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CASE SUMMARY: MOOT – AN INTERPRETATION AND APPLICATION OF THE PRINCIPLE IN THE CONTEXT OF AN APPLICATION FOR JUDICIAL REVIEW

This case considers when an application for judicial review will be moot and, if so, when the court will nonetheless exercise its residual discretion to hear the issue. The context was a complaint made with respect to the conduct of a parenting coordinator, mediator and arbitrator appointed under the Ontario *Family Law Act* to act as an arbitrator in a family law dispute.

Administrative law – Judicial review – Mootness

[Cuhaci v. Ontario College of Social Workers](#), [2019] O.J. No 1383, 2019 ONSC 1801, Ontario Superior Court of Justice, March 20, 2019, A. Mullins, F.L. Myers and L.G. Favreau JJ.

When is an issue raised on an application for judicial review moot? Even if moot, in what circumstances will a court exercise its residual discretion to nonetheless consider the issue? These were the two primary issues tackled by the Ontario Superior Court of Justice in this case.

The applicant is a registered member of the Ontario College of Social Workers and Social Service Workers and was trained as a parenting coordinator, mediator and arbitrator for the purpose of performing mediations and arbitrations under the *Family Law Act*. In 2015, she acted as the parenting coordinator, mediator and arbitrator with respect to a custody and access dispute. The parents involved in the dispute signed an agreement which provided that the arbitration award made by the applicant could be appealed to the Superior Court of Justice on an issue of law, fact or mixed fact/law. The primary issue in the family law case was the allegation that the father had alienated the teenage daughter from her mother. Expert evidence was presented including a report from a psychologist. The psychologist opined that there was alienation and recommended that the child initially live with the mother with a gradual move to shared parenting.

The applicant issued an interim arbitration decision, providing that the child was to primarily reside with her father with monthly visits to her mother. In her decision, the applicant indicated she had consulted with the experts including the key psychologist. None of the parties appealed the decision.

Several month later, a complaint was made to the College by the child's stepfather and long-time partner of the child's mother. The complaint raised two issues: (1) that the applicant failed to properly consider the psychologist's report; and (2) that the applicant was biased toward the mother, dishonest, manipulative and arrogant. The complaint was referred to the Complaints Committee, a statutory body established for screening these types of complaints. The Complaints Committee does not suppose to determine the merits of any complaint, but is instead tasked with determining whether they should proceed to refer the matter to the Discipline Committee.

In this case, the Complaints Committee determined that the complaint should not be referred to the Discipline Committee for further consideration. In doing so, the Complaints Committee did consider the two issues raised by the stepfather in his complaint, but ultimately concluded they lacked the threshold merit to be referred to the Discipline Committee. The Complaints Committee did say in its decision that the information in the complaint, including its decision, would be kept in the applicant's file and may be considered in the context of future complaints, if made. The Complaints Committee appeared to have considered the merits of the complaint, to some extent, in rendering its decision.

Despite the Complaints Committee's finding, the applicant sought to quash the Complaint Committee's decision on the basis that it had engaged in unnecessary analysis of the merits of the complaint, provided unnecessary advice to the applicant in its decision and was otherwise procedurally unfair. The respondent College argued, on the other hand, the issues were moot because the complaint was not referred to the Discipline Committee and the "advice" contained in the decision was private and non-binding.

The court began its analysis by considering whether the issues raised by the applicant on judicial review were moot. The applicant argued the decision was still prejudicial to her – especially because it could be considered in the context of a future complaint – and could therefore not be moot. The court disagreed. While it appeared to be sympathetic to this position, it nonetheless observed that the investigation was completed, the applicant's licence was not in jeopardy or subject to any restrictions. Further, the advice in the decision was non-binding and not public. Any impact on the applicant in the future was, in the court's words, "entirely speculative". Put simply, the court said the applicant faced no "professional jeopardy as a result of the outcome of [the] complaint". For this reason, the issues raised on judicial review were moot.

In light of this finding, the court considered whether it should nonetheless exercise its discretion to consider the issues. The court concluded that it should not, and this was not a case that required judicial intervention. This was primarily because the College had conceded during argument that the Complaints Committee overstepped by investigating the decision making process of the applicant, something that was beyond its function as a statutory screening body. Further, this issue was not raised by the applicant on judicial review, so the parties did not argue the issue fully. Had the concession not been made and the issue been a central one as part of the application for judicial review, the court may have exercised its discretion to hear the issue since it had some broader impact on how the Complaints Committee performs its function.

In the end, the court dismissed the application as the issues were moot. The court did not award costs to either party.

This case was digested by [Adam R. Way](#), and first published in the LexisNexis® Harper Grey Administrative Law Netletter and the Harper Grey Administrative Law Newsletter. If you would like to discuss this case further, please contact Adam R. Way at away@harpergrey.com.