IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Madadi v. British Columbia College of Teachers,* 2014 BCSC 1062

Date: 20140612
Docket: S117375
Registry: Vancouver

Between:

Behroz Madadi

Appellant

And

British Columbia College of Teachers

Respondent

Before: The Honourable Madam Justice Gropper

On appeal from: Decisions of the Panel of the Discipline Committee of the British Columbia College of Teachers, dated November 12, 2010 and June 22, 2011.

Reasons for Judgment

Appearing on his own behalf:	The Appellant, B. Madadi
Counsel for the Respondent:	T. Mason
Place and Date of Trial/Hearing:	Vancouver, B.C. March 14, 2014
Place and Date of Judgment:	Vancouver, B.C. June 12, 2014

Introduction

[1] When Mr. Madadi commenced this appeal on November 1, 2011, he sought to set aside two decisions of a fitness hearing subcommittee (the "panel") of the B.C. College of Teachers (the "College") in respect of conduct, issued on November 12, 2010 and a supplementary decision in respect of penalty issued June 22, 2011 (the "decisions").

[2] Mr. Madadi was certified as a teacher by the College. At the time of the hearing by the panel and issuance of the decisions, the teachers were members of the College, which was constituted under the *Teaching Profession Act*, R.S.B.C. 1996, c. 449 (the "*TPA*"). The *TPA* was repealed on January 8, 2012 and replaced by the *Teachers Act*, S.B.C. 2011, c. 19.

[3] The Teacher Regulation Branch was a statutory corporation constituted under the *TPA* and had as part of its mandate the discipline of teachers. The panel was established to hear the citations issued under the *TPA* against Mr. Madadi and did so over a period from February 2009 to February 2010. After its decision of November 12, 2010, the same panel held a penalty hearing on April 7 and 8, 2011 and issued its reasons for penalty on June 22, 2011.

[4] The incidents that led to disciplinary action were a series of verbal interactions that took place when Mr. Madadi was working as a teacher-on-call in 2001. In 2005, Mr. Madadi inadvertently failed to pay his College membership fees. When he applied for reinstatement in early 2006, the College declined to process his application until the discipline matter was resolved.

[5] The matter did not go to a hearing until 2009 and 2010 and no decision on penalty was made until 2011. For each of the findings of misconduct, the panel imposed a global penalty prohibiting Mr. Madadi from receiving a certificate of qualification to teach for one year from the date of the penalty decision. The panel declined to consider any part of his penalty as "already served", with the result that Mr. Madadi was without a certificate for approximately six years.

[6] Mr. Madadi brings this appeal under s. 40 of the *TPA*, which was in effect at the relevant times:

> Appeals
>
> 40 A member may appeal to the Supreme Court any decision, determination or order of the qualifications committee, discipline committee, a subcommittee of either, or the council that affects the member and, from a decision, determination or order of the Supreme Court, may appeal to the Court of Appeal with leave of a justice of that court.
>
> …

[7] On December 19, 2013 the respondent advised Lisa Fong, then counsel for Mr. Madadi, that it consented to setting aside the panel's decisions and provided a consent order to Ms. Fong for that purpose. The draft order also contained a provision that "there shall be no order as to costs for or against either party." Mr. Madadi refused to sign the order. Mr. Madadi was no longer represented by counsel at this hearing.

Mr. Madadi's Human Rights Complaint

[8] Mr. Madadi filed a complaint with the B.C. Human Rights Tribunal ("BCHRT") in 2012 under the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "*Code*"). He alleged that the Teacher Regulation Branch discriminated against him in the area of membership in an occupational association on the basis of race, ancestry, place of origin and religion contrary to s. 14 of the *Code*. The Teacher Regulation Branch asserted that there was no such discrimination and applied to dismiss the complaint under s. 27(1)(a), (b), and (c) of the *Code* which provides:

> **Dismissal of a complaint**
>
> **27** (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
>
> (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
>
> (c) there is no reasonable prospect that the complaint will succeed;

[9] In its decision issued October 30, 2012, indexed as *Madadi v. B.C. (Ministry of Education)*, 2012 BCHRT 380, the BCHRT dismissed Mr. Madadi's complaint.

[10] The BCHRT considered two issues: whether the principle of judicial immunity protected the panel members and the Teacher Regulation Branch from liability for their actions in the course of disciplinary proceedings; and whether the BCHRT had general supervisory authority over the statutory decision making process of other tribunals.

[11] In respect of the matter of judicial immunity, the BCHRT concluded "that the principle of judicial immunity does not create an immunity from the *Code's* application" (at para. 44).

[12] In respect of the second issue, the BCHRT's authority under s. 14 of the *Code*, the BCHRT decided as follows:

> [114] It seems clear that the allegation of discrimination relates to the suggestion that the Panel made its determination of professional misconduct in part on the basis of discriminatory stereotypes about Muslim Iranians in Canada.
>
> [115] In order for the Tribunal to determine whether or not the decision is tainted by discrimination, it will be necessary for the Tribunal to review the evidence that was before the Panel, consider whether the conclusions drawn by the Panel were in accordance with the evidence and whether they are, in context, discriminatory. I do not see how the Tribunal could make a determination with respect to whether the Panel's decision was ultimately discriminatory with respect to Mr. Madadi's faith or ethnic and cultural background (race, ancestry, place of origin, or religion) without revisiting and effectively reconsidering the evidence which was before the Panel upon which their conclusions were drawn and effectively reconsidering the merits of the decision.
>
> [116] More specifically, the Tribunal hearing this Complaint would, in my view, be required to consider the evidence respecting the circumstances under which Mr. Madadi's use of the phrase "I pray for you" was used in each instance. That would be necessary in order to determine whether the phrase could be reasonably construed as having been made in a threatening manner or whether that conclusion was discriminatory. It would involve consideration of Mr. Madadi's evidence regarding his intentions and whether, in fact, no evidence was offered or admitted in the proceedings on what it meant to be Canadian, or how a Canadian resident ought to have understood the statement in context. It would involve consideration of whether there was any evidence supporting the statement in the Decision that as a long time

> resident of Canada the complainant ought to have known the phrase "I pray for you", in the context, would be construed as threatening.
>
> [117] I do not agree with Mr. Madadi that the Complaint, unsupported by the Amendment, alleges that the Decision set a discriminatory professional standard, as described by him, so I am not prepared to allow the Complaint to go forward on that limited basis. In any event, that allegation would also require the Tribunal to undertake a similar review of the Decision.
>
> [118] I am advised that Mr. Madadi has filed a Notice of Appeal of the Decision in the Supreme Court of British Columbia.
>
> [119] The Supreme Court, in my view, is the appropriate body to review the Decision. In the process, it certainly has the jurisdiction to consider whether the conclusions of the Panel were improperly influenced by discriminatory considerations so as to deprive Mr. Madadi of natural justice. It is clear that the Supreme Court of Canada wishes that the legislative appeal processes be followed and that the Tribunal not unnecessarily insert itself into the affairs of other tribunals.
>
> [120] While the Tribunal has jurisdiction to consider whether the Respondent has contravened s. 14, the particular circumstances of this Complaint ask the Tribunal to undertake a role it has said is not open or appropriate for it to undertake. To address the complaint of discrimination, the Tribunal would be required, in my view, to engage in a review of the merits of the Decision.
>
> [121] Accordingly, while this is not a case where the Tribunal lacks jurisdiction over the complaint, it is one, in my view, which asks the Tribunal to engage in what amounts to the function of the Court on judicial review. There is no reasonable prospect that the Complaint can succeed and it is dismissed pursuant to s. 27(1)(c).
>
> [Emphasis added.]

[13] Mr. Madadi did not seek judicial review of the BCHRT decision.

Mr. Madadi's Position

[14] Mr. Madadi is seeking various remedies against the College:

1. an order setting aside both decisions;

2. an order that his name be removed from the College's website and that his record be cleared within a reasonable time;

3. an order that the College write to all the websites that show information about the decisions which provide any information about him to remove his name from those websites within a reasonable time;

4. an order that the College write to all the public school districts informing them that the decisions have been set aside;

5. an order that the College publish this decision on its website and in its other publications. Mr. Madadi will specify where the decision ought to be placed on the website;

6. adjudication by this Court to address the human rights aspect of his case;

7. an order that the College educate their lawyers, staff and hearing panel members on the following:

    a. human rights rules and regulations;

    b. rules of evidence, particularly in regard to hearsay; and

    c. proper conduct of hearing panel members.

8. compensation for injury to Mr. Madadi's dignity;

9. a ruling that the College violated his natural justice rights "by finding guilt on hearsay and double hearsay"; and

10. an order for special costs, punitive damages, loss of income and other appropriate compensation.

The Respondent's Position

[15] The respondent consents to certain items in Mr. Madadi's remedy list and not to others. Its position is:

1. The respondent consents to setting aside both decisions of the panel of November 12, 2010 and June 22, 2011.

2. The respondent agrees to remove the decisions from its website or any reference to them.

3. The respondent agrees to provide "other websites" that show information about the decisions notice informing them of the fact that the decisions are set aside, upon receipt of a list of the "other websites" provided by Mr. Madadi.

4. The respondent agrees to write to all the public school districts informing them that the decisions have been set aside.

5. The respondent agrees that the Teacher Regulation Branch will publish this decision on their website in the discipline decision section.

6. The respondent says there is no violation of Mr. Madadi's human rights and there is no jurisdiction for this Court to order remedies under the *Code*.

7. The respondent agrees that the Teacher Regulation Branch will use this case for educational purposes, but Mr. Madadi's specific requests cannot be enforced as a court order.

8. The respondent says that compensation for injury to Mr. Madadi's dignity is within the jurisdiction of the BCHRT. Further, Mr. Madadi has not established a basis for such compensation nor has he quantified it.

9. The respondent says that there has been no violation of Mr. Madadi's "natural justice rights by finding guilt on hearsay and double hearsay."

10. The respondent says there is no basis for an award of costs against the former College.

Issues

[16] I will not address the claims that the respondent has agreed to address. The issue for determination is whether I have jurisdiction to provide Mr. Madadi with the compensation that he claims for a breach of the *Code* and the alleged injury to his dignity, damages for the alleged breach of natural justice, specifically what

Mr. Madadi describes as "finding guilt on hearsay and double hearsay" special costs, punitive damages, and loss of income.

Analysis

[17] I will first address whether this Court has the jurisdiction to consider a breach of the *Code* and whether Mr. Madadi's claims for compensation and costs are available in the context of his appeal.

Jurisdiction to Consider a Breach of the Code

[18] In para. 119 of the BCHRT decision (referred to above), the tribunal concluded that this Court "certainly has the jurisdiction to consider whether the conclusions of the [p]anel were improperly influenced by discriminatory considerations so as to deprive Mr. Madadi of natural justice."

[19] Mr. Madadi did not seek a judicial review of the decision of the BCHRT, nor would he, as he did not take issue with the BCHRT decision. The respondent did not seek judicial review of that decision but takes the position that compensation for injury to Mr. Madadi's dignity is within the jurisdiction of the BCHRT, not within the jurisdiction of this Court. The respondent suggests that if Mr. Madadi seeks damages for injury to his dignity, he ought to have sought judicial review of the BCHRT decision.

[20] In support of its position, the respondent relies on the following paragraph in *Miller v. Thompson Rivers University*, 2013 BCSC 2138:

> [34] In order to assist the defendants in responding to the claim and to ensure that the trial proceeds as efficiently as possible, the portions of the plaintiff's claim alleging violations of human rights legislation and the *Charter* will be struck. It is well established that a plaintiff who alleges a breach of human rights legislation has no cause of action in the courts: *Moore v British Columbia* (1988), 23 B.C.L.R. (2d) 105 (C.A). If Mr. Miller would like to pursue his allegation of a human rights violation he may do so in the proper forum - the British Columbia Human Rights Tribunal. In addition, the plaintiff does not identify a law or government action which could be subject to the *Charter*.

[21] In *Moore v. British Columbia* (1988), 23 B.C.L.R. (2d) 105 (C.A.), the case upon which *Miller* relies, the plaintiff attempted to bring a civil cause of action for a *Code* violation. The court rejected that attempt, concluding at 110 that:

> … the claims in the action based upon the Human Rights Act ought to be dismissed. The appellant must pursue those claims under the procedure provided in the [Human Rights] Act, which forecloses any civil action based directly upon a breach thereof, and also excludes any common law action based on invocation of a public policy expressed in the Act.

[22] On a broad reading of *Moore*, it appears that the superior courts are not the proper venue for bringing allegations of *Code* violations. Courts have generally presumed that when a legislature has created an administrative agency to govern a particular area that courts no longer have jurisdiction to adjudicate in the same area. Donald J.M. Brown and John M. Evans, in *Judicial Review of Administrative Action in Canada*, (loose-leaf December 2013 update), (Toronto: Carswell, 1998), explain at 1:7330:

> … where the legislation creating a new right also provides the means for determining those rights through an independent tribunal, a court will likely infer that its jurisdiction has been excluded by implication. And analogous reasoning led the Supreme Court of Canada to conclude [in *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181] that it would be inconsistent with the statutory provisions for the enforcement of human rights legislation to permit a person to seek damages in the courts for breach of the statutory duty not to discriminate.
>
> [Footnotes omitted.]

[23] However, these authorities may not be a bar to applying the *Code*. *Seneca*, *Miller* and *Moore* presented a different issue than the case at bar.

[24] In *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181, the Court decided that there was no tort of discrimination that would permit a person to seek civil damages in the courts for breach of a statutory duty not to discriminate. In *Miller* the plaintiff alleged a violation of the *Code* as the basis for a civil cause of action. Similarly, in *Moore*, Macfarlane J.A. commented at 110 that the *Code* “forecloses any civil action based directly upon a breach thereof”.

[25] This line of authority does not necessarily mean that a superior court has no jurisdiction to apply the *Code* or award *Code* remedies.

[26] It is also worth noting that *Seneca College* and *Moore* were decided more than 25 years ago when *Charter* and human rights jurisprudence was much less developed. Since that time, administrative agencies besides human rights tribunals have been found competent to apply human rights codes: *Parry Sound (District) Social Services Administration Board v. O.P.E.S.U.*, *Local 324*, 2003 SCC 42. Observations made in *Moore* about human rights adjudication being an adequate substitute to *Charter* claims have been rejected by other courts: *Perera v. Canada*, [1997] F.C.J. No. 199 at paras. 15-17 (F.C.T.D.); *Ayangma v. Prince Edward Island Eastern School Board*, 2000 PESCAD 12 at paras. 7-9.

[27] In *Sparrow v. Manufacturers Life Insurance Co*., 2004 MBQB 281 Suche J. addressed an application by the defendant to strike the statement of claim of the plaintiff. Mr. Sparrow was employed with the defendant but was dismissed after he developed an illness which affected his eyesight. Before starting the action, Mr. Sparrow filed a complaint with the Manitoba Human Rights Commission alleging that the defendant failed to reasonably accommodate his illness. There was no evidence of when or if the Commission would proceed with the complaint, despite the approximately 18 month time lapse. In the action, the plaintiff sought general damages, including damages for humiliation and loss of self-respect for breach of an express or implied contract term that any disability would be accommodated and for wrongful termination.

[28] The court addressed its jurisdiction in paras. 15-20:

> [15] The question then, is whether this court has jurisdiction to hear an action for wrongful dismissal based on a breach of the ***Code***. The jurisdiction of a superior court to entertain claims based on human rights legislation has been a matter of some controversy over the years. One line of cases, which New Flyer relies on, begins with ***Seneca College of Applied Arts and Technology v. Bhadauria***, 1981 CanLII 29 (SCC), [1981] 2 S.C.R. 181. There, the Supreme Court of Canada concluded that no independent right of action is created by the prohibition against discrimination existing in ***The Ontario Human Rights Code***, R.S.O. 1970, c. 318.

> [16] The ***Bhadauria*** decision can be distinguished for several reasons. Ms. Bhadauria had applied for employment with the defendant. She alleged defendant did not hire her because of her race. No common law rights arise when an individual applies for a job, so there was no existing right of action which could be enforced by the courts. The question before the court then, was whether an independent tort was created by the legislation.
>
> [17] The situation here is quite different. Mr. Sparrow is party to a contract of employment, from which a common law right of action arises. That right can be enforced by the courts.
>
> [18] In addition, the human rights legislation under consideration in ***Bhadauria*** granted exclusive jurisdiction to decide all issues relating to a breach of the legislation to an adjudicator or a panel appointed under that Act. It also expressly limited original jurisdiction to the complaint process.
>
> [19] The ***Code*** does not restrict jurisdiction to a human rights adjudicator, except to determine issues of fact and law that arise on a complaint the adjudicator hears. It also contemplates that the court has original jurisdiction to decide issues arising under the ***Code*** in certain circumstances.
>
> [20] New Flyer relies on several decisions, including some from this court, which have followed ***Bhadauria***, in circumstances where the parties were in an employment relationship. [See, for example, ***Tenning v. Manitoba***, [1983] M.J. No. 79 (Man. C.A.), ***Mallet v. Province of New Brunswick*** (1982), 143 D.L.R. (3d) 161 (N.B.Q.B.), ***Mbaruk v. Maple Ridge-Pitt Meadows School District No. 42***, [1996] B.C.J. No. 3093 (B.C.S.C.), and ***Moore v. The Queen in right of British Columbia et al***1988 CanLII 184 (BC CA), (1988), 50 D.L.R. (4th) 29 (B.C.C.A.)] I note, however, that none of these considered the effect of the difference between an action based in contract, and an independent right of action based on discrimination.
>
> [21] I also cannot help but note that at the time ***Bhadauria*** and some of these other cases were decided, the concepts of reasonable accommodation, adverse impact discrimination, and some of the refinements in human rights law that have since developed, did not exist. For these reasons, then, I do not think that these cases are helpful.
>
> [Emphasis added.]

[29] Justice Suche discussed whether a right of action arises from a statutory right where a statutory remedy is also provided and finds three relevant factors (at paras. 22-25):

> (i) whether the action was brought in respect of the harm the statute was intended to prevent;
>
> (ii) whether the plaintiff is one of the class the statute was intended to protect; and
>
> (iii) whether the remedy provided by the statute is adequate for the protection of the person injured.

[30] At paras. 26-32, Suche J. says:

> [26] Applying this test to the present situation, the kind of harm alleged – discrimination in employment – is exactly what the ***Code*** was designed to address; a person suffering from a physical disability falls within the class that the statute was designed to protect. The real issue for determination is whether the remedy provided by the ***Code*** is inadequate, or otherwise by necessary implication excludes the court's jurisdiction.
>
> [27] The starting point is a consideration of the nature of the ***Code***. Human rights legislation is special legislation, often described as "almost constitutional". Not only does it confer a benefit but also it is remedial in nature. It is paramount to any other legislation. In the case of the ***Code***, this is specifically stated to be so, both in the preamble and in s. 58. Thus, human rights legislation cannot be contracted out of, and is to be interpreted broadly, to give effect to its objectives.
>
> [28] In my view, there is no question that the ***Code*** intends to incorporate those provisions relating to employment into every contract of employment it governs. New Flyer does not really contest this issue, but argues that the only remedy available to the plaintiff is through a complaint to the Commission.
>
> [29] There is nothing in the ***Code*** that by necessary implication excludes court action. On the question of "adequacy of remedy", a significant consideration is the fact that a complaint brought under the ***Code*** is controlled by the Commission, not the complainant. Whether a complaint will be accepted, the nature and pace of the investigation, whether the matter will proceed to a hearing before an adjudicator, and conduct of the hearing, (if one is held), are all matters determined by the Commission. The Commission even has the right to terminate a complaint if, in the process of mediation – which is only undertaken if directed by the Commission – the respondent makes an offer to settle which the Commission thinks is reasonable, but the complainant will not accept. The six-month limitation period is, also a factor, albeit a minor one.
>
> [30] In addition, a right of action for wrongful dismissal is an existing common law right over which the courts have jurisdiction. To grant additional rights to employees but to deny them access to enforce those rights is antithetical to the objects of the ***Code***.
>
> [31] Employees who have claims for wrongful dismissal, which include a breach of the ***Code,*** would be required to launch two separate proceedings to determine or enforce rights arising from one contract of employment. This would not make for a good law, or provide appropriate remedies.
>
> [32] <u>All of this leads me to the conclusion that an employee's rights arising under the ***Code*** are not limited to a complaint to the Commission, and an employee is not prevented from bringing an action in this court to enforce rights arising within an employment relationship.</u> The claim is not an abuse of process and I dismiss the defendant's motion in that respect.
>
> [Emphasis added.]

[31] Despite the finding that the court had jurisdiction to consider the alleged breach of the *Code*, Suche J. concluded that the court did not have jurisdiction to award *Code* damages:

> [39] Consequential injury to dignity and self-respect is a concept found in the ***Code***. If an adjudicator, having conducted a hearing into a complaint, concludes that a party has contravened the ***Code***, s/he may make an order requiring that party to pay damages to any person affected by the contravention.
>
> [40] This remedy does not exist at common law, and the ***Code*** does not, in my view confer jurisdiction to the court to grant the remedy. For that reason, I will grant the defendant's motion for an order striking that portion of paragraph 19 of the statement of claim, as well.
>
> [Emphasis added.]

[32] The BC *Code* does not appear to grant exclusive jurisdiction to the BCHRT. However, all the remedial powers refer to "members" and the "panel" exercising those powers, and I can find no reference to a court exercising any of the powers under the *Code*:

> Remedies
>
> 37
>
> (2) If the member or panel determines that the complaint is justified, the member or panel
>
> …
>
> (d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this Code to do one or more of the following:
>
> …
>
> (ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;
>
> (iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.
>
> …

Section 1 defines the roles of "member" and "panel" as follows:

> **"member"** means a person appointed under section 31 (1) (b) as a member of the tribunal;

> **"panel"** means a panel designated under section 27.1 (1) (b);

[33] Based upon the above, I find that I have jurisdiction to consider a breach of the *Code*, but I am limited to addressing the breach, not the remedy. There is no point in my considering whether there was a breach of the *Code*, because I cannot provide the remedy that Mr. Madadi seeks.

Are Mr. Madadi's claims for compensation and costs available in the context of his appeal

[34] The starting point for my consideration of this issue is s. 42(1) of the *TPA*:

> **Protection against actions**
>
> 42 (1) An action for damages does not lie against the college, the council, a member, an officer or employee of the college, or any other person, for anything done or omitted by him or her in good faith while acting or purporting to act on behalf of the college or the council under this Act.

[35] This provision is clear and is a full answer to Mr. Madadi's claim for compensation; however, I will address the principles involved in order to fully address Mr. Madadi's claims.

[36] Before explaining my substantive findings, I will address two procedural problems in this case with awarding damages even if there was a precedent for doing so.

[37] First, Mr. Madadi did not claim administrative law damages in his pleadings, and the court ordered it on its own initiative. Second, Mr. Madadi's statutory appeal is now moot. The decision he was appealing has been vacated; there is no longer a live issue between the parties.

[38] The doctrine of mootness was described by Sopinka J. for a unanimous Court in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353 as follows:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This

> essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision.

[39] These obstacles aside, it appears that there is no general scope to award damages as an administrative law remedy. Brown and Evans explain at 5:2300:

> Generally speaking, apart from section 24 of the *Charter* or a statutory provision to the contrary, damages cannot be obtained on an application for a prerogative order or on a statutory application for judicial review. The reason would seem to be that an assessment of damages together with any duty to mitigate usually requires evidence of a kind that is better received in a trial context than through the summary procedure followed in connection with an application for judicial review. Moreover, public law grievances will not give rise to a cause of action for damages, unless the invalid decision also involves a tort.
>
> [Emphasis added, footnotes omitted.]

[40] They go on to discuss some exceptions, none of which apply here:

> However, in certain circumstances, monetary relief may be available. For example, where a payment of money is due, an order or declaration to that effect may be granted. As well, where public [office]-holders are wrongfully deprived of office, quashing the decision or making a declaration of invalidity can result in money becoming due to the office-holder.
>
> …
>
> Of course, where a tribunal flagrantly refuses to abide by a court order, it may be found in contempt of court and fined.
>
> [Footnotes omitted.]

[41] Brown and Evans also say in footnote 430 on damages at 1:7100, "...other than in Saskatchewan, damages and a prerogative order may not be sought in the same proceeding, nor may damages be claimed on an application for judicial review."

[42] There is no provision in the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (the "*JRPA*") or the BC *Supreme Court Civil Rules*, B.C. Reg. 168/2009 that enables a party to seek judicial review and damages in the same action.

[43] There are several cases which indicate that there is no scope for damages as an administrative law remedy. Most of these cases arise in somewhat different

contexts: as applications for judicial review through the *Federal Courts Act*, R.S.C. 1985, c. F-7 or through a particular province's rules of court or judicial review procedure statutes. The parties in this case do not agree on whether the *JRPA* governs the available remedies (the appellant claims that it does not at para. 374 of his memorandum of argument and the Attorney General indicates it does at para. 74 of its written submissions). However, the Supreme Court of Canada has expressed that statutory appeal and judicial review from the decisions of administrative tribunals are subject to the same principles: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, at para. 21; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at footnote 2.

[44] Appeals to this Court under s. 40 of the *TPA* have been treated as judicial reviews, much as they would be treated under the *JRPA*. For instance, in *Fox v. British Columbia College of Teachers*, 2004 BCSC 1448 Ehrcke J. began his analysis by determining the standard of review given the contextual factors of the statutory scheme and decides that the questions of law should be reviewed on a correctness standard, whereas the question of fact should be reviewed on a standard of reasonableness. Similarly in *Kempling v. British Columbia College of Teachers*, 2004 BCSC 133, aff'd 2005 BCCA 327 Holmes J. considered the statutory context to determine that the appropriate standard of review of the decisions under appeal is reasonableness and applying a "somewhat probing examination" led him to the conclusion that the hearing panel's decisions were reasonable.

[45] The following decisions made by superior courts iterate the basic principle that damages are not available in a judicial review proceeding. *First Real Properties Ltd. v. Hamilton (City)*, 2002 CanLII 49478 (Ont. S.C.J.) was an application for consolidation of two proceedings brought by the same plaintiff regarding the same subject matter: a judicial review application to the Ontario Divisional Court and an action seeking damages in the Superior Court:

> [4] The subject matter of each case, the proposed relocation of the Hamilton Farmers' Market, is identical. The grounds alleged for the action are essentially the same as the grounds alleged for the judicial review. The

> evidence to support the action will be the same as the evidence to support the judicial review. The remedies sought on the judicial review and the action are similar in the sense that the core of each remedy is a declaration that the by-law is invalid. The only differences are these:
>
> -- the judicial review seeks an order quashing the by-law but the action does not.
>
> -- the action seeks damages but the judicial review does not (and cannot).
>
> [Emphasis added.]

[46] *Graduate Students' Ass'n (University of Alberta) v. University of Alberta*, 82 D.L.R. (4th) 271 (Alta. C.A.) was an appeal from a declaration that an increase in Post-Program Fees and Continuous Registration Fees charged by the defendant was null and void, requiring the return of the fees collected. At issue was whether the fees were "fees for instruction", in which case approval from the Minister was required before an increase. The Court of Appeal agreed with the chambers judge that at least some of the fees constituted a "fee for instruction" and the decision should be set aside. The court had the following discussion on the appropriate remedy at 277-278:

> Given these conclusions, what remedies are available to the Respondents? The Board contends that the chambers judge erred in ordering that Post-Program Fees and Continuous Registration Fees collected from graduate students for the year 1990-91 be returned to the students or credited against any future fees payable by such students. The Board submits that damages and restitution were neither pled nor argued. It further argues that in any event, an action for damages or restitution cannot be joined with an action for judicial review, as was initiated by the Respondents in this case. We agree.
>
> [Emphasis added.]

[47] *Graduate Students' Ass'n* was applied in *Shea Nerland Calnan LLP v. Canada Revenue Agency*, 2009 ABQB 645. In *Shea Nerland Calnan LLP* the Canada Revenue Agency applied to quash a motion for a prerogative writ filed by a law firm on its own behalf seeking costs in relation to legal action the firm took to recover documents obtained by the CRA in a warranted search. Justice McIntyre found that the firm was in fact seeking damages and summarized the law as follows:

> [12] The first task is characterizing what the applicant seeks. The applicant purports to seek costs, the costs alleged to have been incurred in dealing with the search warrant obtained by the CRA. There had not been any

> proceeding in court, criminal or civil, between the applicant and the respondent, until the applicant initiated this one. The documents have been returned. In my view, the applicant is seeking damages, not costs. The applicant is seeking the expenses incurred by it or its client in asserting solicitor-client privilege for the documents seized by the CRA. These are damages, not costs.
>
> [13] The following principles emerge from the cases:
>
> a) Damages are not available in judicial review applications: *Graduate Students' Assoc. (University of Alberta) v. University of Alberta*, (1991), 80 Alta. L.R. (2d) 280, 117 A.R. 188 (ABCA).
>
> b) Damages are not available in applications in Federal Court for certiorari but must be sought through the rules of procedure for such claims: *Lussier v. Collin*, [1985] 1 F.C. 124 (C.A.).
>
> c) In unsuccessful criminal prosecutions, an award of costs against the Crown may be made when there is prosecutorial misconduct: *Robinson*, at paragraph 29, *R. v. 976494 Ontario Inc*., [2001] 3 SCR 575, 2001 SCC 81 (egregious incidents of non‑disclosure).
>
> d) If there is misconduct by an investigative agency, the appropriate remedy is a civil claim for damages: *Tiffin* at para. 96, *Leblanc* at para 16, and *Luipasco* at paras. 89, 90.
>
> e) Prosecutorial misconduct is different from investigative misconduct: *Luipasco* at para 70. I agree with the holding of Lefever A.C.J Prov. Ct. that the authorities have not "created a form of conjoined police-Crown prosecutor entity which, without more, visits upon the Crown liability for police acts amounting to malicious prosecution" and like him I am not prepared to follow the reasoning in *R. v. Galka*, 2007 ONCJ 17.
>
> [14] In conclusion, the remedy sought by the applicant is not available in law. The originating notice of motion must therefore be dismissed. Costs may be addressed in writing within 30 days.
>
> [Emphasis added.]

[48] *Graduate Students' Ass'n* was also relied on in *Haagsman v. British Columbia (Forests)*, 1998 CanLII 15122 (B.C.S.C.), an application decided by Sigurdson J. that followed from Edwards J.'s judgment in *Hayes Forest Services Ltd. v. Minister of Forests*, 1997 CanLII 2155 (B.C.S.C.). Haagsman, Hayes and several others obtained logging licences from the respondent Minister of Forests. Each paid the Minister a deposit for performance under the licence, but then did not harvest the timber under the licence. The Minister cancelled the licences and declared that the deposits were forfeited. The regulation which gave the Minister the authority to

cancel the licences and declare the deposits forfeited was set aside on judicial review by Edwards J. in *Hayes*, who also ordered the Minister to return the deposits.

[49] Following the decision in *Hayes* the Minister refused to refund the deposits paid under the invalid regulation and Haagsman and others brought this application for judicial review of the decision to retain the deposits. Justice Sigurdson found that the decision in *Hayes* that the regulation was invalid was binding, but the order to return the deposits was not, as no arguments were heard on the matter and the decision did not address important issues, such as whether repayment of the deposits could be ordered on judicial review. The *Haagsman* judgment discussed this issue as follows:

> [30] The order that the petitioners seek is a return of deposits. What is the nature of the plaintiffs' claim? It is not a claim in the nature of mandamus, certiorari or prohibition. It is a restitutionary claim rooted in unjust enrichment or perhaps a claim for money had and received. Can a claim of this type be brought in a judicial review proceeding?
>
> [31] In Administrative Law, 6th ed. (Oxford: Clarendon Press,1989), H.W.R. Wade addressed the traditional distinction between prerogative and private law remedies. At p. 584 he writes:
>
> > Until not long ago anomalies used to be caused by the fact that the remedies employed in administrative law belong to two different families. There is the family of ordinary private law remedies such as damages, injunction, and declaration; and there is a special family of public law remedies, principally certiorari, prohibition and mandamus, collectively known as the prerogative remedies... Within the "ordinary" and "prerogative" families the various remedies could be sought separately or together or in the alternative. But each family had its own distinct procedure. Damages, injunctions, and declarations were sought in an ordinary action, as in private law; but prerogative remedies had to be sought by a procedure of their own, which could not be combined with an ordinary action.
>
> [32] Section 2(2) of the Judicial Review Procedure Act clearly alters this and allows a petitioner to seek a declaration or injunction in judicial review proceedings, but is silent on the issue of damages. The following passage from D.P. Jones and A.S. de Villars, Principles of Administrative Law, 2d ed. (Toronto: Carswell, 1994) at 500 addresses this issue:
>
> > In addition to statutory appeals and prerogative remedies, redress for illegal government actions may sometimes be achieved by using private law actions for damages, injunctions or declarations. Although these private law remedies could historically only be sought by an action, applications for an

> injunction or a declaration (but not damages) can now be included in an "application for judicial review", either on their own or in combination with an application for a prerogative remedy. (emphasis added)
>
> [33] My review of the authorities indicates that in the absence of a specific rule allowing it, a claim for damages or restitution cannot be made in a judicial review proceeding. No such rule exists in British Columbia…
>
> [Emphasis added.]

[50] *Haagsman* was relied on for the authority that damages may not be awarded on an application under the *JRPA* or in a judicial review generally in *McLean v. HMTQ*, 2004 BCSC 285 at paras. 47-49, *Yellowridge Construction Ltd. v. Village of Anmore*, 2005 BCSC 304 at paras. 43-44, *Shilander v. BC Human Rights Tribunal*, 2005 BCSC 728 at para. 19, *Maerkl v. Denman Island Local Trust Committee et al*, 2005 BCSC 1308 at para. 14, *West Van Cab Ltd. v. British Columbia (Ministry of Transportation and Highways)*, 2007 BCSC 413 at para. 73, aff'd 2009 BCCA 47, and *Taylor v. The Law Society of British Columbia*, 2010 BCSC 1098 at para. 61. *Williams v. College Pension Board of Trustees*, 2005 BCSC 788 cited the ruling in *Haagsman* while discussing the advantages and disadvantages for the plaintiff in proceeding by judicial review or by class action:

> [121] However the judicial review proceeding would create certain disadvantages for the plaintiffs: there would be no oral discovery as of right; there would be no discovery of documents as of right; the plaintiffs would be potentially liable for costs; and, perhaps of most importance, the issue that the plaintiffs seek to advance is not necessarily the same issue as would be advanced in the ***Judicial Review Procedure Act*** application.
>
> [122] The last point is of some significance. Leaving aside the question of the declaration sought, the plaintiffs say that the central issue is whether there has been an actionable breach of fiduciary duty sounding in damages. In contrast, the defendants and intervenors say that central and fundamental issue is one of administrative law: did the Board act outside its jurisdiction in finding that it was not acting in breach of its fiduciary duty to the members?
>
> [123] Not only does a judicial review proceeding not address the issue of whether there can be a claim for damages or not, there may be differences in the central questions in the different proceedings…
>
> [Emphasis added.]

[51] Awarding costs in respect of the proceedings before the fitness hearing subcommittee of the College (the panel) in respect of conduct and penalty is, in my

view, restricted by the same principles. The panel itself has no authority to order costs, even if Mr. Madadi was successful in those proceedings. An award of costs by this Court in respect of those proceedings is compensatory and, like an award of damages, is not available in the context of this appeal.

Conclusion

[52] Even if I accept Mr. Madadi's characterization of the proceedings before the panel and the "great deal of personal anguish" that he says he suffered, I cannot order the compensation he seeks.

[53] Mr. Madadi has succeeded in his real quest: the decisions are set aside with the respondent's consent. That is the remedy that he has achieved.

Costs

[54] Although Mr. Madadi was successful at having the decisions set aside, his claims for compensation were unsuccessful. In the circumstances, no costs are payable by either party.

"Gropper J."