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Academic Misconduct and the Availability of Judicial Review

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Although judicial review has long been used in "traditional" areas of law, such as in disputes between health professionals and their regulatory bodies, judicial review is becoming increasingly available in non-traditional settings.

In *Asa v. University Health Network* ("*Asa*") 2016 ONSC 439, the Ontario Divisional Court found that judicial review was available to the Applicant researchers to quash a decision of the Respondent University Health Network in which it was held that the Applicants had committed academic misconduct.

The Facts

In *Asa*, the Applicants were distinguished cancer researchers engaged in research activities with the Respondent. In this capacity, the Applicants published numerous research papers.

In the Fall of 2012, the Respondent received several complaints about the quality of the Applicants' research papers. Pursuant to the Respondent's Research Policy, which established specific research and publication standards, an Investigation Committee was formed to investigate the impugned publications.

In October 2014, the Investigation Committee found that the Applicants had committed three types of academic misconduct. As a result, the Applicants' research activities were temporarily suspended pending a further investigation into their research.

Pursuant to the Research Policy, the Applicants appealed the Investigation Committee's decision to the Respondent's CEO. The CEO dismissed their appeal in March, 2015 (the "Decision").

The Applicants then brought an application for judicial review seeking an order to quash the Decision, and to send the matter back to the Respondent for a redetermination at an oral hearing.

The Respondent opposed this application, in part, by arguing that the Decision was not subject to judicial review.

Writing for a unanimous Divisional Court, Justice Sachs found that the Decision was susceptible to judicial

review on a reasonableness standard. Moreover, the Court found that it was unreasonable for the Respondent to have found that the Appellants committed two of the three types of academic misconduct. However, the Court found that the Decision was reasonable as it related to the finding of the third type of academic misconduct. In the circumstances, the Court remitted the matter back to the Respondent for reconsideration of the appropriate sanction.

The Availability of Judicial Review

While the Court's reasoning as it relates to the reasonableness of the Decision is a typical application of the reasonableness standard, as set out in the Supreme Court of Canada's decision *Dunsmuir v. New Brunswick* 2008 SCC 9, it is the Court's willingness to find that the Decision was susceptible to judicial review which makes *Asa* unique.

In finding that judicial review was available to challenge the Decision, the Court relied on the Ontario Court of Appeal's decision in *Setia v. Appleby College* ("*Setia*") 2013 ONCA 753 wherein the Court held that the jurisdiction to grant an order quashing a decision pursuant to s. 2(1)1 of the *Judicial Review Procedures Act* R.S.O. 1990, c. J.1 does not depend on whether the impugned decision is an exercise of a statutory power.

Rather, in *Setia*, the Court of Appeal held that the jurisdiction to grant such an order "turns on whether the... decision is the kind of decision that is reached by public law and therefore a decision to which a public law remedy can be applied."

The Court of Appeal held that such an inquiry should consider the following eight (8) criteria:

1. the character of the matter for which review is sought;
2. the nature of the decision-maker and its responsibilities;
3. the extent to which a decision is founded in and shaped by law as opposed to private discretion;
4. the body's relationship to other statutory schemes or other parts of government;
5. the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity;
6. the suitability of public law remedies;
7. the existence of a compulsory power; and
8. **whether the impugned decision is part of an "exceptional" category of cases where the conduct has attained a serious public dimension. [emphasis added]**

In *Asa*, the Court relied exclusively on the eighth criteria (whether the impugned decision is part of an exceptional category of cases where the conduct has attained a serious public dimension) to find that the Decision was subject to judicial review. In particular, the Court found a pronounced public dimension to the Decision as it barred the Applicants from conducting cancer research that affects medical protocols used in cancer treatment in Ontario.

The Court found a further public dimension in the Decision by virtue of the wording of the Decision itself which noted that the Respondent had to provide a "strong public pronouncement" regarding its commitment to excellence in cancer research.

Moreover, the Court considered the Decision to have a public dimension because the Respondent was a public hospital, and because the Decision concerned the operation of the Respondent's research facilities and the provision of cancer research.

Lastly, the Court observed that the Decision's public dimension was highlighted by the fact that the Decision was made pursuant to the Research Policy, which was mandated by government agencies that fund medical research in Canada.

Taken together, the Court found that these facts put the Decision within the purview of public law, and thus was one that could be judicially reviewed.

Conclusion

Asa is a notable decision as it shows how judicial review is available in a range of contexts and how liberally Ontario Courts have begun to construe the *Setia* criteria. Indeed, the Court in Asa relied entirely on the public dimension criteria from *Setia* to find that a decision by an executive at a public hospital concerning cancer research was susceptible to judicial review.

Given the liberal interpretation of the *Setia* criteria in *Asa*, a party who is subject to an unfavourable decision in any forum would do well to keep judicial review in mind, and think about how their unfavorable decision may be the kind of decision which is reached by public law.