# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *The Parent obo the Child v. The School District,*
2020 BCCA 333

Date: 20201127
Docket: CA46113

2020 BCCA 333 (CanLII)

Between:

**The Parent obo the Child**

Respondent
(Petitioner)

And

**The School District**

Appellant
(Respondent)

And

**B.C. Human Rights Tribunal**

Respondent

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated May 1, 2019 (*The Parent obo The Child v. The School District*, 2019 BCSC 659, Vancouver Docket S186830).

Counsel for the Appellant (via videoconference): D.J.A. Bell, J.A. Bank

Counsel for the Respondent, The Parent obo the Child (via videoconference): L.A. Waddell, S.A. Hanson

Place and Date of Hearing: Vancouver, British Columbia, June 23, 2020

Place and Date of Judgment: Vancouver, British Columbia, November 27, 2020

**Written Reasons by:**
The Honourable Mr. Justice Butler

**Concurred in by:**
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Fitch

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***Summary:***

*The respondent's complaint to the Human Rights Tribunal alleging discriminatory conduct by the School District was dismissed because it was filed outside the time limit in the Human Rights Code. The respondent's application for judicial review was allowed. The chambers judge found that the decision of the Tribunal turned on an extricable legal error regarding the evidence required to assert erroneous legal advice as a reason for filing delay. She concluded that the Tribunal's decision was patently unreasonable. On appeal, the School District argues the chambers judge erred in finding an extricable legal error and by failing to afford sufficient deference to the Tribunal's decision. Held: Appeal dismissed. The judge identified the correct standard of review and the appellant is unable to show that she applied that standard incorrectly. The Tribunal member applied the wrong legal test for sufficiency of evidence about erroneous legal advice. The judge correctly found that the Tribunal's exercise of discretion was arbitrary as defined in s. 59(4) of the Administrative Tribunals Act.*

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**Reasons for Judgment of the Honourable Mr. Justice Butler:**

[1] This appeal concerns a decision (the "Decision") of the British Columbia Human Rights Tribunal (the "Tribunal") by which it refused to accept the respondent's complaint of discriminatory conduct on grounds that it was filed outside the six-month time limit under the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*Code*]. On judicial review, the Supreme Court of British Columbia set aside the Tribunal's Decision to dismiss the complaint as patently unreasonable: *The Parent obo The Child v. The School District*, 2019 BCSC 659 (the "Reasons"). The judge found that in arriving at the Decision, the Tribunal made an extricable legal error regarding the evidence required to assert erroneous legal advice ("lawyer advice error") as a reason for delay in filing. The judge held that the Tribunal's erroneous conclusion with respect to this material consideration rendered the Decision arbitrary and thus patently unreasonable within the meaning of s. 59(4)(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*].

[2] On appeal, the School District (the "District") argues that the judge erred in finding an extricable legal error and that she failed to afford sufficient deference to the Decision of the Tribunal. The District says the Tribunal should be given the "benefit of the doubt" and that, when read as a whole and in context, the Decision

falls well within the realm of reasonable outcomes. For the reasons that follow, I would dismiss the appeal.

**Background**

[3] For ease of reference, I will refer to the respondent as the Parent. On June 25, 2015, the Parent filed a complaint with the Tribunal under s. 8 of the *Code*, alleging that the District failed to provide adequate accommodation for his child, who suffered from mental disabilities. The dispute has had a lengthy history before the Tribunal and the courts. This is the second time the matter has reached this Court. In this Court's previous decision, indexed as 2018 BCCA 136, Justice Hunter summarized the factual background:

> [7] The complaint to the BCHRT concerns the education of the Child. For the first seven years of education, the Child attended school in the School District. The Child has been diagnosed with a complex psychological condition that requires a safe environment with certain accommodations, including a small teacher-to-student ratio and support and supervision in social interactions during unstructured school time.
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> [8] The complaint alleges that the School District failed to provide the Child with a meaningful education due to the Child's mental disabilities, thereby contravening the *Code* by discriminating in the area of accommodation or service on the ground of mental disability.
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> [9] From kindergarten to grade six, the Child was enrolled in school in the School District, with mixed but generally unsatisfactory results. In grades two and three, the complaint alleges that the Child did not receive adequate support and as a result attended school less than half the time. Grade four was much more successful, and the Child was able to attend school 100% of the time. Grades five and six, however, were not successful. The School District placed the Child in a mainstream classroom at one point, but the placement only lasted a month. The Child was then placed in a different school in the School District, but that placement is alleged to have had significant detrimental effects on the Child.
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> [10] Finally, the Parent enrolled the Child in a private school in another school district for grade seven. On August 26, 2014, the Parent met with representatives of the School District to request that the School District pay the private school tuition since the School District had been unable to provide an appropriate educational program in the district.
>
> [11] On November 10, 2014, the School District Superintendent advised the Parent that the School District would not reimburse the Parent for the tuition at the private school.
>
> [12] On June 25, 2015, the Parent, on behalf of the Child, filed a complaint with the BCHRT under s. 8 of the *Code* alleging a contravention of the *Code*.

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> The Child was in grade seven at the private school in another school district when the complaint was filed. On October 15, 2015, the BCHRT accepted the complaint for filing.

[4] On February 23, 2016, the District applied under s. 27(1)(g) of the *Code* to dismiss the complaint as outside the six-month time limit for filing. The District took the position that the last allegation that could constitute discriminatory conduct was its November 10, 2014 decision to not reimburse the Child's private school tuition. The Parent's appeal of that decision was dismissed on February 3, 2015. The Parent's complaint was filed on June 25, 2015, more than seven months after the November 10, 2014 decision. The Parent argued that the nature of the discrimination was ongoing, as the District's failure to accommodate the Child's disabilities continued through the new school year.

[5] Under s. 22(2) of the *Code*, "if a continuing contravention is alleged in a complaint, the complaint must be filed within 6 months of the last alleged instance of the contravention." The Tribunal member held that the complaint was over a continuing contravention that could extend to the end of the school year and was therefore timely. On judicial review, a chambers judge held that the Tribunal was correct in its assessment and that the discrimination constituted an ongoing or continuous state of affairs.

[6] The Court of Appeal overturned the ruling of the chambers judge, holding that properly interpreted, s. 22(2) was not available as a mechanism for acceptance of the complaint. Because there had been no event or discrete act capable of constituting a separate contravention within the six-month period, the complaint was not timely within the meaning of s. 22(2). However, the Court remitted the complaint back to the Human Rights Tribunal to determine whether the Tribunal should nonetheless accept the late-filed complaint in the public interest under s. 22(3).

**The Decision**

[7] Six days after the decision of this Court, a single Tribunal member issued the Decision (*The Parent obo the Child v. The School District (No. 2)*, 2018 BCHRT 89)

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finding that it was not in the public interest under s. 22(3) to accept the late filing of the complaint. The complaint was thus dismissed pursuant to s. 27(1)(g) of the *Code*. The relevant provisions of the *Code* state:

> 22 (1) A complaint must be filed within 6 months of the alleged contravention.
>
> …
>
> (3) if a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that
>
> > (a) it is in the public interest to accept the complaint, and
> >
> > (b) no substantial prejudice will result any person because of the delay.
>
> …
>
> 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:
>
> > …
> >
> > (g) the contravention alleged in the complaint or that part of the complaint occurred more than 6 months before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22(3).

[8] In the Decision, the Tribunal member set out the "fact and contact specific inquiry" that must be undertaken to determine if it is in the public interest to accept a late-filed complaint and the non-exhaustive list of factors to be considered, with reference to relevant authorities. The Decision considered a number of reasons advanced by the Parent for the late filing of the complaint, including: the Parent was pursuing another remedy (the appeals of the November 10, 2014 decision of the Board of the School District); the Parent received incorrect legal advice about when the complaint had to be filed; and the Parent was under financial and other pressures relating to paying for and sending the Child to private school in another city. Lastly, the Tribunal considered whether there was anything unique, novel, or unusual about the complaint such that the resolution of the issues raised would be in the public interest. The Decision concludes at para. 19:

> Considering all of the circumstances, I am ultimately not persuaded that it is in the public interest to accept the Parent's late-filed complaint. Despite a brief delay in filing, I conclude that it is not in the public interest to accept the

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> late-filed complaint, having determined the various reasons for the delay offered by the Parent do not attract the public interest. In exercising my discretion, I also conclude there is nothing unique about this case sufficient to attract the public interest.

[9] In arriving at that conclusion, the Tribunal member reasoned as follows, at paras. 13–14, regarding the Parent's explanation about reliance on incorrect legal advice:

> [13] In deciding whether there is anything that distinguishes this case from others regarding the pursuit of internal avenues of redress, I have considered the Parent's explanation that at the time he appealed the February 3, 2015 decision to the Superintendent of Achievement, a lawyer told him he had six months from the date of that decision to start a human rights complaint. Without naming the lawyer, the Parent says this lawyer specializes in human rights cases against schools for a failure to accommodate children with disabilities. The lawyer allegedly told the Parent that the complaint must be filed within six months of the February 3, 2015 decision out of an abundance of caution.
>
> [14] The Parent relies on *Ashrafinia v. Koolhaus Design (BC) Ltd.*, 2007 BCHRT 241, at para. 11, for the proposition that it is in the public interest to accept a complaint where a delay in filing is the result of an error by a complainant's counsel. As pointed out by the School District; however, in *Adolphs v. Boucher Institute of Naturopathic Medicine*, 2014 BCSC 298, at para. 43, the court stated that attracting the public interest <u>requires</u> evidence to the effect that counsel for the complainant had erred and the error had been explained. <u>In my view, in order for the Parent to rely on lawyer advice error as a reason for the delay, it would be necessary for him to identify the lawyer in question and have that lawyer confirm the advice he gave was made in error and explain how the error occurred. Without more evidence, I am unable to conclude counsel made an error in advising the Parent such that the public interest in allowing the late-filed complaint to proceed is engaged</u>.
>
> [Emphasis added.]

### The Reasons

[10] In its petition for judicial review of the Decision, the Parent raised a discrete issue: whether the Tribunal erred by incorrectly answering an extricable question of law regarding the evidence required for a complainant to rely on lawyer advice error as a reason for delay to justify accepting a late-filed complaint in the public interest. The judge acknowledged that the court should not be "too quick to brand a question as one of mixed fact and law and therefore subject to a standard of correctness", citing *J.J. v. School District 43 (Coquitlam)*, 2013 BCCA 67 at para. 28. She

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nevertheless concluded that a question of law was readily discernible from the underlined passage in para. 14, and that the Tribunal member answered the question incorrectly. Specifically, the Tribunal member held that the public interest will only be engaged on grounds of legal advice error where certain mandatory conditions are met by a complainant. The complainant had to identify the lawyer, confirm the erroneous nature of the advice provided, and explain how the error came about: at paras. 38–39.

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[11] The judge reviewed the authorities referred to by the parties and concluded that there is no requirement for such mandatory prerequisites:

> [40] This Court has not established mandatory pre-requisites for advancing an assertion of erroneous legal advice as a reason for delay in filing under s. 22(3) of the *Code*. More particularly, the Court has not said that this form of explanation is only available for consideration where the complainant first identifies the lawyer that provided the advice, obtains confirmation from the lawyer that the advice was erroneous, and the lawyer explains how the error occurred.
>
> [41] Nor has this Court held that the public interest under s. 22(3) will only be appropriately engaged where the legal advice is shown, in fact, to be wrong.
>
> [Emphasis added.]

[12] However, the judge recognized that the Decision could not be set aside merely because the Tribunal made an extricable error of law. She also had to consider whether the error rendered the Decision to dismiss the complaint patently unreasonable within the meaning of s. 59 of the *ATA*. The relevant provisions of that section are:

> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
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> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
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> > (a) is exercised arbitrarily or in bad faith,
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> > (b) is exercised for an improper purpose,
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> > (c) is based entirely or predominantly on irrelevant factors, or
> >
> > (d) fails to take statutory requirements into account.

[13] In deciding that the Decision was patently unreasonable, the judge acknowledged that the Tribunal member recognized the broad and flexible nature of the enquiry required under s. 22(3) of the *Code* and that the Decision sufficiently examined all of the reasons advanced by the respondent for the late filing. However, the Tribunal's conclusion on the public interest component of the analysis was based on the failure of the Parent to provide any reason that could be said to "attract the public interest". That included the Parent's claim that he relied on legal advice in determining the timeframe for filing his complaint. As that conclusion was predicated on the Tribunal member's erroneous self-instruction, the error was material to the decision to dismiss the complaint. The judge observed:

> [68] In my view, the rejection of the lawyer advice explanation for delay was squarely grounded in the BCHRT's misunderstanding that certain requirements must be met before this kind of evidence can be considered (and weighed) under s. 22(3).

[14] While recognizing that the Tribunal was exercising a discretion in arriving at its decision under s. 22(3), the judge referred to *Envirocon Environmental Services, ULC v. Suen*, 2019 BCCA 46 at para. 34, and concluded that the Decision was arbitrary because it was grounded on an erroneous conclusion with respect to a material consideration. Accordingly, she found that it was patently unreasonable within the meaning of s. 59(4) of the *ATA*. In doing so, she was satisfied that the error in the Tribunal's rejection of the explanation for delay was obvious, could be explained simply and easily, and left no real possibility of doubting that the Decision is defective: at para. 70.

**Grounds of appeal**

[15] The District raises two interrelated grounds of appeal. I would state the grounds raised as follows:

1) Did the judge err in finding that the Tribunal member incorrectly answered an extricable question of law regarding the evidence required to advance erroneous legal advice as justification for accepting a late-filed complaint in the public interest?

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2) Did the judge otherwise err in determining that the Tribunal member's decision to not accept the late-filed complaint was patently unreasonable?

**Standard of review**

[16] The standard of review on appeal of a judicial review decision is correctness. The task of this Court is to "step into the shoes" of the chambers judge and "determine whether she identified the correct standard of review applicable to the Tribunal's Decision and applied that standard correctly": *Envirocon* at para. 26. In this case, the underlying Decision must be considered on the patent unreasonableness standard prescribed by s. 59(3) of the *ATA* for discretionary decisions: *Morgan-Hung v. British Columbia (Human Rights Tribunal)*, 2011 BCCA 122 at para. 28.

**Did the judge err in finding that the Tribunal member applied an erroneous legal test?**

**Positions of the Parties**

[17] The District argues that the judge misread or misinterpreted the Decision. It frames the issue as whether the Tribunal member applied a separate legal test for "erroneous legal advice" or, whether he simply found that the evidence adduced by the Parent was insufficient to justify exercising his discretion to hear the case in the public interest. When the Decision is read in its full context, the District says it is evident the Tribunal member was only observing that the Parent's vague reference to legal advice did not meet the standard of evidence required in other authorities to invoke the public interest under s. 22(3). Characterized in this way, the District says the Tribunal member's finding cannot be regarded as the application of an erroneous legal test.

[18] In support of its position, the District notes that a Tribunal's decision under s. 22(3) involves the exercise of discretion and the burden is on a complainant to establish both elements of s. 22(3): that it is in the public interest to accept the late-filed complaint and that no substantial prejudice will result to any person because of the delay. The District emphasizes that the Tribunal is deemed to be

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well-versed in the public policy considerations that must be considered. Relying on this Court's decision in *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220, the District says the Tribunal is entitled to a contextual review of its decisions on the principle of curial deference. It argues that the judge failed to give the "benefit of the doubt" to the Tribunal as required by the authorities. Further, the District says the judge was "too quick" to identify an extricable question of law, as a result of which the fundamental gatekeeping function granted to the Tribunal was undermined.

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[19] The District argues that the judge improperly focused on one sentence in para. 14 of the Decision and subjected it to close scrutiny instead of reading the reasons as a whole to determine what the Tribunal member *could* be saying. The District says that by reading paras. 13, 14, and 19 in context with the Decision as a whole, it is evident that the Tribunal member was making a general finding that the evidence adduced by the Parent was not compelling enough for him to exercise his discretion in accordance with s. 22(3). The District acknowledges that the wording in para. 14 could have been "clearer or more careful" but invites the Court to restate the reasoning of the Tribunal member to accord with that which it says was intended.

[20] The Parent disagrees with the way the District frames this issue. He says there is no distinction between applying an incorrect separate legal test for 'erroneous legal advice' and applying an incorrect test to weigh the sufficiency of evidence. Regardless of the way in which the Decision is interpreted, it is clear that the Tribunal member applied the wrong threshold test against which to measure the Parent's evidence. The Tribunal member found that the Parent had to "identify the lawyer in question and have that lawyer confirm the advice he gave was made in error and explain how the error occurred" before he could rely on lawyer advice error as a reason for delay. The Parent says the authorities clearly establish that there is no such mandatory requirement.

[21] The Parent says that the District's reliance on *Mzite* is misplaced. This is because the Tribunal member's reasoning as set out in para. 14 is abundantly clear.

The Parent argues that the District is not asking this Court to read the Decision contextually but to redraft para. 14 to remove the legal error. The Parent says this would require the Court to overstep its role as a reviewing court and rewrite the Decision. While a reviewing court may supplement reasons, it cannot ignore or replace the reasons of the Tribunal.

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**Discussion**

[22] I would not give any effect to this ground of appeal. In my view, the judge correctly identified the legal test applied by the Tribunal member to determine whether the Parent could rely on lawyer advice error to allow the late-filed complaint to proceed in the public interest. The judge was also correct to conclude that the Tribunal member's Decision introduced a set of mandatory prerequisites for the consideration of lawyer error that is not established in the jurisprudence and is inconsistent with the generally-accepted analytical approach under s. 22(3): at paras. 40, 55. Finally, I am of the view that it is not possible to uphold the Decision by reading it contextually and with a high degree of deference. This is because in assessing a material consideration, the Tribunal member applied a test that is unsupported by the statutory scheme and the jurisprudence. It is not this Court's role sitting in review to ignore the reasons provided by the Tribunal and substitute its own.

***The incorrect test***

[23] As the Parent argues, the legal error identified by the judge is clearly evident in the impugned language in para. 14 of the Decision, repeated below:

> In my view, in order for the Parent to rely on lawyer advice error as a reason for the delay, it would be necessary for him to identify the lawyer in question and have that lawyer confirm the advice he gave was made in error and explain how the error occurred. Without more evidence, I am unable to conclude counsel made an error in advising the Parent such that the public interest in allowing the late-filed complaint to proceed is engaged.
>
> [Emphasis added.]

[24] As the judge correctly noted, the Decision identifies preconditions before a complainant can rely on erroneous legal advice as a reason for delay in filing under

s. 22(3). The Tribunal member found that the Parent was required to: (a) identify the lawyer; (b) confirm the erroneous nature of the advice; and (c) explain how the error occurred. Further, the Tribunal member held that the public interest would be "engaged" only where the legal advice was shown to be wrong: at paras. 38–42. This was the threshold requirement established by the Tribunal member against which he measured the Parent's evidence.

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[25] As explained in *Sopinka, Lederman & Bryant: Law of Evidence in Canada*, Alan W. Bryant, Sidney N. Lederman, Michelle K. Fuerst, 3d ed. (Canada: LexisNexis Canada Inc., 2009) [*Sopinka*] at §3.7, the sufficiency of evidence relates to the evidential burden placed on a party rather than the persuasive burden:

> The term "evidential burden" means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue.
>
> [Emphasis added.]

The incidence of the evidential burden, the evidentiary effect of its discharge, and whether evidence is capable of satisfying the evidential burden are questions of law: *Sopinka* at §3.16.

[26] Accordingly, it matters not whether the question is framed narrowly as an error in applying a legal test for 'erroneous legal advice' or more broadly as an error in applying a test to weigh the sufficiency of evidence: both are questions of law. By establishing mandatory prerequisites for the Parent to meet to rely on lawyer advice error as a reason for the delay, the Tribunal member set out a threshold test for evidence that the judge correctly identified as a question of law.

#### ***Is there an extricable question of law?***

[27] The District submits that the threshold test for evidence on the "lawyer advice error" issue is not an extricable error of law. However, it did not expand on this argument in detail, focusing instead on the argument that the Decision should be read contextually as a whole.

[28] In my view, the judge took the proper approach to considering whether there was an extricable question of law and she conducted the required analysis. At para. 26, she referred to paras. 28–33 of *Morgan-Hung* for the proposition that if there is an extricable question of law or fact underlying a discretionary decision, it must be reviewed on a correctness standard. Then, if an error is found, the court must determine whether the error renders the decision patently unreasonable within the meaning of s. 59(4) of the *ATA*.

[29] At para. 36 of the Reasons, the judge explained the approach she took in determining the extricable error:

> I appreciate that the Court must not be "too quick to brand a question as one of mixed fact and law and therefore subject to a standard of correctness": *J.J. v. School District No. 43 (Coquitlam)*, 2013 BCCA 67 at para. 28. In its submissions before me, the BCHRT appropriately emphasized this point. However, in the circumstances of this particular case, I am satisfied that the question of law is readily discernible from the impugned passages.

[30] The judge then referred to the impugned para. 14, which indicated that the Tribunal member viewed identification of the lawyer, confirmation of the erroneous nature of the advice provided, and an explanation as to how the error occurred as necessary preconditions for erroneous legal advice to be considered under s. 22(3): at para. 38. The District is unable to identify any error in her approach or the conclusion that she reached. The extricable question of law is indeed readily discernable from the Tribunal's Decision.

### *Is the test supported by the jurisprudence?*

[31] The District referred to numerous authorities that have considered erroneous legal advice under s. 22(3) to support its argument that the Tribunal member did not apply an erroneous legal test. It suggests that the Tribunal's jurisprudence establishes that a complainant must adduce "*some* evidence beyond a bald assertion of lawyer negligence… to show that something happened over which the complainant could not be expected to know about or have control over". While the Parent takes a somewhat different view of the jurisprudence, he does not dispute that general proposition. Rather, the Parent says this does not translate into a

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requirement that the lawyer in question must be identified or that the error must be explained or confirmed by the lawyer.

[32] In their factums, both parties also set out policy and practical considerations that may be relevant for the Tribunal to consider when deciding whether to exercise its discretion in considering 'erroneous legal advice' as a basis to accept a late-filed complaint in the public interest under s. 22(3).

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[33] In my view, it is unnecessary to consider the Tribunal's jurisprudence in detail to examine the relevant policy perspectives. This is because the question on appeal is whether the threshold test applied by the Tribunal member on the erroneous legal advice issue is *correc*t. The Tribunal member justified his approach with reference to the decision in *Adolphs v. Boucher Institute of Naturopathic Medicine*, 2014 BCSC 298. The judge found that the Tribunal member misinterpreted *Adolphs* and that led to the application of the wrong test. In my view, the judge's reading of *Adolphs* as to the proper test to apply when considering erroneous legal advice as a justification for a late-filed complaint is correct.

[34] The judge considered these issues in some detail at paras. 40–54 of the Reasons. As the judge noted, in *Adolphs*, the Tribunal rejected the complainant's argument based on legal advice error because the applicant gave *no explanation* for the delay in submitting the complaint. Instead, in *Adolphs*, the court found that "despite it being obvious that the Complaint had been filed late, [petitioner's counsel] made a convoluted and nonsensical attempt to demonstrate that it had been filed in time": at para. 44. The court went on to note, in para. 45, that there was no evidence before the Tribunal that the late filing was due to *error* on the part of counsel. Rather, the petitioner deliberately chose to take the position that no explanation was required because the complaint was filed in time and no error had been made.

[35] As the Parent properly notes, in the present case, there was evidence before the Tribunal that the late filing was due to erroneous legal advice. In the Parent's affidavit, he stated:

> Around the time we filed our appeal to the Superintendent of Achievement, we consulted with a very experienced lawyer who specializes in human rights cases against schools for a failure to accommodate children with disabilities. The lawyer advised us that if we chose to file a human rights complaint, we should ensure that we file our complaint within six months from February 3, 2015 out of an abundance of caution. We relied on that advice.

[36] In *Adolphs*, the court referred to various Human Rights Tribunal decisions in which "evidence was proffered to the effect that counsel for the complainant had erred and the error had been explained": at para. 43. However, this does not require that the lawyer be identified or admit that their advice was erroneous, nor that the legal advice is shown to be wrong, as the judge correctly notes at paras. 46–47:

> I do not read *Adolphs* as holding that evidence of erroneous legal advice, when put forward as an explanation for a late filing, is only open for consideration under s. 22(3) if it identifies the lawyer, includes an admission that the lawyer provided erroneous advice, and the lawyer explains how that came to be. Nor does *Adolphs* hold that the public interest under s. 22(3) is only engaged where the legal advice is shown, in fact, to be wrong.
>
> Instead, in my view, Justice Weatherill was simply making the point, in contrast to the record before him, that in cases where erroneous legal advice has been found to warrant an exercise of discretion in favour of a late filing, the explanation for delay was supported by evidence relevant to that issue. As there was no evidence tendered in *Adolphs*, the petitioner fell short.
>
> [Emphasis added.]

[37] At paras. 48–53, the judge notes that the approach taken by the Tribunal member would unduly narrow the circumstances in which a complainant might advance lawyer error as an explanation and justification for the late filing of a complaint. It would exclude cases where legal advice was not in error but the complainant honestly but mistakenly believed something different. It would also exclude cases where misunderstanding of filing requirements could be impacted by language barriers. The judge referred to *Libonao v. Honeywell*, 2009 BCHRT 184 as an example in which the Tribunal accepted evidence on lawyer error without requiring identification of the lawyer or confirmation that the advice was indeed erroneous, and in which language barriers were a factor.

[38] In her analysis of the proper approach to assessment of the public interest, the judge also cited *Hoang v. Warnaco and Johns*, 2007 BCHRT 24 for the

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proposition that "[t]he list of potentially relevant factors is not closed and nor will every factor be important in every case": at para. 26, cited with approval in this Court's decision in *Mzite* at para. 53.

[39] The further Human Rights Tribunal decisions referred to by the District on appeal do not support its position that the test applied by the Tribunal member was correct. These decisions may be summarized in two groups: those in which lawyer advice error justified a late-field complaint and those in which it did not.

[40] In *Ashrafinia v. Koolhaus Design*, 2007 BCHRT 241, the Tribunal agreed to accept a late-filed complaint where the complainant's lawyer admitted that the error was his alone and arose due to administrative error. In that case, the complainant had "consulted counsel in a timely way" and the complaint was filed only a month late: at paras. 10–12. In both *Larsen v. Opel Financial & Investment Group and others*, 2008 BCHRT 300 and *Greaves v. Slegg Construction Materials,* 2012 BCHRT 292, the Tribunal relied on *Ashrafinia* to accept late-filed complaints in the public interest because of errors admitted to by counsel. However, there was no suggestion in any of these decisions that it was necessary for counsel to have admitted their error. Rather, the reason for the delay and the length of the delay were factors, along with others, that were considerations in determining whether it was in the public interest to accept the late-filed complaints: *Ashrafinia* at para. 10; *Larsen* at para. 8; *Greaves* at para. 25, relying on *Earnshaw v. Lilydale Cooperative and UFCW, Local 1518*, 2005 BCHRT 146.

[41] In *Libonao*, the complainant did not provide the name of the lawyer who provided him erroneous advice nor was there evidence that the lawyer admitted the mistake. The Tribunal nonetheless accepted the late-filed complaint in consideration of a number of factors. The length of the delay, less than two weeks, was quite short. The complainant retained legal counsel in a timely manner but counsel did not advise him of his right to file a human rights complaint. The Tribunal noted that given his limited English language skills, it was not unreasonable for the complainant to

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rely on advice provided by his former counsel, and that once he obtained a second opinion he filed his human rights complaint without delay: at paras. 26–36.

[42] In *Naziel-Wilson v. Providence Health Care and another*, 2014 BCHRT 170, the Tribunal accepted a late-filed complaint based on erroneous advice received from a non-lawyer, who provided evidence and admitted her mistake. The District seeks to distinguish this decision on the basis the complainant would have no remedy against a non-lawyer for failing to properly advise her of the filing deadline. However, this was simply one factor in the Tribunal's decision. Also relevant was the complainant's reliance on a community advocate (who did not inform her of the possibility of a human rights complaint) and disabling conditions that made it difficult to file complaints on her own: at paras. 16–22. The Tribunal explicitly relied on *Ashrafinia*, *Greaves*, and *Larsen* for the proposition that where complainants have missed the time limit due to erroneous legal advice, and through no fault of their own, it may be in the public interest to accept the late-filed complaint: at para. 19.

[43] Both parties also refer us to a number of cases in which the Tribunal refused to accept a late-filed complaint in their public interest discretion. In *Poe v. London Drugs*, 2008 BCHRT 294, the Tribunal did not accept a complaint filed three-and-a-half months after the filing deadline. The complainant did not consult counsel in a timely way, as she had retained a lawyer only on the day the six-month limitation period was to expire. As such, she could not blame her counsel for not filing on time. She further gave no satisfactory explanation for her further delay in filing thereafter, including after she consulted a second lawyer two months later: at paras. 28–31.

[44] In *N.D. v. University of British Columbia and others*, 2009 BCHRT 60, the Tribunal did not accept the complainant's argument that advice given by the UBC Equity Office and the complainant's union caused her to miss the filing deadline without "more substantive confirmation". The Tribunal held that the allegations "would be more persuasive if either organization had confirmed the advice she says they gave her, as the lawyer did in *Ashrafinia*, or if ND could

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substantiate her allegation, through, for example, correspondence with the two organizations that confirmed the advice she says they gave”: at para. 62.

[45] In *Grenia v. Mister Invermere Tire and another*, 2009 BCHRT 287, the Tribunal held that ignorance of the law was not a reason to accept a late-filed complaint where the complainant was represented by counsel and several other claims were filed on his behalf during the six-month limitation period: at para. 14.

[46] In *Holloway v. Vancouver Police Board and another*, 2016 BCHRT 49, the Tribunal refused to accept a late-filed complaint where the complainant did not seek legal advice for a year and provided no reasonable explanation for why, even after doing so, she waited several additional months before filing her complaint: at para. 63.

[47] In *Thandi v. Abbotsford Police Department*, 2017 BCHRT 152, the Tribunal held that counsel error was inconsistent with the assertion that the complainant did not have the financial resources to pay his lawyer to file a timely complaint: at para. 40. In *Thandi*, there was no erroneous legal advice; rather, complainant’s counsel, though “clearly alert to the human rights dimension of the matter”, chose not to file a human rights complaint: at para. 37.

[48] In *Fernandes v. City University of Seattle in Canada and others*, 2018 BCHRT 93, the Tribunal held there was no way of knowing whether the complainant retained counsel in a timely way, and the complainant did not say what, if any, advice he had received from counsel: at para. 39. Factors present in other cases that justified accepting a late complaint on public interest grounds were not present on the evidence before the Tribunal, including language impediments or evidence from counsel: at para. 39.

[49] In summary, neither *Adolphs* nor the Tribunal’s jurisprudence establish mandatory requirements that a complainant must meet in order to rely on erroneous legal advice as a reason to accept a late-filed complaint. The jurisprudence does not require identification of the lawyer, confirmation of the erroneous nature of the

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advice, or an explanation as to how the error occurred as necessary prerequisites in order for erroneous legal advice to engage the public interest under s. 22(3). Further, the authorities do not require a complainant to show that the advice received was, in fact, wrong. These are simply factors to be considered, among others, when determining whether to accept a late-filed complaint for public interest reasons. Rather, the case law requires that the complainant obtain legal advice in a timely way, provide some evidence about the nature of the advice and their detrimental reliance thereon, and demonstrate diligence in filing despite that advice. While identification of the lawyer is not essential, it would usually be prudent for a complainant seeking an extension of time to provide as much information as possible about the advice received including the identity of the lawyer and how the advice factored into the timing of the complaint.

***Is the Decision saved by a contextual reading?***

[50] The District relies on *Mzite* for the proposition that the Tribunal is entitled to a contextual review of its decisions on the principle of curial deference: at para. 49. Further, it notes that the deference afforded to the administrative decision maker requires a reviewing judge to pay respectful attention to the reasons offered or which could be offered in support of the decision: *Mzite* at para. 50, citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. It is not contentious that *Mzite* accurately describes the correct approach to be taken on judicial review. However, the District overstates the principle by saying that the judge was required to give the Tribunal member the "benefit of the doubt". Further, the requirement for curial deference does not permit a reviewing court to give effect to erroneous legal principles or substitute its own reasoning in the place of erroneous reasoning.

[51] In *Delta Airlines Inc. v. Lukács*, 2018 SCC 2, Chief Justice McLachlin, writing for the majority, explained the difference between supplementing reasons, which is appropriate in some cases, and substituting reasons, which is not permitted. The difference is based on the principle that reasons matter; a reviewing court looks not only at the outcome, but also the reasoning on which it is based: at para. 27. She

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describes the limitation on a reviewing court's ability to ignore or replace reasons at para. 24:

> The requirement that respectful attention be paid to the reasons offered, or the reasons that could be offered, does not empower a reviewing court to ignore the reasons altogether and substitute its own: *Newfoundland Nurses*, at para. 12; *Pathmanathan v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 353, 17 Imm. L.R. (4th) 154, at para. 28. I agree with Justice Rothstein in *Alberta Teachers* when he cautioned:
>
>> The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" .... [para. 54, quoting *Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56]
>
> In other words, while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. Additional reasons must supplement and not supplant the analysis of the administrative body.
>
> [Emphasis added.]

[52] The District is inviting this Court to supplant the analysis of the Tribunal member and replace it with our own reasoning. That is precisely what a reviewing court is not permitted to do. In its factum, the District invites this Court to rewrite para. 14 of the Decision and conclude that the Tribunal member intended to say:

> "In other cases where complainants have succeeded under s. 22(3)(a) of the *Code* on the assertion of 'erroneous legal advice' causing a delay in filing a complaint, the complainants have provided evidence to establish that something the lawyer did or did not do caused the delay and this was something which the complainant could not be expected to know about or have control over".

[53] Presumably, the District would also ask us to conclude that the Tribunal member intended to say that the evidence provided by the Parent was insufficient to satisfy the public interest test.

[54] I agree that it would not have been objectionable for the Tribunal member to have exercised his discretion in that fashion through appropriate reasoning. However, that is not what he did. It is not for this Court to attempt to rebalance the

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relevant factors that the Tribunal should take into account when deciding whether it is in the public interest to accept a late-filed complaint.

[55] In summary, I would not give effect to this ground of review.

**Did the judge otherwise err in determining that the Tribunal's Decision to not accept the late-filed complaint was patently unreasonable?**

[56] The District argues, in the alternative, that even if the Tribunal member applied an erroneous legal test, the Decision was not patently unreasonable. It emphasizes that patent unreasonableness is the highest standard of curial deference. Relying on *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 and *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, the District argues that the Decision cannot be said to be patently unreasonable because it is not "clearly irrational", "evidently not in accordance with reason", or "so flawed that no amount of curial deference can justify letting it stand".

[57] The Parent says the District's argument fails to take into account the statutory definition of patent unreasonableness and the analysis the judge was required to apply pursuant to s. 59(3) and (4) of the *ATA*. The Parent says that a discretionary decision based on an error of fact or law that is material to the exercise of discretion is "arbitrary" within the meaning of s. 59(4)(a) and thus patently unreasonable.

[58] I would not give effect to this ground of appeal. While I agree with the District that it cannot be said that the conclusion reached by the Tribunal member was clearly irrational or not in accordance with reason, patent unreasonableness is defined by s. 59(4) of the *ATA*, which provides that a discretionary decision will be patently unreasonable if the discretion "is exercised arbitrarily". The definition of patent unreasonableness in the *ATA* must be measured against both the reasoning and the result of the decision of a tribunal. If the reasoning meets the definition of patently unreasonable in s. 59(4), the decision cannot be upheld on review.

[59] The proper approach to consideration of fact-finding errors made by a tribunal for the purpose of s. 59(3) and (4) was explained in *Morgan-Hung* at paras. 31–32:

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> An analysis under s. 59(2) does not end the matter. The impugned fact-finding is only important to the Tribunal's decision in that it was a factor in the making of a discretionary order. Having identified the error in fact-finding, therefore, it is necessary to analyze the effect of that error on the exercise of discretion. This analysis must be performed under ss. 59(3) and (4) of the *Act*.
>
> In *Berezoutskaia* at para. 21, Levine J.A. commented that a discretionary decision, based on a finding of fact that is overturned, can be characterized as "arbitrary" under s. 59(4)(a) of the *Administrative Tribunals Act*. In the context of *Berezoutskaia*, it is clear that she had in mind factual errors that might have a material effect on exercises of discretion.
>
> [Emphasis added.]

[60] In *Envirocon*, this Court applied the reasoning in *Morgan-Hung* to an error in reasoning similar to that committed by the Tribunal member in this case:

> [34] In *Morgan-Hung*, this Court held that a discretionary decision based on an error with respect to a material fact was patently unreasonable because it was "arbitrary", as that term is used in s. 59(4)(a) of the *ATA*: paras. 32–33. By a parity of reasoning, a discretionary decision will be arbitrary if it is grounded on an erroneous conclusion with respect to a material consideration.
>
> [Emphasis added.]

[61] As I have already explained above, the judge correctly referred to the two-step process she was required to carry out under s. 59(4) of the *ATA*. She identified an extricable error of law and found that it was material to the Decision. Indeed, she concluded, at para. 68, that the "rejection of the lawyer advice explanation for delay was *squarely grounded in the [Tribunal's] misunderstanding that certain requirements must be met before this kind of evidence can be considered (and weighed)* under s. 22(3)": at para. 68. This was an erroneous conclusion with respect to a material consideration that rendered the Decision arbitrary and therefore patently unreasonable.

[62] In summary, I see no error in the approach taken by the judge to consider patent unreasonableness and no error in the conclusion at which she arrived.

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## Disposition

[63] I would dismiss the appeal and remit the matter back to the Tribunal member for reconsideration.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Fitch"