

# CASE COMMENT: MITTEN V. COLLEGE OF ALBERTA PSYCHOLOGISTS

## WHAT IS THE SCOPE OF A COMPLAINANT'S RIGHT TO SEEK JUDICIAL REVIEW?



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In *Mitten v. College of Alberta Psychologists*, 2010 ABCA 159, the Alberta Court of Appeal considered whether or not a complainant whose complaint is dismissed is entitled to seek judicial review of the dismissal of her complaint, after exhausting the internal appeal procedures that are available pursuant to the governing legislation.

In *Mitten*, an individual made a complaint to the College of Alberta Psychologists against her former psychologist (the "Complainant"). The Complainant did not agree with the psychologist's therapeutic methods, her professional attitude, her failure to provide some documents, and a report that the psychologist felt obliged to make under statute. The Complainant filed a lengthy complaint with the College on March 31, 2005. Part of the complaint was that she was denied access to her personal records. The Complainant made parallel complaints on that issue to the federal and provincial privacy commissioners. The College did not initially investigate that portion of the complaint, but revived this portion of the investigation after it became clear that there would be considerable delays in having the privacy commissioners deal with that issue. On June 15, 2006, after reviewing the investigator's report, the Acting Registrar of the College determined that there was insufficient evidence of professional misconduct or unskilled practice, and dismissed the complaint.

The Complainant appealed the decision to dismiss her complaint to the Discipline Committee of the College. The Discipline Committee, after hearing oral submissions on behalf of the Complainant, agreed with the Acting Registrar that there was insufficient evidence to warrant a disciplinary hearing on the merits and dismissed the appeal. The Complainant then filed an Originating Notice seeking judicial review of the Discipline Committee's decision to dismiss the complaint, arguing that the proceedings before the Discipline Committee were procedurally unfair, that the appeal ought

to have been considered pursuant to the provisions of the *Health Professions Act* (HPA) and not the *Psychology Profession Act* (PPA), and that the decision to dismiss the complaint was unreasonable.

The College filed an application seeking to quash the application for judicial review on the basis that judicial review is not available to a complainant in professional regulatory proceedings who disagrees with the disposition of his or her complaint. In making its application, the College relied upon the earlier decision of the Alberta Court of Appeal in *Friends of the Old Man River Society v. Assn. of Professional Engineers, Geologists and Geophysicists of Alberta*, 2001 ABCA 107, ("APEGGA") where the Court held that the complainant was not given the right under the statute to cross-examine witnesses, to be present for the duration of the proceedings, or to be represented by counsel. Accordingly, the Complainant was a witness and not a "party", and was therefore not entitled to bring an application for judicial review of the decision to dismiss the complaint. Moreover, the Court held that the decision whether or not to dismiss a complaint without referring it to a hearing is akin to the type of discretion exercised by the Crown in criminal proceedings, which is not amenable to judicial review. As such, decisions regarding whether or not a matter should proceed to a hearing under the applicable statute were similarly not amenable to judicial review.

In *Mitten*, the Alberta Court of Queen's Bench granted the College's application to strike the Complainant's Originating Notice, holding that the Discipline Committee did not err in processing the complaint under the PPA. The Complainant's argument that the College applied the wrong statute was "factually hopeless." The Court also held that the Complainant had no standing to bring an application for judicial review, based on the decision of the Court of Appeal in *APEGGA*.

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On appeal to the Court of Appeal, the Court affirmed that the College did not err in applying the substantive provisions of the PPA and agreed with the findings of the lower court that that aspect of the application for judicial review was “factually hopeless.” The Court of Appeal also upheld the finding of the Court of Queen’s Bench that certain aspects of the Complainant’s application for judicial review were not amenable to judicial review. Specifically, the Court agreed that the Complainant was not entitled to seek judicial decision. The Court also agreed that the Complainant was not entitled to seek judicial review of the decision to dismiss the complaint, since the decision whether to proceed to a hearing is akin to the exercise of prosecutorial discretion.

Although the Court of Appeal agreed with a number of findings in the earlier decision of *APEGGA*, the Court of Appeal held that judicial review was available to the Complainant in some respects. Specifically, the Complainant was not barred from pursuing an application for judicial review insofar as her application related to the fairness of the proceedings before the Discipline Committee. Although the *merits* of the decision to dismiss her complaint were not subject to judicial review, the Complainant was entitled to seek judicial review of the *manner* in which the Discipline Committee conducted its proceeding, and the fairness of its process. Consequently, the Court of Appeal upheld the decision to strike certain aspects of the Originating Notice dealing with the merits of the decision, but determined that the Complainant was entitled to file an amended Originating Notice of those aspects of her application for judicial review dealing with the fairness of the process before the Discipline Committee. Those aspects included allegations that the Discipline Committee relied upon information that the Complainant did not have access to and that the Discipline Committee failed to issue written reasons for its decision. The Court of Appeal specifically declined to comment on the content of the duty of fairness, and made no findings regarding whether the Discipline Committee breached the duty of fairness owed to the Complainant during the appeal process, remitting those issues to the Court of Queen’s Bench for further consideration.

The Court of Appeal in *Mitten* spent very little time reconciling its own approach to the question of whether or not a Complainant has standing on judicial review, and the approach taken by the Court in *APEGGA*. In *Mitten*, the Court of Appeal noted that the Court of Appeal in *APEGGA* did make findings regarding whether or not the appeal proceedings were unfair, whereas in *Mitten*, there was no adjudication of the issues raised by the Complainant relating to procedural fairness.

The decision in *Mitten* represents a change for regulators given that the Court of Appeal has now determined that complainants who have concerns about the fairness of an appeal or review under the governing statute may be entitled to seek judicial review. The decision in *Mitten* reinforces the need for regulators to ensure that their statutory appeal or review processes are procedurally fair. Although regulators cannot stop a complainant from seeking judicial review of a decision to dismiss a complaint if the grounds for doing so relate to the fairness of the appeal or review process, regulators can minimize the risk of a decision being overturned by ensuring that the procedures employed comply with the principles of procedural fairness and natural justice.

Notwithstanding this change in approach, complainants are still not entitled to seek judicial review of a decision if they merely disagree with the conclusion reached by an appeal or review body, upholding the dismissal of a complaint. In such a circumstance, regulators may still choose to make an application to strike the application, in accordance with the decisions in both *APEGGA* and *Mitten*. ▲

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