Citation: Thielmann v The Association of Professional Engineers and Geoscientists of the Province of Manitoba, 2020 MBCA 8

Date: 20200121
Docket: AI19-30-09210

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Jennifer A. Pfuetzner
Madam Justice Karen I. Simonsen

B E T W E E N :

VICTOR JAKOB THIELMANN	)	***R. P. Sokalski*** *and* ***K. D. Toyne*** *for the Appellant*
(Applicant) Appellant	)	
- and -	)	***S. J. Blake*** *and* ***A. R. Foderaro*** *for the Respondent*
THE ASSOCIATION OF PROFESSIONAL ENGINEERS AND GEOSCIENTISTS OF THE PROVINCE OF MANITOBA	)	*Appeal heard:* ***September 11, 2019***
(Respondent) Respondent	)	*Judgment delivered:* ***January 21, 2020***

STEEL JA

[1] This is an appeal from an order dismissing an application for prohibition against the respondent (the Association) seeking to prohibit a disciplinary hearing on a charge of two counts of professional incompetence. The appeal involves a consideration of the extent to which a statutory tribunal ought to be allowed to fulfill its mandate before a party seeks recourse before the courts.

[2] The applicant alleged that early intervention in the administrative hearing by way of an order of prohibition was warranted on two grounds: a

lack of jurisdiction; and an apprehension of bias on the part of the discipline committee.

[3] The application judge dismissed the request for prohibition, finding that the application was premature and that exceptional circumstances did not exist which would justify early intervention.

[4] I agree and would dismiss the appeal.

FACTS

[5] The applicant is a professional engineer. The Association is the licensing body for all professional engineers in Manitoba and is governed by the provisions of *The Engineering and Geoscientific Professions Act*, CCSM c E120 (the *Act*) and The Association of Professional Engineers and Geoscientists of the Province of Manitoba, *By-Laws* (October 2014-at the relevant time) (the by-laws).

[6] In 2013, the Association received a complaint from an engineer relating to the conduct of the applicant (the Loewen complaint). The Association's investigation committee (the IC) struck a sub-committee to investigate that complaint. During its investigation of that complaint, the sub-committee determined that there were reasonable grounds to suspect instances of possible unskilled practice involving the applicant. The sub-committee sought third-party opinions as to whether certain drawings prepared by the applicant met industry standards.

[7] In a meeting in May 2014, the IC decided that allegations of unskilled practice should be advanced against the applicant and, in

October 2014, the Director of Professional Standards wrote to the applicant giving him notice that the Loewen complaint had expanded to include the issue of unskilled practice. He was provided with copies of the third-party reports and asked to comment.

[8] In January 2015, the Loewen complaint was resolved when the applicant confirmed that he was accepting a caution.

[9] The unskilled practice allegations could not be resolved. So, in November 2015, the Association's registrar wrote to the applicant informing him that the IC had concluded that there were reasonable and probable grounds to believe that he had engaged in unskilled practice and enclosed draft charges.

[10] In February 2016, formal charges were signed by the Chair of the IC and were sent to the applicant by the registrar. In June 2016, a panel of the discipline committee was convened solely to meet the 120-day deadline set out in the Association's by-laws. It then adjourned.

[11] The applicant then filed an application seeking prohibition in the Court of Queen's Bench, arguing lack of jurisdiction on the part of the Association to proceed. He argued that the IC and the registrar failed to strictly comply with the procedures set out in the *Act* respecting the lodging of complaints and the formulation of charges resulting in a complete loss of jurisdiction. As well, he alleged that there was a reasonable apprehension of bias given the relationship between the IC members and the members of the discipline committee (who had been appointed by a past president who was also one of the third-party experts retained by the IC).

[12] Also, the applicant sought to expunge substantial portions of the affidavit evidence filed by the Association on the ground that they were irrelevant or expressed opinions from individuals who were not qualified as experts.

THE APPLICATION JUDGE

[13] The application judge found the challenged portions of the affidavits to be relevant statements of fact and not opinion.

[14] She dismissed the request for prohibition, holding that there was jurisdiction for the discipline committee to proceed in the manner that it did and that it had substantially complied with the requirements of the *Act* and the by-laws.

[15] As to the allegations of reasonable apprehension of bias, she was of the view that it was premature and the applicant had failed to demonstrate any exceptional circumstances warranting the court exercising its discretion to intervene at this stage.

[16] She also held that the applicant had not exhausted all remedies available to him and that the governing legislation adequately provided the appropriate forum and various rights of appeal should the applicant disagree with the panel's ruling on any of the alleged issues.

[17] The applicant's grounds of appeal can be summarised as follows:

1. That the application judge erred by relying on the affidavits in their entirety when they contained inadmissible or irrelevant evidence;

2. That the application judge erred when she concluded that this was not a case warranting judicial intervention given that it was a true question of jurisdiction;

3. That the discipline committee of the Association lacked and continues to lack jurisdiction to proceed in light of the *Act* and the by-laws; and

4. That there remains a reasonable apprehension of bias on the part of both the IC and the discipline committee which cannot be cured by a hearing before the discipline committee.

ANALYSIS AND DECISION

Affidavits

[18] The applicant argues that the application judge erred by relying on inadmissible and irrelevant evidence tendered by the Association. He argues that the affidavits contain opinion evidence not given by a qualified expert and that they are irrelevant.

[19] As a preliminary point, the applicant objects to the application judge's comments that the proper procedure in cases where there is an objection to affidavits is to bring a motion to strike. However, the Association did not take issue with the applicant raising his objections at the hearing of the matter as opposed to bringing a specific motion to strike.

[20] There were some paragraphs in the affidavits regarding the applicant's character and reputation which I agree are irrelevant. However, the other paragraphs are narrative and necessary to an understanding of the

events as they took place. They are statements of facts and a recitation of the course of action taken by the Association. In any event, the decision to strike or expunge evidence in an affidavit is discretionary and significant deference is owed to the application judge. The few paragraphs which I would consider irrelevant are minor and incidental to the course of events described in the affidavit.

[21] Most importantly, whether the application judge's comments as to procedure were correct is inconsequential to the merits of this appeal. This appeal is rooted in the boundaries of court intervention in the work of a tribunal.

The Prematurity Rule

[22] The applicant argues that exceptional circumstances supporting prohibition exist in this case because the jurisdictional issue which has been raised is a true question of jurisdiction. The applicant maintains that the IC and the registrar failed to strictly comply with the procedures set out in the *Act*, respecting the lodging of complaints and the formulation of charges. The applicant submits that the IC, upon discovering new matters of concern which it wished to investigate, was required by the *Act* to file a complaint with the registrar, formulate a charge with particulars (see section 35(1)(b)) and the registrar was then required to refer the matter back to the IC. Substantial compliance was not sufficient (see *Henderson v College of Physicians and Surgeons of Ontario* (2003), 228 DLR (4th) 598 (Ont CA)).

[23] The applicant also argues that there is a reasonable apprehension of bias relating to the members comprising the IC and the discipline committee, which is a further exceptional circumstance supporting prohibition. The

involvement of two past presidents of the Association as proposed expert witnesses gives rise, it is submitted, to a reasonable apprehension of bias of not just the IC, but also the discipline committee.

[24] In the past decade, there has been a significant shift away from early judicial intervention in the work of a tribunal. The general rule with respect to prematurity is that "absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted" (*Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at para 31). Moreover, the exceptional circumstances exception is exceptionally narrow and the threshold for intervention is exceptionally high (*ibid* at para 33).

[25] The Supreme Court of Canada's decision in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 expressed approval of *CB Powell Limited* and explained that there were sound reasons for restraint with respect to judicial intervention. The Court stated (at para 36):

> Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes: . . .. Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal, particularly when asked to review a preliminary screening decision such as that at issue in *Bell* (1971) [*Bell v Ontario Human Rights Commission*, [1971] SCR 756].

[26] Cases decided prior to *Halifax (Regional Municipality)*, may not properly reflect this change in direction of the jurisprudence (see *British Columbia (Ministry of Public Safety and Solicitor General) v Mzite*, 2014 BCCA 220 at para 37, leave to appeal to SCC refused, 36041 (27 November 2014)). More recently, in *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2017 FCA 241, the Federal Court of Appeal repeated that the threshold with respect to exceptions to the prematurity rule was high, stating that such exceptions "are rare" (at para 50).

[27] This shift away from court intervention in ongoing administrative processes, whether by interlocutory appeal or by judicial review, has been accepted by many Canadian appellate courts, including our own. See, for example, *Neufeld et al v The Manitoba Securities Commission*, 2018 MBCA 101 at para 7; *Dorn v Association of Professional Engineers and Geoscientists (Man)*, 2014 MBCA 25 at para 13; *Mzite* at para 44; *689799 Alberta Ltd v Edmonton (City)*, 2018 ABCA 212 at para 2; *Saskatoon (City) v Wal-Mart Canada Corp*, 2019 SKCA 3 at para 72; *French v Township of Springwater*, 2018 ONSC 94 at para 36; and *Potter v Nova Scotia (Securities Commission)*, 2006 NSCA 45 at para 16.

[28] Academic commentary has also confirmed this change in direction. In Robert W MacAulay, James LH Sprague & Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters, 2019) vol 3 (loose-leaf updated 2019, release 11), the authors note (at pp 28-108 to 28-109):

> Tempting as it may be to run off to seek immediate justice, the modern rule in both appellate and judicial review is that, except in rare cases, the courts will not entertain applications contesting

> decisions of agencies where the main proceeding remains uncompleted before the agency or where an appeal route remains untried.
>
> [footnotes omitted]

See also Donald JM Brown & the Hon John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 2017) vol 2 (loose-leaf updated October 2019) at para 3:4400.

The Prematurity Rule Applies Even for Jurisdictional or Bias Issues

[29] The issues on appeal relate to a lack of jurisdiction and reasonable apprehension of bias. It is clear that the general principle of reluctance inherent in the prematurity rule is equally applicable to decisions involving both of those issues. Assertions of bias or lack of jurisdiction do not give rise to an automatic right to early judicial review (see *Bennet v Registered Psychiatric Nurses Association of Manitoba*, 2002 MBCA 116 at paras 3-4).

[30] With respect to allegations of bias or apprehension of bias, Canadian appellate courts have often denied judicial review applications (or applications for leave to appeal) for prematurity where allegations of bias/apprehension of bias are raised prior to or during a hearing by a decision-maker. See, for example, *Obouhov v Lunn*, 2018 ONSC 772; *Prasad v Canada (Social Development)*, 2015 FCA 22; and *MK Engineering Inc v The Association of Professional Engineers and Geoscientists of Alberta Appeal Board*, 2014 ABCA 58.

[31] Evans J (as he then was), in *Air Canada v Lorenz*, 1999 CarswellNat 1768, explains why an allegation of bias does not, per se, constitute an exceptional circumstance, stating (at paras 19-20):

> Counsel submitted that an allegation of bias casts a cloud over the legitimacy of the entire proceeding before the adjudicator, and to require Air Canada to push through to the end without having this question resolved would impose serious hardships. A party should not be subject to the exercise of legal powers by a tribunal whose very authority to hear the dispute the party has called into question.
>
> This factor cannot be determinative, however, because otherwise a reviewing court would always have to decide allegations of bias and to award relief when they are upheld, even though raised before the completion of the administrative process. This would mean, in effect, that a court would have no discretion to dismiss an application for judicial review for prematurity when bias is alleged or, putting it another way, an allegation of bias always constitutes "exceptional circumstances" justifying judicial intervention before the administrative process is complete. In my opinion this is not the law.

[32] Similar to allegations of bias, there are many decisions which explicitly indicate that an allegation that the administrative tribunal has exceeded its jurisdiction will not, on its own, constitute an exceptional circumstance justifying early review. The leading case, much cited on this issue, is *CB Powell Limited*, where Stratas JA states (at para 33):

> . . . [T]he presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

For other examples, see *Saskatoon (City) v Wal-Mart Canada Corp*, 2019 SKCA 3 at paras 84-86; *Kadri v Windsor Regional Hospital*, 2019 ONSC 5427 at para 59; *French v Township of Springwater*, 2018 ONSC 94 at

para 44; *Black v Canada (Attorney General)*, 2013 FCA 201 at para 11; and *Violette v New Brunswick Dental Society*, 2004 NBCA 1 at para 21.

[33] Also similar to allegations of bias, the reason why a jurisdictional issue does not, per se, constitute an exceptional circumstance is because almost any issue could then be labelled as jurisdictional in order to attract early judicial review. In the very recent case of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, the Supreme Court of Canada provides insight into the tenuous nature of jurisdictional issues, stating (at para 66):

> As Gascon J. noted in *CHRC*, the concept of "jurisdiction" in the administrative law context is inherently "slippery": para. 38. This is because, in theory, any challenge to an administrative decision can be characterized as "jurisdictional" in the sense that it calls into question whether the decision maker had the authority to act as it did . . ..

[34] Again, academic authority is in line with the cases referred to above. For example, in MacAulay, Sprague & Sossin, the authors state (at pp 28-140 to 28-141):

> At one time courts were more willing to entertain judicial reviews in the midst of agency proceedings when the issue at stake was jurisdictional — including claims that the decision-maker was biased. . . .
>
> However, that is no longer the case. The rule against prematurity applies today to all forms of decisions including issues of bias and other jurisdictional issues.

See also Sara Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis, 2017) at 259.

[35] With respect to the applicant's argument that exceptional circumstances exist in this case because the jurisdictional question that has been raised is a "true question of jurisdiction", the Supreme Court of Canada in *Vavilov* has clearly indicated that jurisdictional questions and true questions of jurisdiction or *vires* refer to the same concept (see para 65).

Exceptional Circumstances

[36] So, if early judicial intervention in the tribunal process is limited to exceptional circumstances regardless of the nature of the issue, what are those exceptional circumstances?

[37] Not surprisingly, there are no hard and fast rules or pattern as to when a tribunal should be closed down by way of an order of prohibition or when the proceedings before a tribunal should be left to run their course and only then be subject to judicial review or appeal (see *Psychologist "Y" v Nova Scotia Board of Examiners in Psychology*, 2005 NSCA 116 at para 22). The best that can be done is to list the factors that have been considered to be relevant.

[38] *Air Canada* is one of only a few cases that list a number of factors that may be considered by a court when determining whether to hear a judicial review application or dismiss it for prematurity. In that case, Evans J listed six factors and considerations to be weighed:

1. hardship to the applicant, including an element of urgency;

2. waste;

3. delay;

4. fragmentation;

5. strength of the case; and

6. statutory context.

[39] This list of factors has been considered and applied in several other cases, including *The Winning Combination Inc v Canada (Attorney General)*, 2019 FC 1014 at paras 20, 29; and *Unimac-United Management Corp v St Clare's-Monaco Place*, 2015 ONSC 4760 at paras 10-21.

[40] With respect to hardship or prejudice, several cases indicate that special or exceptional circumstances may exist if the impugned decision is finally dispositive of a substantive right of a party, such that any damage that is done cannot be corrected. For example, in *Manitoba Hydro-Electric Board v Consumers' Association of Canada (Man) Inc et al*, 2012 MBCA 1 (in chambers), leave to appeal was ordered where the Public Utilities Board ordered Hydro to disclose its export contracts in the course of determining an application by Hydro for a rate increase. Hamilton JA determined that exceptional circumstances existed as disclosure of the contracts had the potential to cause irreparable harm to Hydro, and because (at para 81):

> [W]aiting until the final rate order is issued is inappropriate because a final order will not be able to resolve these questions or [will] render them moot, given that the export contracts will already have been disclosed. The resolution of these questions is important not only for Hydro and its current [rate increase application], but also for PUB and future rate-setting proceedings. As such, it is important in the public interest to resolve the questions now, especially when there is a full evidentiary record for that purpose.

[41] The factor referring to waste involves consideration of the time and money that would be wasted if an applicant had to postpone its application for review until after the proceedings were completed, and ultimately was successful in its application for review. It should be noted that an applicant may not ever have to bring its review application if it is ultimately successful in the tribunal hearing. The contention that a favourable decision on a jurisdictional issue at an early juncture would put an end to the proceeding, thus sparing the applicant and others the time and expense of a full hearing on the merits, is a factor, but not in and of itself an exceptional circumstance (see *Black v Canada (Attorney General)*, 2013 FCA 201 at paras 18-20). In *DioGuardi Tax Law v Law Society of Upper Canada*, 2015 ONSC 3430, the Court stated, "The additional time involved by starting in the appropriate forum does not amount to 'exceptional circumstances' that would justify skipping the tribunal step altogether" (at para 12).

[42] The issue of delay involves consideration of the delay involved in completing administrative proceedings when interim court applications are brought—not only in the current case, but also with respect to the conduct of other administrative proceedings. In *Air Canada*, Evans J stated (at para 25):

> If the Court were to decide Air Canada's allegation of bias prior to the completion of the administrative process it is all too likely that participants in other administrative proceedings may resort to judicial review on this ground for the purpose of delaying the proceedings, or forcing the more vulnerable party to surrender or settle.

[43] However, exceptional circumstances have been found where there has been exceptional delay at the tribunal level. For example, in *Lethbridge Regional Police Service v Lethbridge Police Association*, 2013 ABCA 47, the

Court agreed that the lower court judge was correct to determine the application for judicial review on the merits of the adjudicator's decision, rather than await the adjudicator's decision on remedy, as the adjudicator's decision on the merits was released 25 months after the hearing.

[44] The factor of fragmentation involves consideration of whether the determination of the issue would finally resolve matters between the parties, or whether a proliferation of litigation with applications for judicial review on other issues could follow, leading to a burden on court resources and public programs. MacAulay, Sprague & Sossin indicate (at p 28-127):

> [A] judicial review of a decision of an agency at a discrete stage of a proceeding can fragment an agency proceeding just as much as a judicial review of a decision made during an actual hearing. Both can result in either parallel proceedings continuing simultaneously before the agency and the courts or alternatively in the adjournment of the agency proceeding while awaiting the outcome of the judicial review.

[45] The strength of the case involves consideration of whether the issue raised appears frivolous or fanciful, or clear and obvious. So exceptional circumstances may arise where the ruling complained of is so tainted or there are strong reasons to believe the ongoing process is so deeply flawed that the result of the later judicial review would be preordained and the hearing will have to be repeated. There are often concerns relating to procedural fairness (see *Lourenco v Hegedus*, 2017 ONSC 3872 at para 6; and *Toronto Police Services Board v Briggs*, 2017 ONSC 1591 at para 19).

[46] With respect to the statutory context, as Evans J stated in *Air Canada*, "the factors outlined above must be evaluated, not only on the basis

of the facts of the particular case, but also in the context of the statutory scheme from which the application for judicial review arises" (at para 33). This involves consideration of the legislative intent of conferring upon the administrative body the jurisdiction to make decisions in a manner that minimises expense and delay, and considerations of deference.

[47] Consideration may also be given to the Supreme Court of Canada's decision in *Strickland v Canada (Attorney General)*, 2015 SCC 37, a case in which the Court, mentioning *CB Powell Limited*, sets out factors for a court to consider when determining whether an adequate alternative remedy exists, which are similar to those seen in the case law above relating to prematurity. The Court stated (at para 42):

> The cases identify a number of considerations relevant to deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear a judicial review application. These considerations include the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost.

See, for example, *Dorn*, where Mainella JA determined that the statutory right of appeal provided a convenient and adequate remedy.

[48] Finally, one of the most important factors is the principle that the administrative tribunal should be given the opportunity to determine the issue and provide reasons that can be considered on any eventual review or appeal. In *Canada (Attorney General) v Harris Corporation*, 2018 FCA 130, the

Court refused judicial review on the grounds of prematurity, stating (at para 10):

> The Attorney General should first have brought her motion before the CITT [Canadian International Trade Tribunal] or otherwise made her submissions on this question to the CITT and received a ruling from the CITT on this question. Without a decision of the CITT on whether the inquiry can continue, we do not have any reasons to review. The refusal of the CITT to bifurcate this issue from the merits of the complaint is not an exceptional circumstance that warrants the intervention of this Court. Failing to allow the CITT to first rule on this question is, in the circumstances of this case, fatal to this application. The application for a writ of prohibition should be dismissed.

[49] In conclusion, the courts have not provided a definition of "exceptional circumstances" with respect to the prematurity principle. The factors to be considered in exercising this discretion cannot be reduced to a checklist or a statement of general rules. The list of factors to be considered is not closed and courts will not have to apply every factor, but only those that are relevant.

[50] Among the factors that might be considered are: (i) hardship/prejudice (including irreparable harm, urgency, and excessive delay); (ii) waste of resources if judicial review is not proceeded with; (iii) delays if judicial review proceeds; (iv) fragmentation of proceedings; (v) strength of the case, including whether there is a clear abuse of process or proceedings that are so deeply flawed that it is clear and obvious that judicial review will be successful; and (vi) the statutory context, including whether there is an adequate alternative remedy. Furthermore, weight should always be given to the overarching consideration that an administrative

tribunal should be given the opportunity to determine the issue first, and to provide reasons that can be considered by the court on any eventual review.

The Application of the Prematurity Factors in This Case—Does This Case Present Exceptional Circumstances?

(i) Hardship to the Applicant

[51] The applicant has raised no particular hardship that would result if he were to simply bring his concerns to the discipline committee. No irreparable harm, prejudice, abuse of process, urgency or lengthy delay by the discipline committee has been alleged. Furthermore, the applicant will not be denied a remedy if this application is quashed as premature.

[52] If the discipline committee decides to proceed with the hearing and the applicant is convicted, he can raise the issue of bias and jurisdiction on appeal to the council, which can quash, vary or confirm findings or orders of the discipline committee (see section 53 of the *Act*). A further appeal from council to the Court of Queen's Bench is also available (see section 55 of the *Act*).

[53] It is to be recalled that simply having to be subject to discipline proceedings is not considered a hardship (see *Air Canada* at paras 19-20), nor is it a hardship to be required to start and proceed in the appropriate forum (see *DioGuardi Tax Law* at para 12). This factor thus militates against the applicant.

(ii) Waste

[54] This factor involves consideration of the time and money that will be wasted if the applicant is forced to go through the discipline proceedings, only to have the proceedings quashed on appeal for bias concerns or lack of jurisdiction. This is a factor in favour of hearing the early judicial review application, particularly if the proceedings are expected to be overly lengthy and cost-prohibitive. In this regard, the applicant has not suggested that this is the case in this matter. Furthermore, this factor must be weighed with other factors, particularly the strength of the arguments regarding bias and jurisdiction, as weak arguments on these issues would mean that the proceedings would ultimately be unlikely to be quashed. The possibility that the applicant could successfully defend the charges brought against him, and thus not need to bring any further appeal, should also be considered. Consequently, this factor is neutral as it hinges upon the strength of the arguments regarding bias and jurisdiction, and upon the ultimate outcome of the discipline hearing.

(iii) Delay

[55] Clearly, the interim court proceeding in this case has delayed the start of the discipline hearing. The hearing was opened and adjourned on June 24, 2016 in a brief appearance before the discipline committee, in order to meet the requirements of by-law 15.6.3.1. On March 23, 2017, the application for prohibition was filed. It is now over three years since the initial appearance before the discipline committee and no further hearings have occurred. The delay to the proceedings is significant, especially considering

that no evidence has yet been heard, nor has a continuance date even been agreed upon.

(iv) Fragmentation

[56] Resolution of the bias issue, even in the applicant's favour, would not finally resolve matters, as a different discipline panel could be appointed to hear the charges. Certainly, an early determination of the jurisdiction issue in favour of the applicant would resolve the matters by quashing the current charges, subject to further appeal. However, it is not certain that the jurisdiction issue would be resolved in the applicant's favour. This factor will therefore depend upon the strength of the argument regarding jurisdiction.

[57] The applicant argues that there is no fragmentation in this case, as the proceedings have not truly begun. However, as discussed by MacAulay, Sprague & Sossin, this argument takes a limited view of what fragmentation is. Early judicial review brought to prohibit the discipline committee from proceeding can still cause fragmentation if the discipline committee decides to press on, despite the parallel court proceedings, or alternatively, leads to delay while the discipline committee awaits the completion of the court proceedings. At best, as discussed in *Mzite*, the concern about fragmentation is somewhat less significant than if the discipline committee proceedings had been halted after evidence-taking had commenced.

[58] Permitting early judicial review of the discipline proceedings, even if it is determined that the hearing is to proceed, may encourage further judicial review attempts during the course of the hearing, which places additional burdens on court resources. Fragmentation will be significantly reduced if courts consistently refuse to entertain early judicial review

applications, for reasons of prematurity, and allow the discipline committee to begin and complete the proceedings it has been legislatively designated to deal with, absent truly exceptional circumstances. Then, following completion of the discipline proceedings, the applicant can bring all of his concerns, about bias, jurisdiction and any other procedural or substantive concerns that have arisen throughout the course of the hearing, all at once to the council on appeal (and then subsequently to the court if necessary).

[59] Therefore, contrary to the applicant's argument, there is still fragmentation present as the discipline hearings are on hold while the court applications are being determined. This factor thus favours rejection of early judicial review.

(v) Strength of Case

[60] The applicant argues that the discipline committee's lack of jurisdiction is clear and amounts to a true lack of jurisdiction. In making his argument, the applicant puts forth an interpretation of how the discipline committee attains jurisdiction over a charge by interpreting the provisions of the *Act* and the by-laws in conjunction with his interpretation of how jurisprudence respecting redundancy and strict compliance should be applied with respect to specific provisions of the *Act* and the by-laws.

[61] His own argument leads one to the conclusion that this matter is clearly one involving statutory interpretation and, more specifically, the statutory interpretation of the discipline committee's home statute. Such concerns do not favour early judicial review.

[62] More specifically, the applicant argues that, although the IC could initiate an investigation on its own initiative pursuant to section 31(2) of the *Act*, the IC was then required to file any complaint based upon that investigation with the registrar. Pursuant to section 32 of the *Act*, the registrar was then required to refer the section 31(2) complaint back to the IC. The applicant argues that neither of these steps occurred and, therefore, there was no "complaint", the particulars of which could be set out in a charge pursuant to section 35(1)(b) of the *Act*. Without a valid complaint, a charge could not be formulated by the IC, thereby rendering the discipline committee without jurisdiction.

[63] The applicant also argues that the minutes of the IC reveal that the IC failed to "formulate" a charge as required by section 35(1)(b) of the *Act*, and failed to direct that the charge be referred to the discipline committee as required by that same provision. He specifically argues that all of these provisions must be interpreted strictly, such that the referral back and forth from the IC and the registrar must occur, that the use of the word "formulate" in section 35(1)(b) of the *Act* means that the IC had to pass a motion and come up with the exact wording of the charges within the committee meeting, and that the minutes of the IC had to specifically reveal that the IC referred the charge to the discipline committee by motion.

[64] I do not think it is appropriate or helpful for me to critique the applicant's interpretation of the tribunal's home statute except to say that the *Act* is not to be strictly construed, but rather, should be construed in a manner to attain its objects (i.e., timely, inexpensive and fair adjudication of complaints in accordance with the public interest). There are alternate interpretations available regarding all of the matters argued by the applicant,

one example of which is included in the Association's factum. Further arguments about the interpretation of the *Act* and the by-laws are also possible. For example, the *Act* uses the word "may", when referring to the IC filing a complaint with the registrar (section 31(2)). Furthermore, as argued by the Association, the term "complaint" can either be narrowly interpreted, as the applicant suggests, to mean an actual written complaint from the IC, or broadly interpreted to mean concerns upon which the IC has initiated an investigation and brought charges.

[65] Regarding the argument about the IC failing to formulate the charges, I note that there is no definition of the word "formulate" in the *Act.* To formulate charges does not necessarily require the IC members themselves to compose the specific wording of the charges, as opposed to determining what the charges should be and having the exact wording composed by someone else. It may be noted that the phrase in French indicates that the IC may "porter une accusation", which may be translated as "bring a charge".

[66] As stated, all of these interpretations could be open, as could other interpretations that are consistent with the aims, purpose and inner workings of the *Act.* It is more appropriate for the discipline committee to make such determinations, as it is a specialised tribunal that works within the confines of the *Act* and the by-laws on a regular basis.

[67] The applicant's arguments are supplemented by the argument that, when dealing with professional bodies, strict compliance is required. I disagree. The general principles relating to substantial compliance are no different where disciplinary bodies are concerned. In essence, where statutory provisions are determined to be mandatory, they must be strictly complied

with; where the statutory provisions are directory, however, substantial compliance can be sufficient.

[68] So, even in cases of professional discipline, the usual principles regarding substantial compliance apply. If there is substantial compliance and no prejudice, the lack of compliance with the letter of the legislation may be determined to be inconsequential. See, for example, *McGrath v Newfoundland (Royal Constabulary Public Complaints Commission)*, 2002 NLCA 74; and *Abdul v Ontario College of Pharmacists*, 2018 ONCA 699, leave to appeal to SCC refused, 38366 (21 March 2019). Once again, it becomes a question of statutory interpretation of the tribunal's home statute. Brown & Evans state (at para 3:8210):

> Accordingly, where the public authority has not acted in flagrant disregard of the law, and no prejudice has been sustained by those affected by the action, the adverse effect of judicial intervention on the operation of the statutory scheme may indicate that judicial restraint is appropriate. For example, in the absence of evidence that any prejudice had resulted from the delay, one court declined to set aside the award of an arbitrator on the ground that it had not been delivered within the stipulated period. Similarly, an application for judicial review was dismissed where there was no evidence of prejudice from failure fully to comply with statutory requirements prescribing the content of the notice to be given before a statutory power was exercised.
>
> On the other hand, if a court interprets a statute as requiring compliance to the letter with its procedural or formal requirements, because of the importance of the statutory provision for either the efficacy of the administrative scheme or the protection of individual rights, it may be reluctant to grant relief on the ground that the decision-maker complied in substance.
>
> [footnotes omitted]

[69] In the present case, the applicant argues that *Henderson* stands for the proposition that professional discipline statutes should be strictly complied with and strictly construed, and that the principles relating to substantial compliance of directory statutory provisions do not apply with respect to professional discipline statutes. However, this "strict compliance" aspect of the *Henderson* decision has been overtaken by more recent case law respecting the interpretation of disciplinary statutes, and has been distinguished by the Ontario Court of Appeal. For example, in *Abdul*, the Court stated (at para 16):

> The interpretive principle of strict compliance with and construction of professional discipline legislation to ensure procedural fairness to accused members is not exclusive or overriding. The Discipline Committee is required to interpret its enabling statute with a view to protecting the public interest in the proper regulation of the professions: *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727, 113 O.R. (3d) 420, leave to appeal to SCC refused, [2012] S.C.C.A. No. 549, at para. 101. A balancing of these interests is required.

[70] The Court later distinguished *Henderson*, stating (at para 25):

> The present case is entirely distinguishable from *Henderson v. College of Physicians and Surgeons of Ontario* (2003), 65 O.R. (3d) 146 (C.A.). There, the College ignored the express procedure set out in ss. 38 and 40 of the Code for the amendment of a notice of hearing. The College attempted to present a newly amended notice of hearing following the commencement of a hearing in circumstances that the Code specifically forbade. Here, there is no such statutory prohibition.

[71] Of particular interest is the case of *Dr Alan Cockeram v College of Physicians and Surgeons (NB)*, 2014 NBQB 227, which closely resembles the case at bar. In *Cockeram*, the applicant, a medical doctor, applied for judicial

review of a preliminary-stage decision made against him in the course of disciplinary proceedings. One of his arguments was that the College had not acted in strict compliance with the provisions of *The Medical Act*, CCSM c M90 (since repealed), which, he argued, meant that the council was without jurisdiction to make an order to appoint a board of inquiry into the complaints against him. He argued that, given what was at stake, a strict construction of the requirements of the statute was needed (see para 102). However, the Court determined that the statute had to be "informed by the broader context" (at para 103).

[72] With respect to the apprehension of bias allegation, the case is not one which is clear and obvious. The main concern is that the experts who opined that the applicant's work was below standard are past presidents of the Association and were presidents during the time period when most of the IC and discipline committee members were appointed (although the president of the Association does not appoint members). The apprehension of bias test is a high one and will not be met by niggling concerns or mere suspicion (see *R v S (RD)*, [1997] 3 SCR 484 at 487). The test is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the decision-maker would not decide fairly (see *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 60). Although arguments could be made on both sides, given the high standard and the onus upon the applicant to prove the presence of an apprehension of bias, the strength of this allegation is low.

[73] Thus, in my view, the strength of the case factor militates against early judicial review. This conclusion also decreases any weight to be given with regard to the waste and fragmentation factors.

(vi) Statutory Context

[74] This factor involves consideration of the legislative intent. A review of the legislation reveals that the object of the legislation is to ensure that the discipline committee will conduct hearings in the public interest in a manner that minimises delay and expense. The legislation further provides a full appeal against findings and orders of the discipline committee to the council and, thereafter, to the Court of Queen's Bench. The statutory context indicates that the Legislature intended matters to be dealt with by the discipline committee, with alleged errors by the discipline committee being addressed through a statutory appeal process. This factor thus militates against early judicial review to the courts.

(vii) The Tribunal Should Have the First Opportunity to Hear the Objection

[75] The discipline committee was designated by the Legislature to deal with discipline hearings and, according to the case law discussed above, it should have the first opportunity to determine the issues raised by the applicant. Allowing the discipline committee to give its views also permits the council or the Court of Queen's Bench the opportunity to consider the discipline committee's reasons and apply the appropriate standard of review. This factor clearly militates against early judicial review.

CONCLUSION

[76] Prohibition is a drastic remedy that should be granted only if exceptional circumstances are present. A high degree of deference is owed to administrative tribunals, and normally all adequate remedies under the

administrative process should be exhausted before seeking redress from the court. This avoids bifurcated proceedings with the attendant further delay, proceedings that may turn out to be redundant or unnecessary and gives the administrative tribunal an opportunity to correct its own errors.

[77] In this case, it is clear that the Association is an administrative body which has broad authority to inquire into the matters at issue which the Legislature intended to be within the jurisdiction conferred on it.

[78] Based upon the weighing of the factors as discussed, it is my view that there are no exceptional circumstances present in the current case that would elevate this matter into one in which the court should have considered early judicial review.

[79] With respect to the apprehension of bias issue, the application judge did not misdirect herself in exercising her discretion to dismiss that argument as premature. The factors simply did not support any exceptional circumstance that would require the court to determine the issue rather than the discipline committee.

[80] On the other hand, insofar as the application judge determined that the discipline committee had jurisdiction to proceed, it is my view that she should not have made that determination, but rather, should simply have dismissed it as premature, and allowed the discipline committee to make the determination. In this regard, she misdirected herself by failing to address the issue of prematurity in relation to the jurisdictional issue. With respect, there is no reason why concerns respecting prematurity were addressed by the application judge with regard to the bias issue, but not with respect to the jurisdictional issue.

[81] Therefore, I find that the application judge properly exercised her discretion to dismiss the application relating to the bias issue on grounds of prematurity. However, with respect to the issue of jurisdiction, I find that she misdirected herself by failing to address the issue of prematurity in relation to the jurisdictional issue.

[82] Rather than expend more time and money by sending it back to the application judge for her determination of the prematurity argument in relation to the jurisdictional issue, I will exercise this Court's jurisdiction under section 26(1) of *The Court of Appeal Act*, CCSM c C240, and give the judgment which ought to have been pronounced, that is, for the reasons expressed, the jurisdictional issue should likewise have been dismissed on the grounds of prematurity. This, of course, still allows the applicant to raise both the bias and jurisdiction issues with the discipline committee, if he so chooses, during the discipline hearing.

[83] The appeal is dismissed with costs on the basis stated in these reasons.

Steel JA

I agree: Pfuetzner JA

I agree: Simonsen JA