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PRACTICE AND PROCEDURE BEFORE ADMINISTRATIVE TRIBUNALS
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The pages in this work were reissued in May 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the May 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

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AUTHOR'S NOTE

One area of Administrative Law that is under-scrutinized involves the judicial review of accountability officials, such as integrity commissioners. These offices typically are appointed by legislatures, as opposed to the executive, and function both as a means of accountability in their own right and as a recourse for whistle-blowers. However, the decisions of integrity commissioners may leave some aggrieved, either by proceeding with investigations, or by failing to do so.

For example, in *Gordillo v. Canada (A.G.)*, 2022 FCA 23, 2022 CarswellNat 251 (F.C.A.), family members of a slain Mexican community activist, Mariano Abarca, made a complaint to the Public Sector Integrity Commissioner of Canada alleging Canadian entities contributed to the crime against Mr. Arbarca. The Commissioner concluded it was not in the public interest to launch an investigation based on the information before him. The Federal Court dismissed an application for judicial review of this decision, and the Federal Court of Appeal dismissed the appeal of that decision.

The Court of Appeal deferred to the Commissioner's exercise of discretion in determining an investigation was not warranted on the basis of the complaint submitted and available evidence. The Court rejected the argument that the decision was unfair as well as the argument that the decision was unreasonable. In the course of its reasonableness analysis, the Court declined to consider arguments raised by interveners regarding the applicability of the *Charter* and international law, as they were not put before the Commissioner or the Federal Court on judicial review.

In *Burlacu v. Canada (Attorney General)*, 2022 FCA 10, 2022 CarswellNat 60 (F.C.A.), the Federal Court of Appeal dismissed another appeal from a Federal Court decision, in this case dismissing an application for judicial review of a decision of the Public Sector Integrity Commissioner not to conduct an investigation into disclosures of wrongdoing made under the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46. The alleged wrongdoing involved decisions on immigration and refugee applications made by the CBSA and Immigration, Refugee and Citizenship Canada officials as well as by a member of the Immigration and Refugee Board of Canada.

In *Burlacu*, the applicant alleged that the officials involved in several administrative decisions committed wrongdoing by breaching IRPA and in so doing, breaching Values and Ethics Code for the Public Sector. The applicant also alleged that some of these actions constituted a breach of s. 126(1) of the *Criminal Code*, which makes it a crime to contravene an Act of Parliament, without lawful excuse, by intentionally doing anything it forbids or intentionally omitting to do anything that it requires to do. The Commissioner declined to commence an investigation into these disclosures, as he concluded that it did not appear that wrongdoing had occurred. Rather, he characterized the applicant's concern as a disagreement over the application of IRPA. The Federal Court, applying the standard of reasonableness, refused to interfere with the Commissioner's decision. The Federal Court of Appeal concluded there was no basis to interfere with this finding.

In both cases, the Court's high degree of deference toward accountability officers in the conduct of their investigative powers was on display.

These cases together suggest that, given the significant discretion afforded accountability officers, and deference shown to these officers on judicial review of their decisions, the courts will play only a minor role in holding accountability officers accountable. That said, even unsuccessful cases shine a valuable spotlight on the jurisdiction and determinations of accountability officers.

This release features developments in several areas of administrative law.

In *Bergman v. Innisfree (Village)*, 2020 ABQB 661, 2020 CarswellAlta 2024, 10 M.P.L.R. (6th) 183 (Alta. Q.B.), a landowner brought a judicial review of a property tax bylaw on the basis that it imposed an impermissible form of minimum property tax, which was unjustifiably high. This was application was one in a series of challenges to the tax brought by the applicant. The applicant sought to admit new evidence of the context surrounding the tax challenge. The Court declined to admit new evidence which the applicant attempted to submit and dismissed the judicial review. While the Court found the judicial review should be dismissed on the merits, it also dismissed the municipality's cross application that the judicial review should be dismissed on the basis of an abuse of process.

In *Brown Bros. Motor Lease Canada Ltd. v. Workers' Compensation Appeal Tribunal*, 2022 BCCA 20, 2022 CarswellBC 117 (B.C. C.A.), the B.C. Court of Appeal considered the scope of the patent unreasonableness standard in the context of a judicial review from a decision of the Workers' Compensation Appeal Tribunal (the "WCAT"). The decision concerned five crew members employed by an American airline who were American residents but who were injured in a motor vehicle accident in B.C. while on layover. The crew members launched a personal injury action in B.C. but the defendants argued that the civil action was barred by s. 10 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492, which bars civil actions for damages when the plaintiff is a "worker" under the Act, the injury arises out of and in the course of the plaintiff's employment. The WCAT held that the crew members were not "workers in British Columbia" to whom the compensation provisions of the Act applied. Accordingly, the appellants could not rely on the Act as a defence to the personal injury actions. The B.C. Court of Appeal dismissed the appeal on the basis that the decision of the WCAT was not patently unreasonable in its reasoning or result.

In *Safe Food Matters Inc. v. Canada (Attorney General)*, 2022 FCA 19, 2022 CarswellNat 175 (F.C.A.), the Federal Court of Appeal considered a judicial review by an environmental NGO of a decision of the Pest Management Regulatory Agency (the PMRA), a division of Health Canada, on whether a pesticide should remain in use under the terms of the *Pest Control Products Act*, S.C. 2002, c. 28 (the Act) and its regulations. The Federal Court found no basis to reverse the finding of the PMRA. The Federal Court of Appeal allowed an appeal and remitted the matter back to the PMRA to reconsider the decision in light of the Court's guidance.

L.S.

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