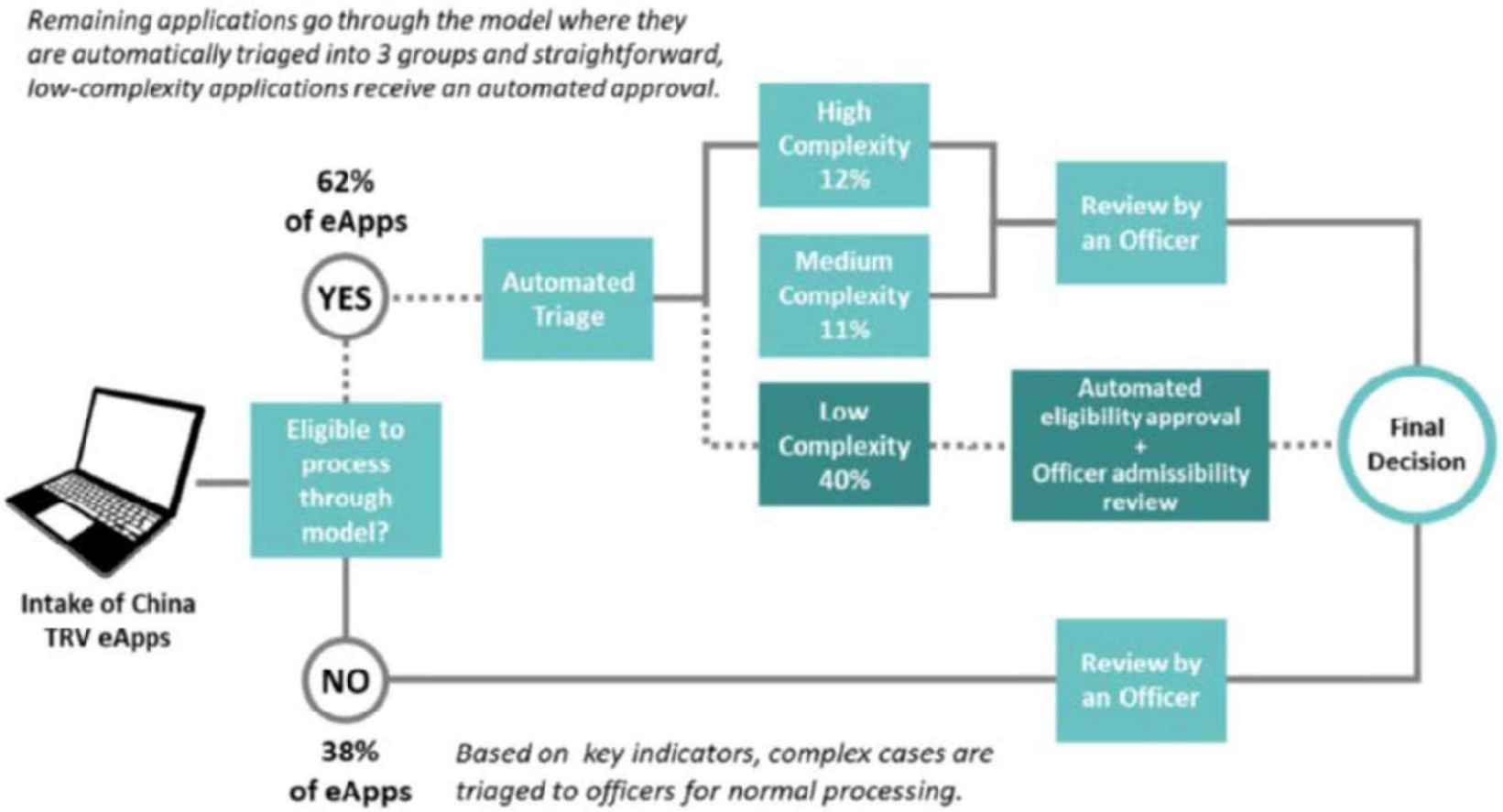
Recourse and Reporting

- Directive requires institutions to provide clients with recourse to challenge administrative decisions.
- Requires publication of information on effectiveness and efficiency of automated decision system in meeting the program objectives.

Example AIA – IRCC Temporary Residence Visas

- Applicant for TRV must be both eligible and admissible.
- Eligibility depends on factors such as whether applicant is likely to leave Canada on or before expiry of TRV. Admissibility can assess matters such as criminal record. Triage process applies to eligibility.
- AI System developed to categorize applicants into “high complexity”, “medium complexity”, and “low complexity”. To reduce impact of algorithm, IRCC only allows AI to make affirmative decisions in cases of “low complexity”. The AI system cannot deny an applicant.
- AI system approvals receive an oversight review by an officer, which is more efficient than having an officer fully assess all low complexity cases.
- Medium and high complexity cases are assessed by officers.
- IRCC’s Algorithmic Impact Assessment emphasizes low impact of this new TRV system, e.g. “Visas are temporary and do not entitle the holder to work, study or immigrate to Canada. Impacts may affect travel plans and the ability of clients to personally attend meetings or events in Canada, but this impact is temporary as clients whose visa application is refused can reapply at any time”.

Examples – IRCC Temporary Residence Visas



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TAB 4

Eight-Minute Administrative Law and Practice 2024

Update on Health Professions Discipline Tribunal Pilot (HPDTP): Background Document

Dionne Woodward, Tribunal Counsel | Tribunal Office
Ontario Physicians and Surgeons Discipline Tribunal

March 5, 2024

cpd

HPDTP
Health Professions Discipline Tribunals Pilot

UPDATE ON HEALTH PROFESSIONS DISCIPLINE TRIBUNAL PILOT (HPDTP): BACKGROUND DOCUMENT

Dionne Woodward, Tribunal Counsel
Ontario Physicians and Surgeons Discipline Tribunal

1. Tribunal Mandate

The Ontario Physicians and Surgeons Discipline Tribunal[1] is a neutral, independent, administrative tribunal that adjudicates allegations of professional misconduct or incompetence of Ontario physicians referred to it by the College of Physicians and Surgeons of Ontario's Inquiries, Complaints and Reports Committee (ICRC). The Tribunal also hears applications brought by former members of the College for reinstatement of their certificate of registration.

The Tribunal is made up of physicians, non-physician members of the public and experienced adjudicators. It manages cases from the point of ICRC referral or a member's reinstatement application forward. This involves conducting pre-hearing conferences, considering motions, holding hearings in a trial-like process on merits and penalty, then releasing orders and reasons for decisions.

2. Tribunal Modernization

The OPSDT was established in September 2021 as the identity of the CPSO's Discipline Committee. This name change, facilitated through an amendment to CPSO's General By-law, was part of a broader initiative to modernize and strengthen the discipline process and to more clearly define the Tribunal as independent of the CPSO.

In establishing a distinct identity, the Tribunal introduced new branding, including its own logo and website. The CPSO Board appointed a full-time independent Tribunal Chair, with expertise in tribunal leadership and transformation, to lead both Tribunal operations and adjudication. Further, five experienced adjudicators with strong hearing management and mediation skills were appointed to the Tribunal following a competitive, merit-based recruitment process. The experienced adjudicators chair hearing panels, conduct pre-hearing conferences and express the panel's views by preparing the first draft of written reasons for decision. In light of this internal expertise, the Tribunal no longer retains

[1] The Ontario Physicians and Surgeons Discipline Tribunal is the College of Physicians and Surgeons of Ontario's Discipline Committee established under the Health Professions Procedural Code.

independent legal counsel to advise hearing panels. This has contributed to significant cost savings.

3. The HPDTP: Sharing the New Model

The measures to modernize the OPSDT, particularly the appointment of experienced adjudicators, garnered interest from other Ontario health regulators. This led to an opportunity to align our common disciplinary function by sharing the OPSDT's existing adjudicative resources.

In March 2023, the Health Professions Discipline Tribunal Pilot (HPDTP) launched, bringing together the discipline committees of three health colleges alongside the OPSDT. These colleges include the College of Massage Therapists of Ontario, the College of Audiologists and Speech-Language Pathologists of Ontario and the College of Registered Psychotherapists of Ontario. As part of the Pilot, participating colleges have cross appointed the OPSDT's Chair and experienced adjudicators to their respective discipline committees. The experienced adjudicators provide adjudicative leadership and case management, chair hearing panels, lead pre-hearing and case management conferences and write reasons for decision. They sit on hearing panels with one professional member of the college's board and two public members (as required under the Code), and one other member of the profession.

a) Key Features

The Pilot model introduces components aimed at enhancing both efficiency and effectiveness within the disciplinary proceedings of participating colleges. It incorporates a robust case management rule that aligns with best practices observed in courts and tribunals. Additionally, the model embraces a decision-writing style that is both more transparent and accessible, mirroring the techniques judges employ to explain their judgments. Furthermore, it facilitates a collaborative educational environment through the hosting of an annual joint educational conference for Pilot adjudicators and hearing office staff. This initiative not only fosters collaboration but also optimizes educational offerings by leveraging a shared legislative framework and helping to avoid duplicative work.

b) Early Results

While a formal evaluation of the Pilot to inform a permanent state is forthcoming, it is expected that many of the benefits seen by the OPSDT since the appointment of experienced adjudicators will extend to Pilot participants. At the Pilot colleges, hearings chaired by experienced adjudicators do not require independent legal counsel to provide the panel with legal advice, offering the potential for cost savings in this area. Further, the hearings management expertise of the experienced adjudicators contributes to efficient hearings and timely release of reasons for decision.

To date, 20 hearings (4 contested) have been held and 21 sets of reasons released as part of the Pilot. The average time to release decisions that are part of the Pilot is 27 days. There are currently 16 Pilot cases in the pre-hearing process. (*Data current as of Feb. 12, 2024)

Law Society of Ontario | Barreau de l'Ontario

TAB 5

Eight-Minute Administrative Law and Practice 2024

Hybrid Hearings: Challenges and Considerations

Jennifer Khurana , Chairperson
Canadian Human Rights Tribunal

March 5, 2024

cpd

Hybrid Hearings:
Challenges and Considerations

Jennifer Khurana, Chairperson
Canadian Human Rights Tribunal (CHRT)

The Canadian Human Rights Tribunal (CHRT)

Policies and Practice Directions

https://www.chrt-tcdp.gc.ca/procedures/practice-notes-en.html

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TAB 6

Eight-Minute Administrative Law and Practice 2024

Costs Awards against Disciplined Professionals in Regulatory Proceedings

Morgana Kellythorne
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March 5, 2024

cpd

Costs Awards against Disciplined Professionals in Regulatory Proceedings

By Morgana Kellythorne[1]

Costs orders are common after discipline proceedings where professionals have engaged in misconduct. They reflect the sui generis nature of such proceedings and serve important purposes. Costs awards may vary significantly, be very large, and concern has been expressed about disproportionality. Recently, the Alberta Court of Appeal departed from convention in stating that costs orders should be the exception rather than the rule. The Court did not give sufficient weight to important considerations, but was right to highlight the value of predictability. A predictable, fair costs regime that reflects the underpinnings of self-regulation and incentivizes parties' good behaviour can enhance the effectiveness of professional discipline. However, the general rule in favour of costs awards should remain. Predictability and fairness can be enhanced by adoption of a tariff rate approach and situating awards within a range of similar cases, with room to depart from the tariff or range in appropriate cases.

Introduction

Professional discipline proceedings are expensive. Like other professional regulatory activities, they are often funded by dues payable to the regulator by members of the profession. To offset this expense, after an adverse finding is made against a professional in a discipline proceeding, it is common for the adjudicative tribunal to

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award costs, payable by the disciplined professional to the regulator. In many professions and Canadian jurisdictions, such a costs award is generally expected as a matter of course. In many jurisdictions, the award may include not only counsel costs, but also adjudicative and investigative costs. From time to time, costs awards are the focus of analysis by a tribunal or an appellate court, but for the most part they have been made with little commentary.

In 2022, the Alberta Court of Appeal in *Jinnah v. Alberta Dental Association and College* ("*Jinnah*")[2] appeared to up-end the conventional approach to costs against defendants in professional discipline proceedings, holding that despite being permitted under the province's *Health Professions Act*,[3] such costs should be the exception rather than the norm. The decision's influence since then has been relatively limited.

However, *Jinnah* and other decisions on the issue reflect ongoing challenges regarding costs payable by disciplined professionals, as well as periodic unease among tribunals and appellate courts at the enormous sums which such costs may reach. This paper explores the reasons for these challenges and proposes a way forward.

As set out in further detail below, professional discipline proceedings are *sui generis* proceedings that are neither criminal nor quasi-criminal nor fully civil in nature, which is reflected in some of the challenges that costs awards involve. Periodically, costs awards have been the subject of attention in appellate decisions or contested, cost-focused tribunal decisions. These decisions reveal the heavy work that costs are expected to do

[2] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336 ("*Jinnah*"), leave to appeal dismissed *Alberta Dental Association and College v. Jinnah*, 2023 CanLII 24527 (SCC)
[3] *Health Professions Act*, RSA 2000, c. H-7

in discipline proceedings. They also reveal the tension that results in part from the *sui generis* identity of such proceedings: individual defendants, whose privilege to carry on their profession is at stake, may be ordered to pay not only the kinds of costs borne by litigants in unsuccessful civil litigation, but also investigative and adjudicative costs.

The Alberta Court of Appeal recognized in *Jinnah* that predictability of costs has value in informing how parties make decisions surrounding a discipline hearing, and in promoting reasonable behaviour. However, the general rule the Court put forward in *Jinnah* (i.e. that costs should be the exception) failed to take into account all of the valuable work that costs awards against the professional member can do in discipline proceedings. Nor, however, is the status quo outside *Jinnah* ideal. It can result in costs awards that are unpredictable and disproportionate.

I argue that a better balance can be achieved by a general practice of (a) imposing costs following a discipline finding against a member, in combination with (b) a reasonable daily tariff rate and (c) guidelines around the exercise of discretion to depart either from the imposition of costs altogether or from the tariff rate. The combination of predictability and discretion offered by this general practice will best enable costs awards to do their useful work in discipline proceedings, while being fair and proportionate.

Below, I discuss the nature of professional discipline proceedings and professional regulation, the legal basis on which costs awards may be made against professionals after discipline findings against them, how costs awards against professionals in discipline proceedings have been treated by tribunals and courts, the *Jinnah* decision, and a way forward.

The Nature of Professional Discipline Proceedings and Professional Regulation

In *R. v. Wigglesworth*, the Supreme Court of Canada described discipline proceedings as neither criminal nor quasi-criminal, but regulatory, protective or corrective in nature, with the primary goal being to maintain discipline, professional integrity and professional standards in the profession.[4] Except where a statute provides otherwise, they are decided based on the civil burden of proof.[5]

However, professional discipline proceedings have features that do not apply to other civil proceedings.

First, professional regulators occupy a special public interest role that is not like that of a litigant in an ordinary civil proceeding. In *Pharmascience v. Binet*, the Supreme Court of Canada observed that it had frequently noted the "crucial role" that professional regulators "play in protecting the public interest," citing the extent to which the public places trust in and is vulnerable in its dealings with professionals.[6] Professional regulation is often carried out via self-regulation by the profession itself. Nonetheless, the primary duty of a professional regulator is, as the Supreme Court stated, to protect the public, rather than to provide service to its members or to protect their collective interest.[7] Self-regulation is described as a privilege that "places the individuals responsible for enforcing professional discipline under an onerous obligation," as it "comes with the responsibility for providing adequate protection for the public."[8] The

[4] *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at paras. 23-24.
[5] *F.H. v. McDougall*, 2008 SCC 53.
[6] *Pharmascience v. Binet*, 2006 SCC 48, at para. 36.
[7] *Finney v. Barreau du Quebec*, 2004 SCC 36, at para. 16
[8] *Pharmascience v. Binet*, 2006 SCC 48, at para. 36.

purpose of disciplinary bodies is "to protect the public, to regulate the profession and to preserve public confidence in the profession."[9]

Second, a professional discipline proceeding is a prosecution, with attendant implications for and entitlements on the part of the professional who is the subject of the prosecution. The proceeding is initiated at the instance of the regulator. As recently observed by the Supreme Court of Canada in *Law Society of Saskatchewan v. Abrametz*, disciplinary bodies have a duty to deal fairly with members whose livelihood and reputation are affected by their proceedings.[10] A professional who is accused of misconduct is entitled to defend themselves against the allegations and to require the regulator to prove them.[11] In fulfilling their duty of procedural fairness to a member who is facing prosecution, regulators often incorporate and are subject to practices from and proceed by analogy to aspects of criminal proceedings, for example regarding their disclosure obligations.[12]

Unlike criminal proceedings, despite their potentially serious sanctions, professional discipline proceedings do not result in true penal consequences. They adjudicate a person's privilege to practice a profession of their choice.[13] This has been made clear in cases holding that section 7 of the Canadian *Charter of Rights and Freedoms* does not apply to professional discipline proceedings, as there is no constitutionally protected right to practice a profession, and such proceedings do not deprive a professional of

[9] *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, at para. 53.
[10] *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, at para. 55.
[11] *College of Physicians and Surgeons of Ontario v. Gillen*, 1993 CanLII 8641 (ON CA); *Deloitte & Touche LLP v. Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee)*, 2008 ABCA 162 (CanLII), at para. 91.
[12] See for example *Familiamiri v. The Association of Professional Engineers and Geoscientists of British Columbia*, 2004 BCSC 660; *Law Society of Upper Canada v. Savone*, 2016 CanLII 33941 (ON SCDC).
[13] *Mussani v. College of Physicians and Surgeons of Ontario*, 2004 CanLII 48653 (ON CA), at para. 90.

their life, liberty, or security of the person.[14] Rather, they maintain discipline within a limited sphere of private activity, differing from criminal matters, which are intended to promote order and welfare within a public sphere of activity.[15]

Given the evolution of their hybrid status, the Supreme Court of Canada has thus now clarified, in *Law Society of Saskatchewan v. Abrametz*, that "disciplinary proceedings are neither civil nor criminal, but rather *sui generis*."[16]

Legal Basis for Availability of Costs Against a Professional After a Discipline Finding

As seen above, while *sui generis* in nature, professional discipline proceedings draw on aspects of both civil and criminal proceedings. Therefore, when considering the legal basis on which costs of professional discipline proceedings are ordered, it is instructive to compare it with the legal basis for how costs are treated in civil and criminal proceedings.

Although it is now also extensively codified, the jurisdiction for courts to order a party to pay all or part of the costs of the other party in a civil legal proceeding has been recognized by the Supreme Court of Canada as a "venerable one," an equitable and discretionary power rooted centuries ago in the courts of equity.[17] The traditional purpose of costs awards in civil proceedings is to indemnify the successful party for

[14] For example, *Mussani v. College of Physicians and Surgeons of Ontario*, 2004 CanLII 48653 at paras. 43, 60.
[15] *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, at para. 54.
[16] *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, at para. 54.
[17] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 ("*Okanagan Indian Band*") at para. 19.

expenses sustained defending a claim that proved unfounded or in pursuing a legal right.[18]

However, as the Supreme Court of Canada recognized in 2003 in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, the "indemnification" principle of costs is outdated, or at the very least incomplete. There are many other kinds of work that can be done by a costs award in encouraging or deterring certain types of conduct: for example, it may be used to encourage settlement, prevent frivolous or vexatious litigation or positions, or discourage unnecessary steps.[19] Recognizing the important work done by costs awards beyond mere indemnification, courts have permitted costs awards to be extended to successful self-represented litigants,[20] and have ordered interim costs to fund aboriginal title litigation.[21] Writing for the majority in *Okanagan Indian Band*, Justice LeBel described costs orders as an "instrument of policy," routinely deployed to further the efficient and orderly administration of justice.[22] He observed that even in the traditional indemnification-focused approach, by offsetting what the winner in litigation has had to spend, costs awards "make the legal system more accessible to litigants who seek to vindicate a legally sound position."[23]

By contrast, costs in criminal cases do not ordinarily follow the event as they do in civil proceedings.[24] There is some power to order costs against the Crown in a "remarkable"

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[18] *Okanagan Indian Band*, at para. 21.
[19] *Okanagan Indian Band*, at para. 23; *Skidmore v. Blackmore*, 1995 CanLII 1537 (BC CA) ("*Skidmore v. Blackmore*") at paras. 28, 44.
[20] *Skidmore v. Blackmore*, at para. 41
[21] *Okanagan Indian Band*.
[22] *Okanagan Indian Band*, at para. 26.
[23] *Okanagan Indian Band*, at para. 26.
[24] Se discussion in *Chartered Professional Accountants of Ontario v. Gujral* 2020 ONCJ 307, at paras. 153-157.

case or where there has been "oppressive or improper conduct" by the Crown.[25] However, the unsuccessful criminal defendant does not usually anticipate paying the cost of their own prosecution, let alone the cost of adjudication or investigation. The Ontario Court of Appeal has held that there are generally two limited instances when costs may be awarded to the defendant: (i) in cases of misconduct by the Crown, and (ii) in other exceptional circumstances where fairness requires that the individual litigant not carry the financial burden flowing from his or her involvement in the litigation.[26]

Unlike a court, a tribunal must be specifically authorized by legislation in order to award costs, and the ambit of the tribunal's ability to do so is defined by the applicable legislation.[27] Professional discipline tribunals' jurisdiction to award costs varies according to the statutory scheme and across the country.

The range of circumstances in which costs orders may be made against unsuccessful defendants in professional discipline proceedings is generally quite broad. In Ontario, the *Statutory Powers Procedure Act ("SPPA")*, which applies to tribunal proceedings, provides that a tribunal may make rules on the ordering of costs. It limits costs to circumstances where a party's conduct has been unreasonable, frivolous, vexatious or in bad faith.[28] While this suggests a narrow ambit, individual professions have their own statutory schemes, the cost provisions of which often permit costs awards on a much

[25] *R. v. M.(C.A.),* para. 98
[26] *R. v. Tiffin* 2008 ONCA 306.
[27] *Jha v. College of Physicians and Surgeons of Ontario* 2022 ONSC 769 at para. 151.
[28] *Statutory Powers Procedure Act*, R.S.O. 1990, s. 17.1.

broader basis, either because their legislation explicitly prevails over the *SPPA* if there is a conflict or because of grandparenting provisions.[29]

Thus, for example, since 1993 Ontario's *Regulated Health Professions Act, 1991* has provided that "in an appropriate case," a discipline panel may make an order requiring a member who the panel finds has engaged in misconduct or is incompetent to pay all or part of the regulatory College's legal costs and expenses, the College's costs and expenses incurred in investigating the matter, and the College's costs and expenses incurred in conducting the hearing.[30] This extends beyond the type of indemnification typically contemplated by costs awards in civil proceedings, where the institutional cost of adjudication is not included. Similarly, the Ontario Divisional Court has upheld as reasonable an interpretation of the applicable legislation and rules governing early childhood educators that permitted the discipline tribunal to order costs against a member after a misconduct finding even where the member's conduct had been reasonable.[31]

While not identical, the situation is nonetheless very similar across the country. For example, in Alberta, the *Health Professions Act* sets out a list of expenses that a tribunal may order a professional to pay, after having been found to have engaged in unprofessional conduct, including expenses related to both the hearing and the investigation, such as travelling expenses for the complaint director, expert expenses,

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[29] *Registrar REBBA v. Jolly*, 2016 ONSC 2338 (where the regulator was required to adhere to the *SPPA*); *Robinson v. College of Early Childhood Educators*, 2018 ONSC 6150 (where the professional statute explicitly prevailed over the SPPA); *SPPA*, s. 17.1(6).

[30] Section 53.1, Health Professions Procedural Code, which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18.

[31] *Robinson v. College of Early Childhood Educators*, 2018 ONSC 6150, at paras. 54-55.

the costs of creating a record of the proceedings, and any other expenses of the college "directly attributable to the investigation or hearing or both".[32] The *Law Society Act* in New Brunswick has a similar provision permitting an order for costs of the "inquiry," including any "investigation or "audit."[33] British Columbia's new *Health Professions and Occupations Act*, not yet in force, will continue to follow this model, permitting orders for hearing and investigation expenses.[34] Comparable provisions are plentiful from coast to coast to coast.

One area of difference across jurisdictions and professions is the ability of a tribunal to award costs against the regulator, payable to a successful discipline defendant. Rather than costs following the event, as in other civil litigation, costs are rarely payable by a regulator. It is common for statutes to provide, like Ontario's *Professional Engineers Act*, that costs are payable by the regulator only where the tribunal "is of the opinion that the commencement of the proceedings was unwarranted."[35] Some tribunals may also be able to order costs where the prosecution caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence, or other default.[36] Others, such as tribunals under Alberta's *Health Professions Act*, have no jurisdiction to award any costs against the regulator.[37] Other statutes, such as British Columbia's *Health Professions Act*, allow costs to be awarded against the regulator if the tribunal dismisses the case on the basis that the matter was without merit.[38] The availability or

[32] *Health Professions Act*, R.S.A. 2000, c. H-7, ss. 82(1)(j), 89(6).
[33] *Law Society Act, 1996*, S.N.B. 1996, c. 89, s. 60(1)(e).
[34] *Health Professions and Occupations Act*, SBC 2022, c. 43, ss. 191, 192.
[35] *Professional Engineers Act*, R.S.O. 1990, c. P.28, s. 28(7). For another example, see s.53, Health Professions Procedural Code, which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18.
[36] See for example Law Society of Ontario, *Rules of Practice and Procedure*, Rule 25.01(1).
[37] See the discussion by the Cougggrt in *Jinnah* at fn 171 of the same.
[38] *Health Professions Act*, R.S.B.C. 1996, c. 183, s. 39(4).

unavailability of costs against the regulator helps shape how tribunals and courts treat costs against the professional, which may be called on to address conduct by the regulator as well.

Tribunals and Courts on Costs Awards against Professionals

Although a statute may authorize a discipline tribunal to order a professional to pay costs of their own successful prosecution, the tribunal is not required to order costs. Costs are discretionary, and the discretion is to be exercised judicially, with regard to relevant factors, including the nature of the allegations, the conduct of the parties, and the reasonableness of the amounts.[39] Below, I discuss the way courts and tribunals have dealt with these factors, and the tensions that have sometimes arisen in their analyses.

1. *No built-in reasonable apprehension of bias*

One aspect of the costs of professional discipline proceedings that has attracted attention stems from the inherent tension that comes from the self-governing status of many professions. The tribunal making the costs award is frequently a branch of the same governing body as the prosecutorial and investigative branches, and it is the governing body that receives the costs award.

In 1991 in *Pearlman v. Manitoba Law Society Judicial Committee*,[40] the Supreme Court of Canada considered the interaction between this structure and costs awards. A lawyer who was subject to professional discipline argued that it gave rise to a built-in

[39] *KC v. College of Physical Therapists of Alberta*, 1999 ABCA 253, at para. 94; *Brand v. College of Physicians and Surgeons (Sask.)*, 1990 CanLII 7711 (SK CA), at para. 22.
[40] *Pearlman v. Manitoba Law Society Judicial Committee*, 1991 CanLII 26 (SCC), [1991] 2 SCR 869.

reasonable apprehension of bias. He argued that the fact of statutory authority to recoup costs of an investigation from a lawyer who is found to have engaged in professional misconduct creates the perception that the tribunal (in this case, the Law Society Judicial Committee) might have a pecuniary interest in a finding of guilt. This assertion arose in the context of a challenge under section 7 of the Canadian *Charter of Rights and Freedoms*.[41]

The Court in *Pearlman* evaluated the concern in view of the legal test for reasonable apprehension of bias, applying it to the context, including the rationale underlying self-governance of the professions and in particular the legal profession. It noted that a large part of effective self-governance rests on the concept of peer review, which requires a power to discipline members. It held that no reasonable apprehension of bias was created by the statutory authority to award costs. First, costs were a "direct reimbursement for expenses previously incurred" in a matter where there were legitimate grounds for sanction. They were not profits or gains. Second, any pecuniary interest that the members of the Judicial Committee might have in a costs award was remote and attenuated as costs were payable to the regulator as a whole. Third, even if recouped costs were applied to reduce bar fees, it would be unreasonable to conclude that it would lead to bias on the part of the Judicial Committee in view of statistical evidence showing the relative size of costs recouped to overall revenues. The Court confirmed, however, that if there were to be an unfair or otherwise abusive costs order, Mr. Pearlman would have administrative remedies.

[41] The Court did not need to decide for the purposes of the case whether section 7 applied to the proceedings.

The result in *Pearlman* was based on the nature of the regulator and the statistical evidence before the Court. It is worth considering, however, whether all regulators would be in a position to be evaluated positively against the same test in all cases. It remains unexplored whether a reasonable apprehension of bias might be of concern in the case of, for example, a small regulator of relatively lower-income professionals faced with very high costs for investigating and disciplining a particular member, or a regulator where costs associated with discipline of its members have a significant effect on fees and members tend to have modest incomes.

2. *Costs are restitution, not a penalty*

As the Supreme Court noted in *Pearlman*, costs provide reimbursement for expenses incurred by the regulator. The Court contrasted this with profit or gain, given that the focus in *Pearlman* was on whether the regulator had a pecuniary interest. However, courts have also repeatedly highlighted that the restitutive purpose of a costs award means that it is not to be treated as a sanction for the defendant.

For example, in *Allen v. The Law Society of New Brunswick*,[42] the New Brunswick Court of Appeal dismissed an appeal of a costs award by a disciplined lawyer, rejecting his contention that the costs order was a penalty. The Court considered the fact that the statutory authorization to order costs upon a finding of misconduct was found within the same provision as statutory authorization to make various types of penalty orders – and the provision was in fact headed "Sanctions". Nonetheless, the Court held the object of a costs order to be "restitutive" rather than punitive, as it was not enacted to enforce

[42] *Allen v. The Law Society of New Brunswick*, 2017 NBCA 32.

obedience to a law or rule.[43] In the case in question, the panel had been authorized by statute to impose both the penalty it did (a reprimand and fine) and a non-punitive measure, namely a costs order. This was described as a "rationally defensible policy choice," appropriate in cases where the professional is found "guilty of all charges." The Court noted that if the prosecution were only partially successful or more serious particulars that were pleaded were not established, some corresponding allocation of the costs might be appropriate.[44]

Similarly, in *Berge v. College of Audiologists and Speech-Language Pathologists of Ontario*, the Ontario Divisional Court rejected the contention that a costs award was a penalty, stating that "costs were awarded to deflect the College's costs incurred during its successful prosecution," as permitted by the enabling statute.[45]

There are very occasional examples where tribunals have treated costs as part of the sanction imposed on the professional, for example by citing a costs award as serving as specific deterrence.[46] This may reflect the practical reality that costs awards in some cases may be the heaviest and longest-lasting part of the tribunal's order for a professional to bear. However, it is inconsistent with appellate case law across the country in professional discipline matters, which treats costs orders as distinct from sanctions, and in this respect as being like costs in civil litigation, which at least in part serve to indemnify the successful party.

[43] *Allen v. The Law Society of New Brunswick*, 2017 NBCA 32, at paras. 35-36, 38.
[44] *Allen v. The Law Society of New Brunswick*, 2017 NBCA 32, at para. 37.
[45] *Berge v. College of Audiologists and Speech-Language Pathologists of Ontario*, 2016 ONSC 7034, at para. 144.
[46] See for example *Ontario (College of Occupational Therapists of Ontario) v. Bode*, 2018 ONCOT 2.

If costs are not intended to be a sanction, as we will see further below, it is possible that the circumstances or quantum of a costs award may unfairly transform it into a penalty.

3. *Indemnification of the profession for the costs of prosecution is seen as appropriate*

The Ontario Divisional Court upheld the costs award in *Berge v. College of Audiologists and Speech-Language Pathologists of Ontario* as consistent with the principle that "it is not appropriate to look to other members of the profession to fund the entire costs of a successful prosecution."[47]

This statement reflects what has been a related corollary to the concept that costs are not a sanction but are reimbursement: the idea that legislative provisions permitting professional discipline tribunals to order costs reflect the legislature's intent that professions ought not to bear the full cost of a successful discipline proceeding. In Ontario in particular, this has sometimes been stated as a "general rule." In 2016, the Court of Appeal for Ontario observed in *Groia v. The Law Society of Upper Canada* that it had found no reason to depart from "the general rule that the reasonable costs of investigating and conducting a disciplinary proceeding should not be borne by the profession as a whole where" a finding had been made against the professional.[48]

The same Court, dismissing a request to extend the time to appeal a decision upholding a large costs award against a health professional in another case stated, "The courts have also identified the College's right and responsibility to protect its members from the weight of the expense of protracted disciplinary proceedings" [emphasis added].[49] This

[47] *Berge v. College of Audiologists and Speech-Language Pathologists of Ontario*, 2016 ONSC 7034, at para. 147.
[48] *Groia v. The Law Society of Upper Canada*, 2016 ONCA 471, at para. 234; overturned on other grounds *Groia v. Law Society of Upper Canada*, 2018 SCC 27.
[49] *Reid v. College of Chiropractors of Ontario*, 2016 ONCA 779, at para. 24.

message was conveyed especially strongly in Ontario and absorbed by tribunals there, as seen in one tribunal's observation in a costs decision that it "recognizes that it has an obligation to its members to obtain costs from members who are found guilty of professional misconduct."[50]

In *Abrametz v. The Law Society of Saskatchewan* ("*Abrametz 2018*"), the Saskatchewan Court of Appeal explained the basis for indemnification. Rather than indemnifying personally an adverse party for its expenses, a disciplined professional ensures that other members of the profession do not have to bear the whole cost of the professional's misconduct. This is part of the burden that comes with what is recognized as a privilege of being a member of a regulated profession.[51]

In Alberta, by contrast, prior to *Jinnah*, the Court of Appeal there had already begun to introduce a note of caution, suggesting that the first question to be asked in any case should be whether to order costs at all, as costs are "neither mandatory nor automatic," nor even presumptive.[52]

4. *A disciplined professional generally ought not to be responsible for all of the costs incurred*

Although costs may be intended to indemnify the profession as a whole from the financial burden caused by a member's misconduct, just as in civil proceedings the regulator's costs award does not usually represent the full cost incurred in prosecuting the professional.

[50] *College of Early Childhood Educators v. Fatima Sahara Sidibe*, 2021 ONCECE 14.
[51] *Abrametz v. The Law Society of Saskatchewan*, 2018 SKCA 37, at para. 44.
[52] *Alsaadi v. Alberta College of Pharmacy*, 2021 ABCA 313, at para. 100; *K.C. v. College of Physical Therapists of Alberta*, 1999 ABCA 253, at para. 94.

Tribunals and courts have recognized that indemnification should usually be partial. In *Abrametz 2018*, the Saskatchewan Court of Appeal said that "the burden of membership principle that underpins a costs order does not necessarily mean full indemnification," and that a careful balance must be struck to ensure that the professional is not prevented from defending themselves.[53] Similarly, in *Chuang v. Royal College of Dental Surgeons of Ontario*, the Ontario Divisional Court stated that while the members of the profession "should not be liable for the costs of guilty members," nor should members "be liable for the whole costs of defending themselves, particularly when their right to practice is at stake."[54] In *Dr. Ignacio Tan III v. Alberta Veterinary Medical Association ("Tan")*, as well, the Alberta Court of Appeal warned that "full indemnity for costs is seldom appropriate" as, among other things, a costs regime should not deter professionals from raising a legitimate self-defence.[55] Thus, it reiterated that was "there was "no presumption that the member is or should be responsible for most or all of the costs" of misconduct proceedings.[56]

In these cases, the Court referred to the reasons to share costs between the profession and the professional as based on an important principle: the need to balance the burden of the disciplined professional's membership in the profession with preservation of their right to defend themselves. Identifying the appropriate balance is an ongoing challenge. Ultimately in *Chuang v. Royal College of Dental Surgeons of Ontario* the reviewing court

[53] *Abrametz v. The Law Society of Saskatchewan*, 2018 SKCA 37, at para. 45.
[54] *Chuang v. Royal College of Dental Surgeons of Ontario*, 2006 CanLII 19433 (ON SCDC), at para. 19.
[55] *Dr. Ignacio Tan III v. Alberta Veterinary Medical Association*, 2022 ABCA 221, at para. 43.
[56] *Dr. Ignacio Tan III v. Alberta Veterinary Medical Association*, 2022 ABCA 221, at para. 41.

reduced the costs awarded from $250,000 to $200,000, but in its brief reasons described costs as in any case "inherently arbitrary," the judicial equivalent of a shrug.[57]

In practice the appropriate proportion of costs to be awarded has sometimes been dealt with by identifying a customary percentage as a guide. In a concurring judgment in *Alsaadi v. Alberta College of Pharmacy*, Khullar J.A. of the Alberta Court of Appeal observed that "a review of the cases shows that the approach taken by hearing tribunals is to calculate the total maximum expenses related to a hearing and appeal, and then to order that a percentage of that amount be paid by the unsuccessful professional."[58] Reviewing cases from Alberta, Khullar J. noted awards in the range of 60-75%, while in Ontario "the default" was said to be "two-thirds of total costs."[59] In *Berge v. College of Audiologists and Speech-Language Pathologists of Ontario*, in upholding a costs award as reasonable, the Ontario Divisional Court also noted that the sum awarded was significantly less than the "typical two-thirds approach."[60] Applying a "typical approach" of this nature may offer the benefit of ease, but can obscure the underlying principles or hamper the careful exercise of discretion.

5. Costs awards may encourage or deter conduct by the defence

In civil proceedings, as discussed above, costs awards do a great deal of work to encourage or deter certain kinds of conduct by litigants. Costs awards have also commonly served a multitude of purposes in this regard in professional discipline proceedings, as seen in the range of factors concerning the parties' conduct that courts

[57] *Chuang v. Royal College of Dental Surgeons of Ontario*, 2006 CanLII 19433 (ON SCDC), at para. 19.
[58] *Alsaadi v. Alberta College of Pharmacy*, 2021 ABCA 313, at para. 109.
[59] *Alsaadi v. Alberta College of Pharmacy*, 2021 ABCA 313, at para. 112.
[60] *Berge v. College of Audiologists and Speech-Language Pathologists of Ontario*, 2016 ONSC 7034, at para. 146.

and tribunals have balanced in determining whether an award is fair and reasonable. This includes conduct by the professional in defending themselves.

Because a costs award is not a penalty, it is not necessarily affected by the aggravating and mitigating factors that impact the misconduct itself.[61] Sometimes courts and tribunals have suggested that more serious misconduct may weigh in favour of making a costs award or of making a higher costs award.[62] It may be perilous for a tribunal to take this approach, given that costs are not to be punitive and the right to defend oneself is all the more important when facing serious allegations. Approaching costs through the lens of the same aggravating and mitigating factors as penalties mixes apples and oranges, is at the very least unnecessary, and fails to take the purpose of costs awards into account.[63] Thus, for example, the Saskatchewan Court of Appeal rejected a disciplined lawyer's contention that in making a costs award against him his regulator had failed to consider his lack of a prior record, that his conduct had not caused financial loss, and that the costs award exceeded the value in issue in the discipline matter. The Court observed that these were all relevant matters at the penalty stage, but not relevant to costs.[64]

A better approach is for a costs award to take into account the professional's conduct in the proceeding itself, rather than the seriousness of the misconduct that has been proven. If strategic choices made in the defence's conduct unnecessarily prolonged the

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[61] *Allen v. The Law Society of New Brunswick*, 2017 NBCA 32, at para. 33.
[62] *Freedman v. Royal College of Dental Surgeons* (2001), 146 OAC 157 (Div. Ct.); *Ontario (College of Physicians and Surgeons of Ontario) v. Deep*, 2008 ONCPSD 15 (CanLII); *KC v. College of Physical Therapists of Alberta*, 1999 ABCA 253 at para. 94.
[63] *Allen v. Law Society of New Brunswick*, 2017 NBCA 32.
[64] *MacKay v. Law Society of Saskatchewan*, 2021 SKCA 99, at para. 112.

proceeding, it is often seen simply in the fact of an award that reflects the length of the proceeding so prolonged, rather than in paying a higher proportion or percentage of the costs. This approach is mindful of the right to defend oneself while providing a proportional response to unreasonable behaviour. In *Ontario (College of Physicians and Surgeons of Ontario) v. Deep*, the tribunal rejected Dr. Deep's contention that no costs should be ordered. In doing so, the tribunal noted that the duration of the hearing was extended by the conduct of Dr. Deep, who was self-represented, including repetitious and protracted testimony, and patient charts that were in poor condition and required extensive hearing time to review.[65] The Alberta Court of Appeal upheld an order that a physician pay over $700,000 in costs after a 47-day hearing, noting that he himself was largely responsible for the complexity of the proceedings, having commenced 14 pre-hearing applications, engaged in excessive cross-examination, and called 50 defence witnesses. In doing so, the Court noted that while a professional is entitled to make full answer and defence, it "does not insulate the professional…if the defence is conducted in a way that is insensitive to the expenses generated."[66]

The danger of penalizing the professional for exercising their right of self-defence must be avoided. This was emphasized by the Saskatchewan Court of Appeal in *The College of Physicians and Surgeons of Saskatchewan v. Leontowicz*, in which it criticized the regulator for, in imposing full indemnity costs, having characterized the professional's decision to engage private legal counsel to defend himself as an "aggravating factor." The Court noted that the tribunal's costs decision "chastised" the professional for taking

[65] *Ontario (College of Physicians and Surgeons of Ontario) v. Deep*, 2008 ONCPSD 15.
[66] *Al-Ghamdi v. College of Physicians and Surgeons of Alberta*, 2020 ABCA 71, at para. 48.

appropriate measures to defend himself, which was described as "to say the least, unusual."[67]

Costs awards may also take into account reasonable behaviour and concessions on the part of the professional. For example, in *Ontario (College of Massage Therapists of Ontario) v. Tekien*, in ordering lower costs than were sought by the regulator, a tribunal noted that the member had cooperated to reach an agreement on some facts of the case and made admissions that shortened the hearing.[68]

Much of the work of costs regimes in regulating how professionals conduct their defence likely occurs behind the scenes, in encouraging reasonable behaviour, rather than in penalizing unreasonable behaviour. Conceding facts not in dispute via an Agreed Statement of Facts, making admissions that are well-supported by the regulator's disclosure, negotiating a Joint Book of Documents, or calling three character witnesses rather than twenty will shorten a hearing and may reduce a professional's potential costs liability. To the extent that a successful costs regime incentivizes such behaviour and is relatively predictable, it can play a significant role in promoting the timely and efficient resolution of professional discipline matters as it does in civil proceedings. This, in turn, can serve to enhance and preserve public confidence in the regulation of the profession.

6. *Costs awards encourage or deter conduct by the regulator*

[67] *The College of Physicians and Surgeons of Saskatchewan v. Leontowicz*, 2023 SKCA 110 at paras. 154, 161-163.
[68] *Ontario (College of Massage Therapists of Ontario) v. Tekien*, 2018 ONCMTO 38. Hardship was however the decisive factor.

Many courts have observed that the regime for costs payable by a disciplined professional can reinforce desirable conduct and deter undesirable conduct on the part of the regulator. Such conduct may relate both to the decision to take certain allegations forward for prosecution, and the conduct of the investigation and prosecution. Some statutory schemes permit costs against the regulator in relation to their conduct of proceedings that were unwarranted: for example, in *Law Society of Upper Canada v. DeMerchant*,[69] Ontario's legal regulator was ordered to pay $250,000 to each of two lawyers against whom discipline proceedings were dismissed, on the basis that the last 40 days of over 130 hearing days were unwarranted. However, costs against the regulator will not be an option if the proceeding led to a misconduct finding against the professional. In those cases, the regulator's conduct has been considered in deciding whether to order the professional to pay costs and, if so, how much.

It may be relevant to consider whether the prosecution was over-staffed, or over-expensively staffed, in relation to the complexity of the case. This was raised as a consideration by the professional in *Ontario (College of Massage Therapists of Ontario) v. Tekien*, discussed above, in which three prosecutors attended the hearing on behalf of the regulator. In *Reid v. College of Chiropractors*, the dissenting judge on an appeal regarding costs was concerned that, while the discipline panel had found it was an appropriate case for two counsel, it did not consider that the regulator had been represented on a relatively straight-forward case by two senior counsel in private practice with a combined hourly rate of between $1050 and $1125 per hour.[70]

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[69] *Law Society of Upper Canada v. DeMerchant*, 2014 ONLSTH 91.

[R] *Reid v. College of Chiropractors of Ontario*, 2016 ONSC 1041 at paras. 138-139.

Courts have expressed concern about regulators prosecuting allegations unwisely, including "overcharging", and have suggested that leaving a proportion of the costs of the proceeding to be borne by the regulator assists in deterring this approach. For example, in *Tan*, the Alberta Court of Appeal observed that the appellant had been "charged" with thirteen "offences" but found guilty of six, and that some of the allegations had overlapped significantly. The Court suggested that this practice could be discouraged by having "residual" costs be carried by the regulator.

Similarly, by bearing some of the costs of the proceeding the regulator may be encouraged to consider whether the professional's alleged misconduct was serious enough to justify the expense of disciplinary proceedings. As the Court in *Tan* observed, "leaving some of the burden of the costs of disciplinary proceedings on the professional regulator helps to ensure that discipline proceedings are commenced, investigated, and conducted in a proportional manner, with due regard to the expenses being incurred."[71]

Costs awards are generally adjusted to reflect mixed success in the case. As observed by the Nova Scotia Court of Appeal, "the authorities support requiring a disciplined member of a professional society to pay costs in proportion to the allocation of expenses between the charges which resulted in convictions and those involving acquittals."[72] Of course, the fact that an allegation was not proven at a discipline hearing may not reflect negatively at all on the conduct of the prosecution. For example, there is an important public interest in having a tribunal hear serious allegations that require a determination of credibility.[73] However, allocating costs according to success does

[71] *Dr. Ignacio Tan III v. Alberta Veterinary Medical Association*, 2022 ABCA 221, at paras. 43-44.
[72] *Hills v. Nova Scotia (Provincial Dental Board)*, 2009 NSCA 13, at para. 66.
[73] *Tribunal File No. 21-019*, 2022 ONPSDT 12, at paras. 31-32, 35, 44.

create a feedback loop for the prosecution regarding proportionality, as contemplated in *Tan*. For example, in *Ontario (College of Physicians and Surgeons of Ontario) v. Lo*, the tribunal awarded the College a single day of costs after a twenty-day hearing. This reflected both mixed success and concerns with the College's expert witness. The tribunal noted that many of the allegations against the physician were not proven on the evidence and an expert witness led by the Colelge was not of much assistance. The tribunal noted that "the careful selection of experts and care in the preparation of expert reports are critical aspects of a discipline hearing," and that the expert's deficiencies made for a lengthier than necessary hearing.[74]

Beyond encouraging the thoughtful and proportional exercise of the regulator's prosecutorial duties, calibration of a costs award can be a tool to respond to abuse of process, in particular in the form of delay. This was recently emphasized by the Supreme Court of Canada in *Law Society of Saskatchewan v. Abrametz*, in which, in considering the effect of delay in administrative proceedings, the Court identified impact on costs as a possible remedy. The Court observed that courts faced with applications for review of administrative delay have the discretion to set aside an order of costs against a party or to order costs against the administrative agency.[75] By the same token, a tribunal may take inordinate delay on the part of the regulator into account in moderating a costs award against a professional.

4. *The quantum must be fair and reasonable*

[74] *Ontario (College of Physicians and Surgeons of Ontario) v. Lo*, 2013 ONCPSD 4.
[75] *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, at paras. 99-100.

It is a truth universally acknowledged that costs imposed against a professional who has engaged in professional misconduct must be "fair and reasonable."[76] What this means and how to evaluate it is less universally agreed. It can be evaluated in light of the conduct of the defence and of the prosecution, as discussed above. However, in determining whether there is a disconnect between the sum sought and the circumstances, courts and tribunals may also have regard to the professional's financial circumstances and evidence of the actual expenses incurred. In addition, very large sums sought by regulators have been the subject of scrutiny and discomfort.

Individual Financial Circumstances and Hardship

The individual professional's financial circumstances may be such that a costs award, or the sum sought, would be a hardship. Courts and tribunals have frequently placed the onus on the professional to lead evidence of their own straitened financial circumstances to support a lower costs award. For example, in *Sazant v. The College of Physicians and Surgeon* [sic], the Ontario Divisional Court upheld revocation of a physician's certificate of registration for sexual misconduct, as well as a costs award of over $95,000 against him.[77] The Court noted that it was "of some concern" that the appellant might find it impossible to pay the sum awarded, as "we are aware that at his age of approximately 75 years the revocation of his licence will mean that, for all practical purposes, the appellant will be unable to earn any significant income." However, "unfortunately," there was nothing in the record to indicate his financial

[76] *Chuang v. Royal College of Dental Surgeons of Ontario*, 2006 CanLII 19433 (ON SCDC), at para. 19.
[77] *Sazant v. The College of Physicians and Surgeon*, 2011 ONSC 323; appeal dismissed on other grounds *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727; application for leave dismissed 2013 CanLII 22324 (SCC).

circumstances, and thus it was "impossible" to consider variation of the award. The Court noted that the College could consider it were the appellant to bring "a properly founded application" for leniency, such as for payment in installments."[78]

Where there was evidence of modest individual financial circumstances, it has been considered by tribunals to moderate what would otherwise be very large costs awards. This approach was applied by the Discipline Committee of the College of Massage Therapists of Ontario in *Ontario (College of Massage Therapists of Ontario) v. Tekien*, in which evidence of hardship was a definitive factor in reducing the costs payable by a massage therapist whose certificate of registration had been revoked. The College had sought $120,000, which was 2/3 of the cost of investigation and prosecution. The tribunal noted that the registrant had sole custody of her child, had been prohibited from practicing under an interim order, and would no longer be able to practice after her certificate of registration was revoked. The registrant also asked the panel to consider that she was currently working for minimum wage. Taking into account that costs are not meant to be punitive, the panel ordered a costs award of $15,000.[79]

Similarly, in *College of Early Childhood Educators v Fatima Sahara Sidibe*, a tribunal rejected the regulator's request for a large costs award, citing the financial circumstances of the registrant and its own awareness that "the financial resources available to most members of the profession [early childhood education] is modest."[80] The registrant had left a toddler unsupervised and failed to follow required procedures. The hearing had been contested, but the registrant's conduct of her defence had not

[78] *Sazant v. The College of Physicians and Surgeon*, 2011 ONSC 323, at para. 285.
[79] *Ontario (College of Massage Therapists of Ontario) v. Tekien*, 2018 ONCMTO 38.
[80] *College of Early Childhood Educators v. Fatima Sahara Sidibe*, 2021 ONCECE 14.

been unreasonable. The College sought a suspension, as well as $41,000 in costs, payable over five years. The defence submitted that nominal costs would be appropriate, based on affidavit evidence of the registrant being a single parent of three, who had been unable to work due to the pandemic-related need to support her children's education at home. The panel felt that it was appropriate to take into account not only the registrant's financial circumstances, but also whether a significant cost award would be a barrier to her rehabilitation and return to the profession after her suspension. In the result, the tribunal reduced the sum from that sought by the regulator by almost half and gave the registrant an extra year to pay.

Likewise, in *Law Society of Ontario v. Adams*, on the basis of the evidence before it, a tribunal concluded that a lawyer's ability to pay costs was significantly impaired.[81] As a result, rather than accede to the regulator's request for $80,000 in costs, the tribunal ordered the lawyer to pay costs of $20,000 over four years. The lawyer had filed extensive affidavit evidence, a sworn financial statement, and an affidavit from her accountant, all speaking to her very compromised financial position. The tribunal balanced this against the fact that the lawyer should reasonably have expected to pay costs in the event the regulator prevailed. Given the financial evidence on her ability to pay, the panel concluded that a costs award of $80,000 could only be characterized on the evidence as a further penalty. However, it found that she had the ability to pay a modest costs award, which ought not to be borne by the wider profession.[82]

Evidence of Expenses Incurred

[81] *Law Society of Ontario v. Adams*, 2018 ONLSTH 91.
[82] *Law Society of Ontario v. Adams*, 2018 ONLSTH 91, at paras. 32-33.

Considerable evidence is often filed and scrutinized regarding the actual expenses incurred by the regulator in support of the sum sought. In *The Law of Professional Regulation*, Bryan Salte asserts that "the regulatory body should provide full supporting material for the amount of costs claimed."[83] Certainly, the principle of indemnification is based on reimbursement for actual expenses, and the tribunal should satisfy itself that the expenses are reasonable. However, the requirement for evidence may result in significant amassing and parsing of evidence of the regulator's expenses, and therefore more time and expense. In *Berge v. College of Audiologists and Speech-Language Pathologists of Ontario*, the reviewing court upheld the costs award noting approvingly that there was "ample evidence to support" it, including affidavit evidence from the College's Director of Finance, attaching a detailed worksheet, and two Bills of Costs, one from the prosecution counsel and one from the independent legal counsel.[84] In *Re Moodley*, the discipline tribunal of the College of Physicians and Surgeons of Nova Scotia dealt at length with the quantum of costs requested by the regulator from a physician who had engaged in sexual misconduct, much of it spent reviewing the expenses documented by the College, which sought an order of $397,978.35, representing 64% of expenses incurred.[85] The expenses were broken down into categories including Investigation Committee honoraria and expenses, transcription services, witness expenses, expert payments, catering, security, Hearing Committee honoraria and expenses, and legal fees.[86] The panel considered and rejected statutory interpretation-based arguments by the physician that honoraria to Investigation and

[83] Bryan Salte, *The Law of Professional Regulation* (Markham: LexisNexis, 2015), at p. 262.
[84] *Berge v. College of Audiologists and Speech-Language Pathologists of Ontario*, 2016 ONSC 7034, at para. 145.
[85] *Re Moodley*, 2021 CanLII 43606 (NS CPS).
[86] *Re Moodley*, 2021 CanLII 43606 (NS CPS), at pp. 23-24.

Hearing Committee members should be excluded,[87] and that the Chair should not have been entitled to a different rate.[88] Legal costs for independent counsel for the complainants were disputed as well.[89]

Relying on in-house prosecutors is presumably more cost-efficient than retaining outside counsel, but documenting and justifying in-house expenses may sometimes be a challenge.. In Saskatchewan, the legal fees component notionally charged by regulators' in-house counsel has been the subject of appeals from costs awards in Law Society proceedings, and the Court of Appeal there has seen fit to exercise its broad discretion to order assessment of such costs by the local Registrar.[90]

It is not surprising that close attention would be paid to the sums that are calculated to be expenses. However, some regulators have taken a different approach, using rule-making powers to create daily tariffs. At these regulators, rules of procedure state that the costs sought per diem are equal to or less than the tariff rate, the regulator need not lead evidence of actual expenses.[91] While the tariff rate may represent a fraction of the actual cost to the regulator of investigation and prosecution, additional costs are not incurred in proving and disputing expenses.

Scrutiny of high costs awards

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[87] *Re Moodley*, 2021 CanLII 43606 (NS CPS), at pp. 29-32.
[88] *Re Moodley*, 2021 CanLII 43606 (NS CPS), at pp. 33-34.
[89] *Re Moodley*, 2021 CanLII 43606 (NS CPS), at pp. 35-37.
[90] *Anthony Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33 at paras. 104-105; *Merchant v. Law Society of Saskatchewan*, 2014 SKCA 56 at para. 157; *MacKay v. Law Society of Saskatchewan*, 2021 SKCA 99, at paras. 120-121.
[91] See for example Ontario Physicians and Surgeons Discipline Tribunal, Rules of Procedure, Rule 17.3.1 and Tariff A; College of Massage Therapists of Ontario Discipline Committee, Rules, Rule 10.02(2) and Tariff A; Ontario College of Teachers Rules of Procedure of the Discipline Committee and of the Fitness to Practise Committee, Rule 16.05(3) and Tariff A.

Given all the components that they can encompass and the price of retaining external prosecution counsel, it is not surprising that costs sought by regulators at the end of a successful prosecution may be high. There are significant sums that have been awarded by tribunals and upheld on appeal with little difficulty. However, there have also been signs over the years of decision-makers' concern that in some circumstances a very high award may not be fair or reasonable.

Even when decision-makers' discomfort with very high costs awards has been apparent, it has not necessarily resulted in their being avoided at first instance or overturned on appeal. For example, In *Robinson v. College of Early Childhood Educators*, the Ontario Divisional Court upheld a costs order of $257,353.76 after an eighteen-day hearing in which an early childhood educator was found to have engaged in sexual abuse. However, the appellant had not challenged the quantum of costs, but only the jurisdiction to order them where the professional's conduct of the hearing was not frivolous, vexatious, or in bad faith. The Court confirmed that the tribunal had discretion to award costs even if the professional's conduct of the hearing was not vexatious. However, it stated that "there is a serious risk that this will have a chilling effect on members whose livelihood and reputations are at stake."[92] These concerns, the Court said, should be brought before the tribunal or the legislators.[93] The costs order represented over five times what the appellant earned in his final year of employment.[94]

In *Reid v. College of Chiropractors of Ontario*, the majority of the Ontario Divisional Court upheld a costs award of $166,194.50 (and leave to appeal was subsequently

[92] *Robinson v. College of Early Childhood Educators*, 2018 ONSC 6150, at para. 52.
[93] *Robinson v. College of Early Childhood Educators*, 2018 ONSC 6150, at para. 53.
[94] *Robinson v. College of Early Childhood Educators*, 2018 ONSC 6150, at para. 6.

dismissed). However, there was a strong dissent on the issue of costs by Wilson J., who found them excessive for a straight-forward five and a half day hearing, and indeed "a barrier to access to justice," punitive, and abusive.[95]

In *K.C. v. College of Physical Therapists of Alberta* in 1999, the Alberta Court of Appeal stated that "when the magnitude of a costs award delivers a crushing financial blow, it deserves careful scrutiny."[96] This statement has been taken up repeatedly in subsequent Alberta and Saskatchewan decisions,[97] reflecting a concern for the potential impact of very high costs awards in discipline proceedings. In 2018, the Alberta Court of Appeal in *Zuk v. Alberta Dental Association* noted that a $175,000 costs award, while large, was within a reasonable range as it reflected an unusually complex discipline process extended to some extent by the professional, and there was no evidence it would be a "crushing" burden on him: he entered no evidence of his financial situation, and nothing indicated that the prospect of a large costs award deterred him from taking steps in his own defence. However, the Court warned that "a similar costs order imposed on someone else could well have both effects," and that costs orders must be individualized.[98] In 2021, in *Alsaadi v. Alberta College of Pharmacy*, the same Court observed with concern that "while the law is clear that costs should not be imposed as a form of punishment, practically speaking the financial hardship arising from the award of costs can be much graver than the punitive aspects of the sanction," and that "costs

[95] *Reid v. College of Chiropractors of Ontario*, 2016 ONSC 1041, at paras. 129-132.
[96] *K.C. v. College of Physical Therapists of Alberta*, 1999 ABCA 253, at para. 94.
[97] *Alsaadi v. Alberta College of Pharmacy*, 2021 ABCA 313; *The College of Physicians and Surgeons of Saskatchewan v. Leontowicz*, 2023 SKCA 110; *Abrametz v. The Law Society of Saskatchewan*, 2018 SKCA 37; *Dr. Ignacio Tan III v. Alberta Veterinary Medical Association*, 2022 ABCA 221.
[98] *Zuk v. Alberta Dental Association,* 2018 ABCA 270, at paras. 192-194.

awards over $100,000 have become regular."[99] The Court expressed concern that "a reasonable opportunity to defend oneself can become hollow if the spectre of paying exorbitant costs creates a disincentive to do so."[100] While payment plans might make sense, the Court noted, the total amount should still be reviewed to see if it was unreasonably high (in the case in question, payment of $120,000 over ten years had been ordered).[101] Given its misgivings about the increasingly dizzying heights of costs awards, the Court stated that a hearing tribunal should "first consider whether a costs award is warranted at all," and then if so, "how to calculate the amount," so as to ensure that the final amount is "reasonable."[102] This was not inconsistent with courts' prior approaches to costs awards in professional discipline decisions, but it again sounded a note of caution. The following year in the *Jinnah* decision, however, that caution would drive the Court to re-vision costs in professional discipline proceedings, as discussed in further detail below.

Jinnah: Tensions Resolved?

The Alberta Court of Appeal's *Jinnah* decision appeared to up-end the conventional approach to costs of professional discipline proceedings, at least in the context of the Alberta *Health Professions Act*, by positing that costs awards against professionals who have engaged in misconduct should be the exception rather than the norm. As such, it was a focus for the tensions and sometimes unease discussed above. The solution found by the Court in *Jinnah* was arguably influenced by the facts of the case. The

[99] *Alsaadi v. Alberta College of Pharmacy*, 2021 ABCA 313, at para. 114.
[100] *Alsaadi v. Alberta College of Pharmacy*, 2021 ABCA 313, at para. 115.
[101] *Alsaadi v. Alberta College of Pharmacy*, 2021 ABCA 313, at para. 122.
[102] *Alsaadi v. Alberta College of Pharmacy*, 2021 ABCA 313, at para. 120.

Court set a new course intended to re-set the balance, based on the problems it could discern from how Dr. Jinnah's case had unfolded.

The *Jinnah* decision was closely bound up in how the merits of the allegations against Dr. Jinnah, a dentist, had played out. Most of the *Jinnah* decision dealt with the appeal on the merits of the allegations against Dr. Jinnah. Only at page forty of fifty-seven did the Court turn to the issue of costs. By that point in the decision, the Court had identified many concerns, and it tailored its new approach to costs to these concerns.

The allegations against Dr. Jinnah concerned her billing and collection practices, in respect of a single patient. The patient had signed an agreement to pay interest on outstanding accounts. The patient subsequently received a statement for a sum describe as a "balance forward" without further details and had difficulty receiving clarity on what the amount represented from Dr. Jinnah's office.[103] Frustrated, the patient wrote to the regulator asking for help resolving the problem. The Court of Appeal observed that "objectively assessed, this letter was not a complaint. It was a request for assistance."[104] Before Dr. Jinnah was notified of the patient's letter (which took almost a month), she sent the patient a final notice, failing which the account would be sent to collections which, the notice stated, could damage the patient's credit rating.[105] The patient phoned the office and finally received the detailed account information she was seeking and promised to pay. However, shortly afterwards, Dr. Jinnah, having received notice from the College of the patient's letter, sent an "ill-advised, to say the least" email to the patient, saying among other things that the patient would bear any costs retaining

[103] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at paras. 22-28.
[104] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 29.
[105] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 32.

a lawyer to deal with false accusations or "defamation of character."[106] The patient replied and clarified that she had already spoken to the office, and she paid her account.[107]

After these initiating events, the Court of Appeal formed many concerns about the course of the case on the merits, including:

- The Notice of Hearing was issued more than 2.5 years after the patient first contacted the regulator, a delay the Court described as "troubling," given that the important facts were not in dispute and the case was not complicated. The Court observed that, "If a dentist needs to alter his or her business practices, this fact should be brought to the dentist's attention promptly, not years later." It further mused in a footnote, "Is it not an abuse of process for the College to wait more than 2.5 years after the patient first contacted the College to issue a notice of hearing and then convene a hearing more than two years after the issuance of a notice of hearing?"[108]
- It was unclear to the Court from the Notice of Hearing what specific acts the College alleged to be unprofessional conduct on Dr. Jinnah's part.[109]
- The hearing tribunal noted that the regulator should provide more guidance to its members on how to collect unpaid accounts. Such guidance remained limited at the time of the appeal. The Guidance "would likely go a long way to prevent similar cases from occurring in the future," while attention to improved

[106] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at paras. 34-37.
[107] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at paras. 38-40.
[108] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 41 and footnote 52 thereto.
[109] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 42.

communication between professionals and patients would decrease the need for investigations and hearings arising from "routine issues."[110]

- While the hearing tribunal held that Dr. Jinnah engaged in unprofessional conduct in five ways (in a finding that the Court noted was "almost five years after the patient first contacted the College asking for its assistance so she could determine what she owed Dr. Jinnah"),[111] all but one of these findings (that Dr. Jinnah's email to the patient after she learned of the patient's letter to the College was unprofessional) were overturned by the Court.[112] The seriousness of the proven unprofessional conduct was "at the low end of the scale."[113]
- The internal appeal panel had already reduced the penalty ordered to a reprimand and ethics coursework, overturning a short suspension. The Court found there was no basis to complain about the reprimand but stated that there was no basis to believe Dr. Jinnah would benefit from a "philosophy course in ethics."[114]

These concerns drove the Court of Appeal's approach to Dr. Jinnah's appeal of the costs award. It was clear that the Court viewed a much-delayed discipline hearing for a single physician as a poor substitute for broader guidance to members of the profession. It was concerned about the disconnect between the costs award against Dr. Jinnah and her relatively low-level misconduct, which was in the regulator's hands to address in a more timely and effective way.

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[110] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at paras. 161-163.
[111] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at paras. 43-51.
[112] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at paras. 78-122.
[113] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 122.
[114] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at paras. 19-20.

The internal appeal panel had reduced the costs award from $50,000 to $37,500. However, the Court found this decision unreasonable. While it remitted the matter of costs to the appeal panel for determination, in doing so it commented that based on the record before the Court there was nothing in the circumstances that justified departing from the (newly created) presumption that no costs be awarded against Dr. Jinnah.[115]

In its analysis, the Court observed that the statutory power to award costs did not mean that they should be awarded in every case. Therefore, the Court sought to define a "principled and predictable" approach.[116] Departing from the responsibility to provide indemnification of the profession as a whole, the Court in *Jinnah* found that professions should bear most, if not all of the inevitable costs associated with the privilege of self-regulation:

> It is the profession as a whole, not just the disciplined member, that benefits from the privilege of self-regulation. A regulator's decision finding a member to have committed unprofessional conduct communicates an unequivocal message to the public that the regulator protects the public's interest. This, in turn, increases the public's confidence in the profession. This positive evaluation of the profession probably increases the public's utilization rate of [professional] services. Arguably, the professional found to have committed misconduct does not receive a benefit from this determination.[117]

Therefore, the Court observed, imposing all or a significant percentage of the "costs of self-regulation" on the profession as a whole is fair "because all members benefit from self-regulation."[118]Furthermore, members benefit from public review of

[115] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 156.
[116] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at paras. 128, 131.
[117] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 134.
[118] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 136.

members' conduct through a discipline process, as it draws their attention to professional expectations.[119]

Certainly, the disciplined professional does not directly benefit from being disciplined: it is the public and the profession as a whole that benefit from maintenance of discipline. The professional, however, has benefitted from their membership in the profession to that point in time, which the Court in *Jinnah* did not fully acknowledge.

Having created a general rule under the *Alberta Health Professions Act* that costs of an investigation and hearing, or a significant portion of them, will be borne by the profession as a whole, the Court stated that departure from the rule is justified only in the face of a "compelling reason," which will exist in four scenarios[120]:

1. "Serious" unprofessional conduct, which the professional "must have known" to be completely unacceptable.[121]
2. A serial offender who engages in unprofessional conduct on two or more occasions, who "may be ordered to pay some costs," or a "substantial portion" or all of the costs, should both of the occasions have involved serious breaches.[122]
3. Failure to cooperate with the regulator's investigation, forcing the regulator to spend more resources than necessary to "ascertain the facts," which may result

[119] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 137.
[120] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at paras. 138-140.
[121] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 141.
[122] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 142.

in an order to pay costs "roughly equal to the unnecessary expenditures attributable to [the professional's] intransigence."[123]

4. "Hearing misconduct," namely "behaviour that unnecessarily prolongs the hearing or otherwise results in increased costs of prosecution that are not justifiable," which may result in an order to pay costs that indemnify the regulator for unnecessary hearing expenses.[124]

The Court's explanation for the merits of the presumption focused on the impact on improving the regulator's conduct, its eye clearly trained on the deficiencies it had noted in the conduct of Dr. Jinnah's case. It noted that the presumption would force the regulator to "carefully evaluate the investigative and prosecutorial options that it has in a given case and select the course that makes the most sense," which may even involve an informal reminder rather than discipline.[125] In addition, the Court was concerned with the unfairness of imposing costs in the face of "selective enforcement," by which conduct may be widespread, but only some professionals are prosecuted for it.[126]

The Court's reasoning was in part rooted in the statutory scheme before it. The Court was concerned that the *Health Professions Act*, unlike a number of professional discipline statutes, did not allow costs to be awarded under any circumstances to a professional who successfully defended a complaint.[127] Coupled with its concern about the regulator's conduct of Dr. Jinnah's case, this led the Court to focus on the work that

[123] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 143.
[124] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 144.
[125] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 147.
[126] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 150.
[127] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 149.

the costs regime could do within these limits to affect the regulator's conduct, more than it was focused on affecting the conduct of the disciplined professional.

The Court also cited the limited impact it concluded the presumption would have on dentists' membership fees, since the dental regulator's revenues significantly exceeded expenditures. This was specific to the dental regulator, of course, and it remains to be seen whether it is the case in all regulated professions. Finding a limited financial impact, the Court noted that the regulator issued only eleven decisions finding unprofessional conduct in a given year. This sat somewhat uneasily with its concern, based on Dr. Jinnah's case, that the regulator was unnecessarily prosecuting cases best resolved through education. The Court both urged the regulator to seek more timely resolution of complaints and observed that this might already be happening to some extent given the low number of hearings compared to the number of resolved complaints.

On the impact of the new regime on disciplined professionals, the Court stated that it would improve the position of professionals facing allegations that are not serious, and that it would ensure professionals are not precluded from raising a legitimate defence.[128] The Court stated explicitly that "most" dentists found to have engaged in unprofessional conduct "will not be subject to a costs order,"[129] thereby presuming that in most cases misconduct is not serious, nor is there failure to cooperate, hearing misconduct, or serial offence. It is not clear how the Court reached this conclusion, other than through its impression of Dr. Jinnah's particular case.

[128] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 148.
[129] *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, at para. 149.

The mismatch that courts and tribunals have sometimes perceived between purportedly non-punitive but heavy costs consequences and an individual professional's culpability had become a primary concern in *Jinnah*, leading the Court to significantly re-frame the test for imposition of costs.

The impact of the *Jinnah* decision has been limited in the short time since it was issued in 2022. An application for leave to appeal to the Supreme Court of Canada was dismissed in March 2023.[130] It has guided costs awards under the *Health Professions Act* in Alberta, including in a matter where costs were contested before the physiotherapy regulator.[131] In that case, the professional's registration was revoked following a sexual abuse finding. While the regulator argued that the seriousness of the finding offered a compelling reason to depart from the general presumption set in *Jinnah*, the hearing tribunal ordered that the professional pay 10% of the costs of the investigation and hearing, citing that there "are varying levels of severity" with sexual abuse, and that the tribunal would not have ordered the professional's practice permit to be cancelled had it not recently been mandatory under the legislation.[132] It may be that *Jinnah*'s implicit message that costs must be moderated because regulators are too harsh could lead tribunals, at least in the health professions, to verbalize some surprising messages about whether misconduct is 'serious' enough to warrant costs. An appeal panel at the legal regulator in Alberta found that *Jinnah* does not apply to them,[133] while the tribunal governing real estate agents has applied *Jinnah*, finding

[130] *Alberta Dental Association and College v. Nimet Jinnah*, 2023 CanLII 24527 (SCC).
[131] *Physiotherapy Alberta – College + Association v. Sherman*, 2023 ABPACA 2.
[132] *Physiotherapy Alberta – College + Association v. Sherman*, 2023 ABPACA 2 at para. 38.
[133] *Law Society of Alberta v. Beaver*, 2023 ABLS 4, at para. 92.

compelling reasons to depart from the presumption each time.[134] *Jinnah* has not yet been cited in courts in other jurisdictions.

A Way Forward

The *Jinnah* decision sought to address broad concerns with the impact and role of costs in professional discipline proceedings, but as viewed through and refracted by the facts of Dr. Jinnah's own case. Because of this, the main features of the problem that the Court was trying to fix included a combination of regulatory sloth and throwing the book at what the Court appeared to view as a relatively hapless single defendant, for conduct better addressed less litigiously. However, this is not the only problem that costs regimes are called on to address. As set out above, costs are called on to do a great deal of work to support effective professional regulation. The presumption set in *Jinnah* risks unbalancing the load that costs regimes must carry, as seen in its subsequent citation by the physiotherapy regulator in favour of a reduced costs award in a case of "less serious" sexual abuse. At the same time, the factors that the Court of Appeal in *Jinnah* focused on were undoubtedly relevant in considering the justness of the costs award in Dr. Jinnah's own case, and unaccountably large costs awards can indeed emperil the right to defend oneself.

Jinnah rightly drew attention to the importance of predictability. It is difficult for costs awards to assist in encouraging reasonable conduct by both parties to a proceeding if neither party reliably knows the potential impact of their behaviour on costs. The right balance between predictability and flexibility can be difficult to achieve. The Court in

[134] *Singh (Re)*, 2023 ABRECA 10; *Chaudhri (Re)*, 2023 ABRECA 1; *Kelley (Re)*, 2023 ABRECA 12.

Jinnah observed that its propositions were relatively easy to follow, that predictability has its own value in regulating actors' behaviour, and that it offers cost savings:

> A norm that simplifies and clarifies is usually beneficial in any regulated process. It substantially increases the likelihood that parties affected by it can accurately predict the adjudicator's response. This relieves the parties of the need to contest the issues before the adjudicator. Time and money are saved.[135]

I suggest that in proposing that the norm be no costs award against the disciplined professional at all, the Court in *Jinnah* failed to acknowledge both the principled and practical basis for an award of costs to be the general rule. First, the Court focused narrowly on the fact that the disciplined professional does not 'benefit' from discipline and that this benefit accrues to the profession as a whole. When the individual became a member of the profession, they gained the benefit of the goodwill and reputation of a regulated profession (and sometimes of access to the means they later used to engage in misconduct). It is on this basis that it is right that disciplined professionals contribute to the costs incurred by members of their profession in the course of disciplining them.

Although the Court in *Jinnah* recognized that unreasonable hearing behaviour by a professional may be a compelling reason to make a costs award against them, it did not recognize that the mere fact that hearing days carry a cost to both participants can incentivize good behaviour and more timely and efficient completion of hearings. This in turn enhances the profession's protection of the public interest.

At the same time, it is true that very large costs awards are an access to justice concern that has long discomfited decision-makers, fighting over the details of expenses costs more time and money, and a predictably disproportionate 'crushing financial blow' would

[135] *Jinnah v. Alberta Dental Association*, 2022 ABCA 336, at para. 152.

be unjust. For this reason, more regulators should adopt a tariff rate approach, as discussed above, by which a tariff rate is set and publicly available to the parties, and costs at or below the tariff rate are sought by the regulator as a matter of course following a finding of misconduct. The tariff rate may be calculated based on the average costs of a day of hearing, and regularly re-visited. This will remove the necessity to prove expenses in most individual cases, saving time and money, although regulators should be prepared to accept that only a small proportion of the real cost may be recovered. As the Court in *Jinnah* observed, there is a cost to self-regulation. In considering the percentage of the average daily hearing cost that a tariff rate should reflect, the regulator should consider the proportional cost that will incentivize reasonable behaviour but not prevent a professional from defending themselves, based on what is known of the general financial circumstances of the profession in question, be they prosperous or modest. Given the restitutive purpose of costs it would be wise of regulators to ensure that evidence is accessible to support the calculations that went into setting their tariff. The predictability of costs based on a tariff rate will enable parties to take them reliably into account in calibrating their behaviour.

Where no tariff rate is available, the tribunal's discretion to order costs should still "be exercised in a broadly consistent way."[136] As observed in *Law Society of Ontario v. Perrelli*, costs awards vary so much because of the lack of "well-established anchors or ranges against which to consider the amount of costs in an individual case." When the starting point is the bill of costs from the prosecution, the sum may vary considerably for similar cases, depending for example on whether multiple counsel, in-house counsel, or

[136] *Law Society of Ontario v. Perrelli*, 2018 ONLSTH 80, at para. 35.

private counsel were involved.[137] The parties should be asked to look at how the litigation proceeded before the tribunal (level of complexity, number of hearing days, conduct of the parties), and compare it to other similar cases, in order to identify the range of like cases as a starting point, so that similar cases lead to similar awards. Even if a professional has not attended proceedings or is not opposing the costs sought because of unsophistication, the prosecution should situate the sum within a range of like cases so the tribunal can satisfy itself it is suitable to the particular case and ensure that appropriate ranges are maintained to anchor future cases. This approach will better ensure that the reasonable expectations of the parties are met, and that costs awards reflect the circumstances of the proceedings and proportionality.[138] It will also enhance predictability, enabling both parties to take costs predictions into account relatively reliably when making decisions about the proceedings.

At the same time, costs awards remain discretionary, and tribunals must be prepared to depart from the tariff rate or range demonstrated by similar cases. Case law provides reasons to adjust costs to individual circumstances, as discussed above: documented financial hardship, mixed success, unreasonable hearing behaviour. Tribunals may find it assists both decision-makers and the parties to set out the circumstances in which they will be prepared to adjust costs to circumstances in a non-exhaustive, transparent guideline.This will guard against arbitrariness, and again provide the benefits of predictability, although decision-makers may always depart from guidelines with justification.

[137] *Law Society of Ontario v. Perrelli*, 2018 ONLSTH 80, at paras. 36-37.
[138] Law Society of Ontario v. Perrelli, 2018 ONLSTH 80, at para. 44.

Conclusion

Costs awards in professional discipline proceedings reflect the *sui generis* nature of such proceedings and serve several important purposes. As costs awards have grown, so too has periodic concern regarding the potential for disproportionality. The recent *Jinnah* decision by the Alberta Court of Appeal was an attempt to re-envision the professional discipline costs regime. While the Court failed to give sufficient weight to some important considerations, it appropriately highlighted the value of predictability. A predictable, fair costs regime that reflects the underpinnings of self-regulation and incentivizes good behaviour by both parties can enhance the effectiveness of professional discipline. However, the general rule should remain in favour of costs being payable by the disciplined professional. Predictability and fairness can be enhanced by widespread adoption of a tariff rate approach, with room to depart from a tariff in appropriate cases.

Law Society of Ontario | Barreau de l'Ontario

TAB 7

Eight-Minute Administrative Law and Practice 2024

Moving Forward with UNDRIP: Implementation in Administrative Law (PowerPoint)

Nick Leeson, Senior Counsel
Woodward & Company Lawyers LLP

March 5, 2024

cpd

WOODWARD & COMPANY
LAWYERS LLP

Moving Forward with UNDRIP: Implementation in Administrative Law

Nick Leeson, Legal Counsel – March 5, 2024

Brief Introduction on UNDRIP

- Adopted by the General Assembly of the United Nations on September 13, 2007
- Achieved through sustained advocacy from Indigenous Peoples across the globe
- UNDRIP sets a *minimum* standard for protecting and promoting the rights of Indigenous Peoples under international law.

Importance of UNDRIP

Canadian Context

- UNDRIP has had an increasingly significant influence on policy and legislation in Canada.
- Canada has already undertaken the ‘domestication’ of UNDRIP – i.e., commitments to bring domestic laws into alignment or compliance with UNDRIP’s minimum standards for the rights of Indigenous Peoples.

Levels of Implementation

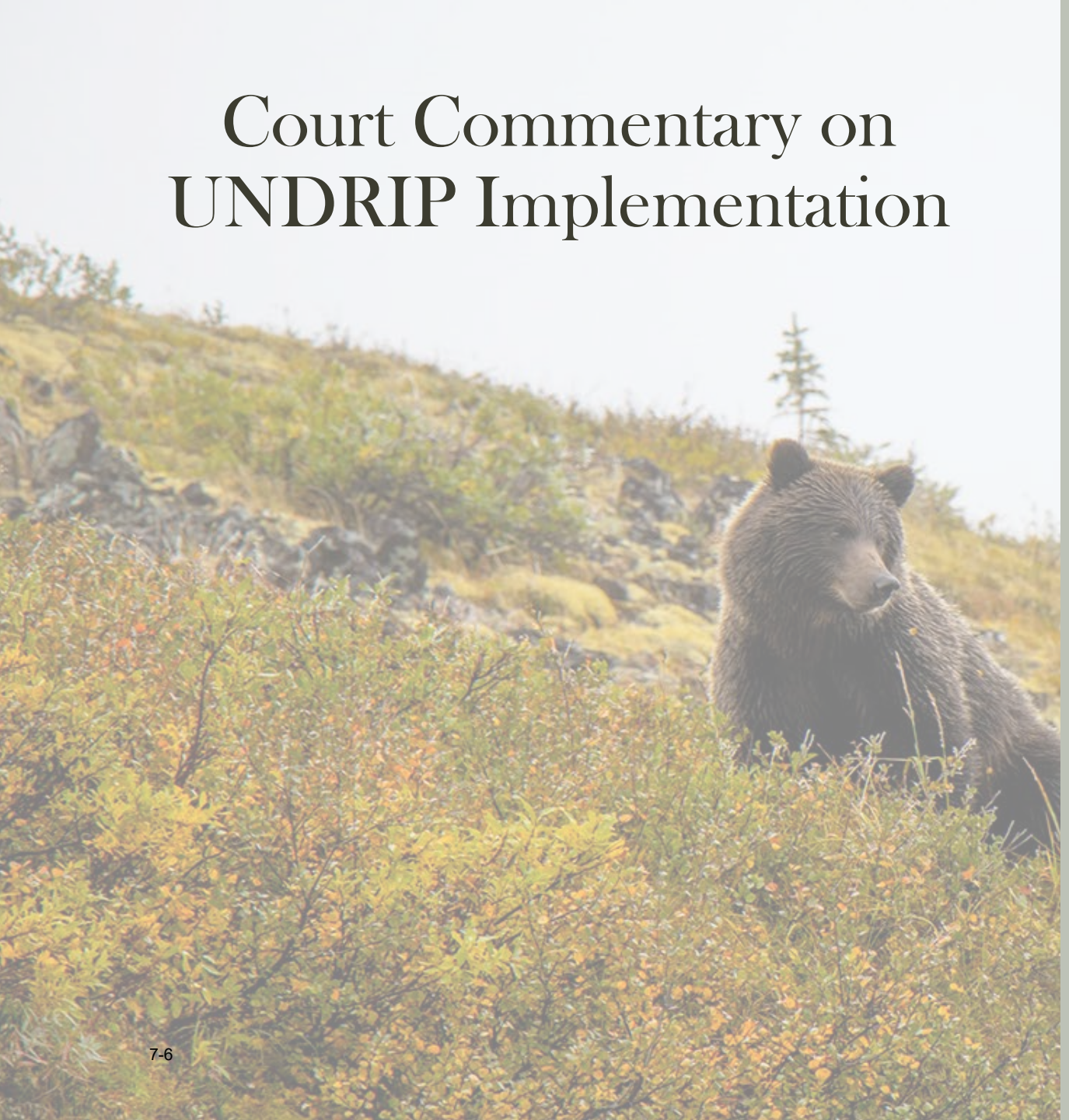
International – Federal – Provincial – Territorial – Municipal – Indigenous Governments

2007	2016 and 2019	2021	2022	2023
The United Nations General Assembly adopts UNDRIP	Canada adopts the *United Nations Declaration Act (UNDA)* British Columbia adopts *Declaration on the Rights of Indigenous Peoples Act (DRIPA)*	Vancouver UNDRIP Task Force	Saskatoon City Council Adoption	Northwest Territories adopts the *UNDRIP-Implementation Act*

Approach to Implementation

- Different levels of governments have engaged in gradual and partnered processes to align their laws and policies with UNDRIP's minimum standards for recognizing and protecting Indigenous rights.
- Co-development process for creating action plans for prioritizing laws for alignment with UNDRIP.
- Courts have commented on how Canada's domestic implementation of UNDRIP has a legal effect.

Court Commentary on UNDRIP Implementation



Gitxaala v British Columbia (Chief Gold Commissioner), 2023 BCSC 1680.

- The Court found that every provincial statute and regulation must be construed in a manner that upholds Aboriginal rights enshrined in section 35 and as set out in UNDRIP.

R v Montour, 2023 QCCS 4154.

- The Court found that UNDRIP is an interpretive tool of Canadian law and stated that Canada gave domestic legal standing to the UNDRIP by adopting the UNDRIP Act. As a result, Canadian law, including section 35(1), must conform to the standards of UNDRIP.

Reference re An Act respecting First Nations, Inuit and Métis children, youth and families, 2024 SCC 5.

- The Supreme Court of Canada stated that the purpose of the Act was to implement UNDRIP into Canadian law and to align the government's policies on child welfare with the standards of UNDRIP.

Challenges in Implementation

- Implementing UNDRIP will take *significant* resources.
- Danger of “Mission Accomplished” mentality
- Need for Sustained Indigenous Advocacy – Political Will for Meaningful Support

Opportunities for Collaboration

- Potential for cross-jurisdictional cooperation
- Potential for Indigenous-led initiatives

Conclusion
Moving Forward

What is needed to continue the momentum and maintain political will in support of UNDRIP and Reconciliation?

- The success of UNDRIP implementation hinges on sustained advocacy and commitment to meaningfully carry out the UNDRIP implementation process.
- Absent that process, there is a very real risk of continued reliance on costly litigation to be the primary method by which the implementation process unfolds.

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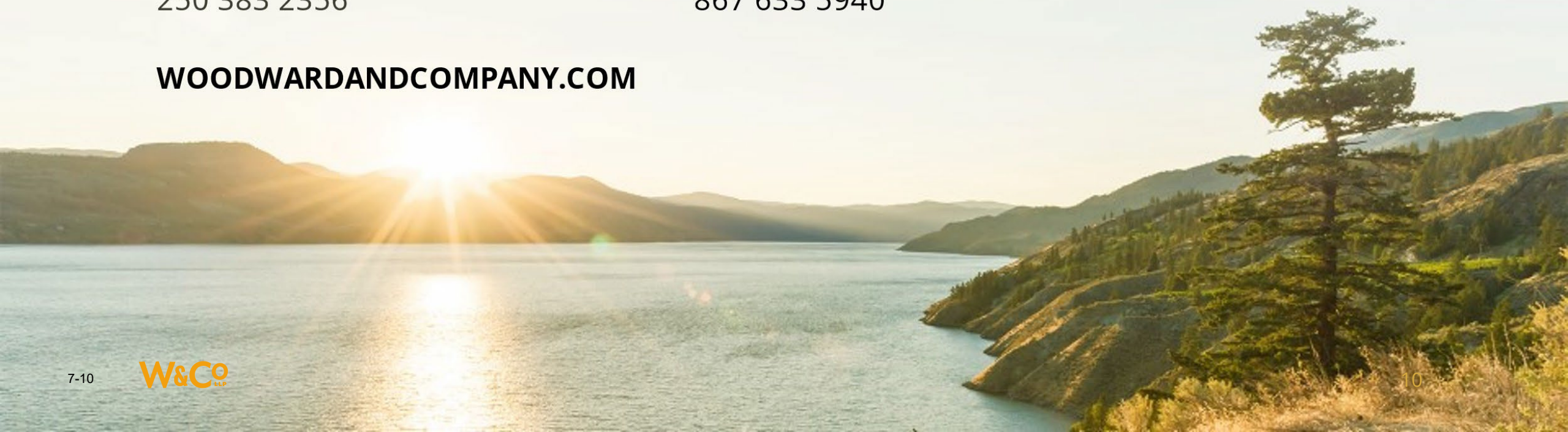


Law Society of Ontario | Barreau de l'Ontario

TAB 8

Eight-Minute Administrative Law and Practice 2024

Frivolous and Vexatious Claims - How to Deal with Challenging Litigants (PowerPoint)

Malcolm Mercer, Chair
Law Society Tribunal

March 5, 2024

cpd

Frivolous and Vexatious Claims - How to Deal with Challenging Litigants

March 5, 2024

Malcolm Mercer

Judicial Authority

Judicial Proceedings including judicial review

Rules of Civil Procedure

2.1.01 (1) The court may, on its own initiative, stay or dismiss a proceeding if the proceeding appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court.

- Worth considering as procedural guidance
- May assist in ensuring procedural fairness

Judicial Authority

(2) The court may make a determination under subrule (1) in a summary manner, subject to the procedures set out in this rule.

(3) Unless the court orders otherwise, an order under subrule (1) shall be made on the basis of written submissions, if any, in accordance with the following procedures:

1. The court shall direct the registrar to give notice (Form 2.1A) to the plaintiff or applicant, as the case may be, that the court is considering making the order.

2. The plaintiff or applicant may, within 15 days after receiving the notice, file with the court a written submission, no more than 10 pages in length, responding to the notice.

3. If the plaintiff or applicant does not file a written submission that complies with paragraph 2, the court may make the order without any further notice to the plaintiff or applicant or to any other party.

4. If the plaintiff or applicant files a written submission that complies with paragraph 2, the court may direct the registrar to give a copy of the submission to any other party.

5. A party who receives a copy of the plaintiff's or applicant's submission may, within 10 days after receiving the copy, file with the court a written submission, no more than 10 pages in length, responding to the plaintiff's or applicant's submission, and shall give a copy of the responding submission to the plaintiff or applicant and, on the request of any other party, to that party.

Rule 2.1.01 - Appellate cases

- *Scaduto v. The Law Society of Upper Canada*, 2015 ONCA 733

  Under this line of authority, the court has recognized that the rule should be interpreted and applied robustly so that a motion judge can effectively exercise his or her gatekeeping function to weed out litigation that is clearly frivolous, vexatious, or an abuse of process. However, the use of the rule should be limited to the clearest of cases where the abusive nature of the proceeding is apparent on the face of the pleading and there is a basis in the pleadings to support the resort to the attenuated process.

- *Khan v. Krylov & Company LLP*, 2017 ONCA 625

  Justice Myers provided an important caution, at para. 18 of Gao (No. 2):

  > It should be borne in mind however, that even a vexatious litigant can have a legitimate complaint. It is not uncommon for there to be a real issue at the heart of a vexatious litigant's case . . . Care should be taken to allow generously for drafting deficiencies and recognizing that there may be a core complaint which is quite properly recognized as legitimate even if the proceeding itself is frivolously brought or carried out and ought to be dismissed.

- *Van Sluytman v. Muskoka (District Municipality)*, 2018 ONCA 32

Judicial review context

- *Awada v. Allstate*, 2021 ONSC 8108

  [5] An appeal will be dismissed as frivolous, vexatious and/or an abuse of process pursuant to R.2.1.01 only in the "clearest of cases".

  [6] An appeal is considered frivolous, vexatious and/or an abuse of process if (among other things) it cannot possibly succeed or if it cannot possibly be of any benefit to the appellant.

  [7] [A]bsent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until effective remedies are exhausted" *Canada (Border Services Agency)* v. *C.B. Powell Limited*, 2010 FCA 61, per Stratas J.A.

  [15] The appeal is premature. There are no "exceptional circumstances". The appeal is dismissed pursuant to R.2.1.01.

Tribunal authority

Statutory Powers Procedure Act

23 (1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,

(a) make orders with respect to the procedures and practices that apply in any particular proceeding

Tribunals – finding vexatious

- *Papouchine v. Touram LP d.b.a. Air Canada Vacations*, 2022 ONSC 7010

  [4] Tribunals, like courts, are custodians of a scarce public resource: time before the tribunal. Meritorious complaints cannot proceed promptly if frivolous complaints clog the system and waste resources. Some tribunals, including the Tribunal, do not charge fees to initiate and pursue a complaint, and some do not order legal costs in favour of unsuccessful parties. These practices facilitate access to justice, but they may also create a false impression that justice is "free" and that there are no constraints on matters that may be brought forward for adjudication.

  [5] Justice is not free. Quite the contrary. Justice is expensive. To the extent that the cost of justice is not borne by the parties, it is borne by the public purse. Tribunals, like courts, are responsible for overseeing their own processes so that public resources are applied effectively to matters worthy of adjudication. To achieve this, tribunals, like courts, must control their own processes, including restraining vexatious conduct and abuse of process.

  [9] The summary process followed by the Tribunal was consistent with the Tribunal's Rules and past practice, was reasonable in all the circumstances, and afforded the applicant a fair opportunity to address the Tribunal's concerns about his complaints.

  [10] The Tribunal applied an appropriate test to decide that the Applicant is a vexatious litigant. Its findings of fact related to this issue are reasonable. The process followed afforded the Applicant an opportunity to be heard in argument; it was a fair and a reasonable process to follow in respect to this issue. The orders made consequent to the finding of vexatiousness were tailored reasonably to the circumstances.

  7

  - since cited 50 times in HRTO proceedings

Tribunals – finding vexatious

- *Papouchine v. Touram LP d.b.a. Air Canada Vacations*, 2022 ONSC 7010

[51] The applicant did not identify any basis on which this court should intervene with the Tribunal's statement of the test to find a person to be a vexatious litigant. Jurisprudence in the courts has developed since *Fabian* and *Foy*, the decisions relied upon in *Hiamey*. Those developments serve to reaffirm the general nature, purpose and test for a vexatious litigant order:

> At the core of the court's jurisdiction under s. 140 of the *Courts of Justice* and pursuant to its inherent jurisdiction is the discretion to control its process and prevent the abuse of its process. Unchecked, abusive and vexatious proceedings consume scarce resources at the expense of *all* litigants, including other self-represented litigants who deserve ready access to justice. This is particularly true in this post-*Jordan* world in which all players in the judicial system, including judges, are obligated to ensure and facilitate more timely access to the courts: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 116.

These principles apply with equal measure to administrative tribunals, including the Tribunal.

Power to manage its own process

- *Kennedy v. College of Veterinarians of Ontario, 2021 ONSC 578*

  [16] The Chair reasonably considered and disposed of the motions. A tribunal has the power to manage its own process. It was reasonable for the Chair to refuse to send motions to the Discipline Committee that were so clearly without merit. She reasonably held there was no jurisdiction to refer the three motions for immediate reinstatement as section 37(1) of the *Veterinarians Act* provides that an application for reinstatement may not be made for at least two years after revocation and that time had not expired. In addition, the Chair reasonably held that there was no basis for an order to recuse the prosecutor, since there was no ongoing proceeding and hence no prosecutor.

- Every tribunal has its own procedures and processes. Findings of 'vexatiousness' and invoking the authority of a tribunal to manage its own processes are often unnecessary
- Often possible to effectively case manage to a fair and effective result using ordinary procedural tools

Law Society of Ontario | Barreau de l'Ontario

TAB 9

Eight-Minute Administrative Law and Practice 2024

Cultural Competence in Administrative Tribunals: Concrete Steps (PowerPoint)

Juliet Chang Knapton, Advocate-in-Residence and Part-Time Professor, Faculty of Law
University of Ottawa

March 5, 2024

cpd

CULTURAL COMPETENCE IN ADMINISTRATIVE TRIBUNALS: CONCRETE STEPS

LSO 8-MINUTE ADMINSRATIVE LAW & PRACTICE

MARCH 5, 2024, ONLINE

JULIET CHANG KNAPTON (SHE/HER/MX.)

JKNAPTON@UOTTAWA,CA

2 WHAT IS CULTURAL COMPETENCE?

- "the ability of **individuals and systems to work or respond effectively** across cultures in a way that acknowledges and respects the culture of the person or organization being served" (Williams, 2001)
- “the ability to relate to others comfortably, respectfully and productively. Being able to **effectively connect** with people who are different from us – not only based on our similarities, but also with respect to differences – is the hallmark of cultural competence, and requires, as a prerequisite, the building of “cultural awareness.” (Bhasin, 2014)

3

The iceberg concept of culture

WHY DOES IT MATTER IN ADMIN TRIBUNALS? WHAT ARE THE GOALS?

APPLICANTS

- I was heard
- I was treated fairly
- I was treated with respect
- I understand what happened while it was happening
- I understand why I received this decision

TRIBUNAL

- Justice
- Procedural fairness
- Efficiency
- Transparency
- Communicate the decision

WHAT DIFFERENCE DOES CULTURAL COMPETENCY MAKE?

APPLICANTS

- I felt included in the process
- I understood what was happening
- I was asked for my story
- I was listened to
- I was given time and space
- I felt seen, heard, valued
- I understand the decision
- I understand why
- I felt I was treated fairly

TRIBUNALS

- Parties are engaged, fully participating
- Parties responsive to needs/issues as they arise
- Witnesses give helpful, complete evidence
- Parties' – Witnesses' experiences as positive as possible
- Minimal time spent on correcting misunderstandings
- All stakeholders have similar procedural goals
- Tribunal makes decision made on better evidence, in a less emotionally-charged environment, less likely to be appealed, more justice and seen to be more just

HOW DO WE SET UP OUR SYSTEMS AND PRACTICES TO BE CULTURALLY COMPETENT?

- Context matters – but how do we become aware of context?

- Ask (Tribunal) or Tell (Lawyer/User)

- Structures and systems matter – Institutional policy

– Inclusive design (Tribunal) or Request/Engage (Lawyer/User)

- Adjudicator/Staff and Lawyer/User training

– Avoid assumptions and use inclusive communication practices and processes – all lead by example

BEFORE THE HEARING – SUBSTANCE AND TONE

- Awareness of SAE's (Subtle Acts of Exclusion) and SAI's (Subtle Acts of Inclusion)
- Prefixes
- Pronunciation – name literacy
- Pronouns
- Plain language
- Invitations

COURT OF APPEAL FOR ONTARIO

Counsel Slip and Hearing Information Form

Please send the completed form to coa.e-file@ontario.ca. For single judge motions, moving parties must submit this form at the same time as they file their notice of motion. Responding parties must submit their form 24 hours before the hearing (excluding weekends and holidays). For panel motions and appeals, all parties must submit this form at least 10 business days before the hearing. Parties to panel motions and appeals are encouraged to collaborate and submit one form on behalf of all parties.

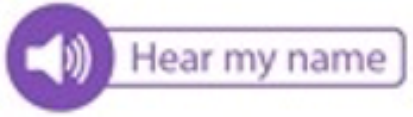
CASE INFORMATION

Court of Appeal File Number (*if applicable*):	
Court of Appeal Motion Number (*if applicable*):	
Case Name:	
Date of Hearing:	
In criminal appeals, is the appellant on a release pending appeal?	☐ No. ☐ Yes. Write out the wording of the surrender condition below:

COUNSEL SLIP[1]

NOTE: When providing your name, if you wish, you may include your prefix (Mr./Ms./Mx., etc.) at the beginning of your name and/or your pronouns (he/him, she/her, they/them, etc.) in brackets after your name, as well as the phonetic pronunciation of your name and/or a link to an audio recording of your name (e.g., a NameBadge from name-coach.com).

For Appellant(s)/Moving Party(ies):

Name of Person Appearing (*including prefix, pronouns and/or name pronunciation, if you wish – see note above*)	**Name of Party**	**Appearing in person[2] or remotely?**	**If appearing in person, please answer this question:**	**Email Address and Phone Number** (*where you can be reached during the appeal/motion, if necessary*)
Mx. Juliet Chang Knapton (*she/her/elle/lui*) [joo-li-ET chaang NAAP-tun] 		☐ In Person ☐ Remotely	I am unable to wear a mask due to a medical or other exemption: ☐ Yes ☐ No	

DURING THE HEARING

- Opening - scripted and inviting
- Plain language
- Terminology
- Clear rules of engagement
- Consistent application of prefix, pronouns, pronunciation, vocabulary, rules
- Active listening
- Conscious and overt management of a party's use of time and space

ENDING THE HEARING

- Invitations
- Managing expectations
- Map out the steps for closing
- Follow the steps for closing
- Scripted language with confident use of all prior tools of engagement

CULTURAL COMPETENCY IS A PRACTICE

13 THANK YOU, MERCI, M'GWITCH

Questions?

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RESOURCE LIST

1) Indigenous webpage – example of a post-secondary institution
https://www.uottawa.ca/about-us/indigenous

2) Gender Inclusive Pronouns – Canadian Bar Association (Ontario)
https://www.oba.org/Professional-Development-Resources/Resources/Gender-Inclusive-Pronouns

3) Social Security Tribunal of Canada Style Guide
https://sst-tss.gc.ca/en/our-work-our-people/style-guide-social-security-tribunal-canada-decisions#id3

4) Government of Canada - Inclusive writing - Quick reference sheet
https://www.noslangues-ourlanguages.gc.ca/en/writing-tips-plus/inclusive-writing-quick-reference-sheet

5) Accessibility
https://www.canada.ca/en/employment-social-development/programs/accessible-canada-regulations-guidance/alternate-formats/making-documents-more-accessible.html

6) Egale Resources, https://egale.ca/resources/#category=resources

15 REFERENCES

1) Cultural Humility, https://healthcity.bmc.org/policy-and-industry/cultural-humility-vs-cultural-competence-providers-need-both

2) Bhasin, (Bhasin, 2014) https://www.practicepro.ca/2014/09/cultural-competence-an-essential-skill-in-an-increasingly-diverse-world/

3) Michigan Bar Journal – Example of a revised summons in plain language, https://www.michbar.org/journal/Details/What-the-Michigan-summmons-should-look-like-Part-1?ArticleID=4816

4) Accessible documents, https://www.canada.ca/en/employment-social-development/programs/accessible-canada-regulations-guidance/alternate-formats/making-documents-more-accessible.html

5) Iceberg Concept of Culture, https://www.pbslearningmedia.org/resource/a353a4ba-cd56-4999-97dd-0e40e11a7211/iceberg-concept-of-culture-images-and-pdfs/

6) Record a namebadge, www.name-coach.com