Court of Appeal for Saskatchewan
Docket: CACV3151

Citation: ***Cameron v The Saskatchewan Institute of Agrologists*, 2018 SKCA 91**
Date: 2018-11-21

Between:

Douglas Cameron

Appellant
(Appellant)

And

The Saskatchewan Institute of Agrologists

Respondent
(Respondent)

Before: Jackson, Herauf and Schwann JJ.A.

Disposition: Appeal dismissed

Written reasons by: The Honourable Mr. Justice Herauf
In concurrence: The Honourable Madam Justice Jackson
The Honourable Madam Justice Schwann

On Appeal From: QBG 638 of 2016, Saskatoon
Appeal Heard: April 17, 2018

Counsel: Daniel LeBlanc for the Appellant
John Agioritis for the Respondent

Herauf J.A.

I. INTRODUCTION

[1] Douglas Cameron, the appellant, was found guilty of professional misconduct by the Discipline Committee [DC] of the Saskatchewan Institute of Agrologists [Institute]. With respect to penalty, the DC ordered that Mr. Cameron be reprimanded, fined $2,000, suspended from the Institute for 30 days, required to take an ethics course, and pay costs to the Institute of $15,000 [Penalty Decision].

[2] Mr. Cameron appealed both the finding of guilt and the penalty as permitted by s. 32 and s. 33 of *The Agrologists Act, 1994*, SS 1994, c A-16.1 [*The Agrologists Act*], to the Court of Queen's Bench. The Chambers judge held that both the finding of professional misconduct and the penalty were reasonable and dismissed his appeal with costs.

[3] Mr. Cameron has appealed some aspects of the Chambers judge's decision to this Court. In addition, Mr. Cameron also raised the constitutionality of s. 4(a) of the *Code of Ethics and Practice Standards of the Saskatchewan Institute of Agrologists* [*Code*]. For the reasons set out below, I would dismiss his appeal.

II. BACKGROUND

[4] Mr. Cameron is a member of the Institute. On January 13, 2014, a fellow member of the Institute, Jim Schille, made a complaint to the Institute regarding the content of various email publications. These publications were in a bimonthly newsletter titled "Grassroots", which Mr. Cameron had created and distributed to between 700 and 800 people. There is some disagreement as to whether these individuals were all members of the Institute. However, during cross-examination at the complaint hearing, Mr. Cameron stated that some individuals, who were not members, did receive the publication. It is undisputed that most of the recipients were members of the Institute.

[5] According to Mr. Cameron, he began publishing Grassroots sometime in 2011 in response to new bylaws the Institute had been proposing. Mr. Cameron believed the proposed bylaws were unnecessarily strict and targeted him personally.

[6] A portion of Mr. Schille's complaint stated:

> In my reading of the Grassroots emails, [Mr. Cameron] makes personal accusations with respect to the integrity and honesty of individual members of Council and the staff of the [Institute]. I do not take issue with his right to direct honest criticism of the decisions made, and the actions taken by Council, but this does not mean he has the right to attack the integrity and honesty of those individuals. In my view, he has not treated them with respect, courtesy, and good faith which The Code of Practice requires. ...

[7] The Professional Conduct Committee [PCC] received Mr. Schille's complaint and recommended the DC determine the complaint. The PCC complaint alleged Mr. Cameron was guilty of professional misconduct pursuant to s. 28(1) of *The Agrologists Act*. Further, the complaint alleged Mr. Cameron was in breach of s. 4 of the *Code*. On March 20, 2015, Mr. Cameron appeared before the DC to address the complaint and the allegations of professional misconduct that had been brought against him.

[8] The Institute had previously reprimanded Mr. Cameron after Alana Koch, Deputy Minister of Agriculture at the time, filed a complaint stating, "Dr. Cameron had been unprofessional, disrespectful and discourteous to Ms. Koch and other members of her staff in emails and correspondence sent by Dr. Cameron." At that time, Mr. Cameron admitted the factual allegations contained in the complaint.

[9] It is important to note that Mr. Cameron was represented by counsel at both the DC and before this Court; he elected to self-represent before the Court of Queen's Bench.

III. DECISION OF THE DC

[10] As a preliminary issue, Mr. Cameron objected to two of the members chosen to sit on the DC for his complaint on the basis of a reasonable apprehension of bias with respect to those members. One of the members, John Spencer, voluntarily recused himself, while the DC dismissed Mr. Cameron's application to remove the other member, Vernon Racz.

[11] On the charge of professional misconduct, the DC unanimously found Mr. Cameron guilty. Specifically, the DC found on a number of occasions Mr. Cameron, through his newsletter Grassroots, had breached the standards expected of agrologists as set out in the *Code* by publishing material that contained unsubstantiated questioning of the integrity and honesty of other agrologists. Further, the DC found this material demonstrated "Mr. Cameron's disregard for his professional responsibility to abstain from undignified or misleading public communication about other members of the [Institute]."

[12] The DC relied upon four specific examples from Grassroots it believed constituted communication in breach of the *Code*:

Grassroots Edition	**Quote**
August 2, 2012	"Thank you for having Rick Koller on the Committee. It is nice to see a conscientious and fair-minded individual. I hope he doesn't get drowned out by others".
January 24, 2013	"Related question: Do lawyers control SIA council? In the last letter (3 October 12) sent to me, Mr. Boychuk stated the following: "this is to inform you that council, the Executive Director and myself will not be providing any further responses to any future correspondence from you … ." **The actual quote from Mr. Boychuk's October 3, 2012, letter reads as follows: Lastly, this is to inform you that council, the Executive Director and myself will not be providing any further responses to any future correspondence from you that raises (sic) that have been previously dealt with. It is simply not fair to the other dues paying membership that the Institute expends significant resources in dealing with issues that are primarily personal to you or those issues of general interest to the membership that have been previously responded to"** [bold emphasis in original].
August 24, 2013	"Two-tiered Code of Ethics: one for council and another for the rest of us?" "What's good for the goose is good for the gander or vice versa: So if we have a council setting an example of unethical behaviour (and it would appear that they are able to get away with it), then it would seem that it is okay for the rest of us to let our professional ethical standards slip a lot lower."
November 2, 2013	"However, if SIA cannot develop an appropriate methodology to conduct a fair, honest and open investigation, free of conflict of interest biases, then we jeopardize our right to self-regulation. Not only do unethical procedures impact on our right to self-regulate, but the example we set will reflect on all other provincial regulatory bodies."

[13] The DC then went on to find that "Mr. Cameron has submitted this [*sic*] his s. 2(b) right to freedom of expression would be infringed upon if he were found guilty of professional

misconduct." Ultimately, the DC agreed with Mr. Cameron and determined a finding of professional misconduct would infringe his s. 2(b) *Charter* rights. However, after conducting a s. 1 *Oakes* analysis (*R v Oakes*, [1986] 1 SCR 103 [*Oakes*]), the DC determined the infringement was "reasonably and demonstrably justified" under s.1 of the *Charter*.

[14] Finally, the DC stated in *obiter* that the charges against Mr. Cameron should not have reached the stage of a discipline hearing and in the future, other means, "such as mediation, be used to resolve similar problems before they reach the adversarial stage."

IV. PENALTY DECISION OF THE DC

[15] In the DC's Penalty Decision, it was ordered that Mr. Cameron be reprimanded, fined $2000, suspended from the Institute for 30 days, required to take an ethics course, and pay costs to the Institute of $15,000. In this Court, as will become apparent, Mr. Cameron appeals the costs order only.

[16] In reaching its decision on penalty, the DC made a number of findings. It found that Mr. Cameron, through his newsletter had "used unsubstantiated questioning of the integrity and honesty of other members in [the Institute]." As well, the DC found the Grassroots newsletters should not be regarded as private but, rather, constituted public communication within the Institute's membership, and Mr. Cameron should have acted with "greater sensitivity, understanding and respect for others." Finally, the DC emphasised yet again that although *The Agrologists Act* does not provide for mediation, if needed, the Institute could utilize it in the future.

V. DECISION OF THE COURT OF QUEEN'S BENCH

[17] Mr. Cameron appealed the findings of professional misconduct and the penalty imposed by the DC to the Court of Queen's Bench pursuant to s. 32 and s. 33 of *The Agrologists Act*. Upon hearing the appeal, the Chambers judge found the appropriate standard of review was reasonableness, and determined that Mr. Cameron had a fair hearing.

[18] In addition, the Chambers judge found:

(a) the finding by the DC that Mr. Cameron's communication was public was reasonable and supported by the evidence;

(b) the findings of professional misconduct by the DC with regard to Mr. Cameron's comments in Grassroots were reasonable;

(c) the infringement of Mr. Cameron's freedom of expression was reasonably and demonstrably justified; and

(d) the DC's Penalty Decision was reasonable and supported by the evidence.

[19] The Chambers judge ultimately dismissed Mr. Cameron's appeal and awarded costs to the Institute.

VI. POSITION OF THE PARTIES

A. Mr. Cameron

[20] Mr. Cameron appeals the Queen's Bench decision on several grounds. He argues:

(a) the Chambers judge erred by determining that the DC's interpretation of "public communication" was reasonable;

(b) the Chambers judge incorrectly applied the standard of reasonableness to the question of whether the *Code* unjustifiably infringes Mr. Cameron's right to freedom of expression under s. 2(b) of the *Charter* when the proper standard of review is one of correctness; and

(c) the Chambers judge erred when he determined the costs portion of the Penalty Decision of the DC was reasonable.

[21] In consideration of these errors, Mr. Cameron invites this Court to find the DC's interpretation of s. 4(a) of the *Code* was unreasonable and therefore the professional misconduct charge against him must be quashed. In the alternative, Mr. Cameron contends that s. 4(a) of the

Code is an unjustifiable infringement of his rights under s. 2(b) of the *Charter*. Finally, if Mr. Cameron is unsuccessful on both of these grounds, he submits the Penalty Decision of the DC – specifically, the $15,000 costs award made against him – was unreasonable and should be set aside.

B. The Institute

[22] The Institute frames the issues on appeal differently from Mr. Cameron, namely, whether:

(a) Mr. Cameron challenged the constitutionality of *The Agrologists Act* or the *Code* itself before the DC or the Court of Queen's Bench;

(b) Mr. Cameron is permitted to raise new issues on this appeal;

(c) the Chambers judge correctly concluded the DC adopted a reasonable interpretation of "public communication" and that there was sufficient evidence to establish the "public" nature of Mr. Cameron's Grassroots publications; and

(d) the Chambers judge correctly concluded the DC's Penalty Decision was reasonable.

[23] The Institute argues Mr. Cameron never challenged the constitutionality of s. 4(a) of the *Code* before the Chambers judge and that Mr. Cameron's appeal to the Court of Queen's Bench was confined to the effect of the DC's decision upon Mr. Cameron's s. 2(b) rights, not the constitutionality of any specific legislation – an issue that Mr. Cameron does not pursue in this Court. The Institute also contends that: (i) s. 4(a) of the *Code* is incapable of constitutional challenge; (ii) Mr. Cameron is not permitted to raise a new ground of appeal; and (iii) Mr. Cameron failed to give notice under *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01 [*The Constitutional Questions Act*], at any point.

[24] As well, it is the Institute's position that the DC correctly interpreted the phrase "public communication", and that its decision to award costs against Mr. Cameron of $15,000 was reasonable.

VII. APPLICABLE LEGISLATION

[25] The relevant sections of *The Agrologists Act* are as follows:

Professional misconduct
28(1) Professional misconduct is a question of fact, but any matter, conduct or thing, whether or not disgraceful or dishonourable, that:

(a) is harmful to the best interests of the public or the members of the institute;

(b) tends to harm the standing of the profession of agrology;

(c) is a breach of this Act or the bylaws; or

(d) is a failure to comply with an order of the professional conduct committee, the discipline committee or the council;

is professional misconduct within the meaning of this Act.

(2) Professional incompetence is a question of fact, but the display by a member of:

(a) a lack of knowledge, skill or judgment; or

(b) a disregard for the welfare of members of the public served by the profession;

of a nature or to an extent that demonstrates that the member is unfit to continue in the practice of the profession is professional incompetence within the meaning of this Act.

Appeal to Court of Appeal
35 The institute or a member who appeals pursuant to section 32 may appeal a decision of a judge of the court on a question of law to the Court of Appeal for Saskatchewan within 30 days of the decision.

[26] The following sections of the *Code* are relevant to this appeal:

BYLAW II

CODE OF ETHICS

1. CODE OF ETHICS FOR AGROLOGISTS

Agrologists will assent and conform to the code of ethics, which is as follows:

The profession of agrology demands integrity, competence and objectivity in the conduct of its members while fulfilling their professional responsibilities to the public, the employer, the, [*sic*] client, the profession and other agrologists.

Regulatory Bylaws (2012), Bylaw II(1),
online: Saskatchewan Institute of Agrologists (2 October 2018)

Responsibility to Other Members of the Institute
• Abstain from undignified or misleading public communication with or about agrologists or agricultural technologists.

...

Code of Ethics & Practice Standards,
online: Saskatchewan Institute of Agrologists (2 October 2018)

[27] The relevant sections of *The Constitutional Questions Act* are:

Interpretation
12 In this Part:

> **"court"** means the Court of Appeal, the Court of Queen's Bench or the Provincial Court of Saskatchewan; (« *tribunal* »)
>
> **"law"** includes:
>
> > (a) an enactment as defined in *The Interpretation Act, 1995*;
> >
> > (b) an enactment within the meaning of the *Interpretation Act* (Canada);

…

Notice to Attorneys General required for constitutional questions
13 No court shall hold any law to be invalid, inapplicable or inoperable if a constitutional question is raised nor shall it grant any remedy unless notice is served on the Attorney General of Canada and on the Attorney General for Saskatchewan in accordance with this Part.

Notice to Attorney General for Saskatchewan required for a challenge to regulations
14 If, in any court, the validity of a proclamation, regulation or order in council made or purportedly made in the execution of a power given by an Act is brought into question on grounds other than those mentioned in section 13, the court shall not hold the proclamation, regulation or order in council to be invalid unless notice is served on the Attorney General for Saskatchewan in accordance with this Part.

Notice requirements
15(1) Subject to subsection (2), a notice mentioned in section 13 or 14 must be served at least 14 days before the day of argument.

(2) The court may, on an *ex parte* application made for the purpose, order an abridgement of the time for service of a notice mentioned in section 13 or 14.

(3) A notice mentioned in section 13 or 14 must include:

> (a) the name of the action, cause, matter or proceeding in which the question arises or application is made;
>
> (b) the law or provision in question, if any;
>
> (c) the basis for the challenge;
>
> (d) the right or freedom alleged to be infringed or denied, if any;
>
> (e) the day and place for the argument of the question; and
>
> (f) the facts that will be relied on in argument.

(4) The Attorney General for Saskatchewan is entitled as of right to be heard in any action, cause, matter or proceeding to which section 13 or 14 applies.

(5) The Attorney General of Canada is entitled as of right to be heard in any action, cause, matter or proceeding to which section 13 applies.

(6) If the Attorney General of Canada or the Attorney General for Saskatchewan appears in an action, cause, matter or proceeding to which section 13 or 14 applies, he or she is a party for the purposes of appeal from an adjudication respecting the validity, applicability or operability of a law or respecting entitlement to a remedy.

(7) If the Attorney General of Canada or the Attorney General for Saskatchewan is not given proper notice pursuant to section 13 or 14 as the case may be, he or she has the right to appeal an adjudication and is a party for the purpose of an appeal.

(8) *If any administrative tribunal considers it appropriate in any matter, the tribunal may require that notice be given to the Attorney General for Saskatchewan in accordance with this section.*

(Emphasis added)

[28] The relevant sections of *The Interpretation Act, 1995*, SS 1995, c I-11.2 [*The Interpretation Act*], are as follows:

Interpretation

2 In this Act:

...

"enactment" means an Act or a regulation or a portion of an Act or a regulation;

...

"regulation" means a regulation, order, rule, rule of court, form, tariff of costs or fees, proclamation, letter patent, bylaw or resolution enacted in the execution of a power conferred by or pursuant to the authority of an Act, but does not include:

(a) an order of a court made in the course of an action; or

(b) an order made by a public officer or administrative tribunal in a dispute between two or more persons;

VIII. ISSUES

[29] I would frame the issues as follows:

(a) Did the Chambers judge err in concluding the decision of the DC, finding Mr. Cameron guilty of professional misconduct, was reasonable?

(b) Should Mr. Cameron be permitted to argue that the *Code* unjustifiably infringes his right to freedom of expression under s. 2(b) of the *Charter*?

(c) Did the Chambers judge err by concluding the DC's Penalty Decision as to costs was reasonable?

[30] With respect to the *Charter* issue, it must be noted that Mr. Cameron did not make any submission in this Court about whether the Chambers judge erred by finding that the infringement of Mr. Cameron's *Charter* right to freedom of expression by virtue of the decision

itself is reasonably and demonstrably justified. I make no comment on the conclusions of the DC and the Chambers judge in that regard.

IX. ANALYSIS

A. Did the Chambers judge err in concluding the decision of the DC, finding Mr. Cameron guilty of professional misconduct, was reasonable?

[31] Mr. Cameron agrees that the Chambers judge correctly identified reasonableness as the appropriate standard of review for this ground of appeal. Therefore, it is necessary to determine whether the Chambers judge correctly applied the standard of reasonableness to the DC's finding that Mr. Cameron was guilty of professional misconduct (see: *Dr. Q. v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 43, [2003] 1 SCR 226 [*Dr. Q.*]).

[32] In *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31, Gascon J., writing for the majority, stated:

> [55] *In reasonableness review, the reviewing court is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process" and with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"* (*Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14). When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa*, at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.
>
> (Emphasis added)

[33] When the Chambers judge addressed this issue, it had been presented as two separate questions: first, whether the findings of the DC were supported by the evidence and facts before it; and, second, whether the DC's finding that Mr. Cameron's communication was public was reasonable and supported by the evidence. The Chambers judge provided the following analysis on these two points:

> **Were the findings of misconduct by the appellant supported by the evidence and facts before it?**

> [21] The DC had before it the editions of “Grassroots” that were at issue. The DC heard the testimony of the appellant on the circulation of “Grassroots” and it was open to the DC to make the determination that they did. I find that all of those determinations with regard to “Grassroots” were reasonable in the circumstances.
>
> **Was the DC’s finding of public communication reasonable and supported by the evidence?**
>
> [22] I am satisfied on reviewing the transcripts that there is significant evidence to establish that the appellant’s publication was publically circulated and that the contents of such publications were offensive to the Institute, which was contrary to the Code of Ethics and Practice Standards of the respondent.

[34] It is clear that the Chambers judge expressed the reasonableness standard incorrectly. As Gascon J. stated in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, and as I have previously quoted, the reviewing Court is concerned with the existence of justification, transparency and intelligibility and whether the decision falls within a range of possible outcomes. In my opinion, the Chambers judge dealt only with justification to show that the decision of the DC fell within a range of acceptable outcomes.

[35] Since the Chambers judge undertook a limited analysis of the DC’s decision in regards to its finding of professional misconduct, it is incumbent on this Court to examine the DC’s decision in greater detail to determine whether it was in fact reasonable. Mr. Cameron’s main argument on this issue is that, in finding him guilty of professional misconduct, the DC adopted an unreasonable definition of the term “public communication.” Mr. Cameron argues that the definition is unreasonable on two bases: first, the definition adopted by the DC does not accord with the ordinary meaning of the phrase “public communication”; and, second, the definition has no nexus with the Institute’s primary purpose.

[36] It is noteworthy to point out the comments of Layh J. in *Meier v Saskatchewan Institute of Agrologists*, 2014 SKQB 389, [2015] 3 WWR 608, as they relate to findings of professional misconduct pursuant to *The Agrologists Act*:

> [27] Although these cases emphatically confirm the appropriateness of the “reasonableness” test, I am also mindful that s. 28 of the *Act* expressly states, *“Professional misconduct is a question of fact...”* This provision, alone, may leave the court with little option but to adopt the reasonable test in matters of professional discipline. *My research shows that no other Canadian jurisdiction uses this phrase in its professional discipline statutes, although it is commonplace in many of Saskatchewan’s professional discipline statutes. Findings of fact are the purview of the discipline committee and command a high degree of deference when subjected to judicial review – thence the appropriateness of the “reasonableness” standard.*
>
> (Emphasis added)

[37] While this decision was ultimately overturned on appeal (*Meier v Saskatchewan Institute of Agrologists*, 2016 SKCA 116, 405 DLR (4th) 506 [*Meier CA*]), the appeal turned on a fresh argument raised by the appellant (*Meier CA* at para 35) and, as such, the observations of Layh J. about the reasonableness standard and deference were undisturbed on appeal.

[38] With these general observations in mind, I now turn to the two questions addressed by the Chambers judge.

[39] In its Discipline Decision, the DC made the following findings with regard to the public nature of Mr. Cameron's communication:

> • That Mr. Douglas Cameron had on numerous occasions, through his newsletter "Grassroots" distributed by e-mail, breached the standards expected of a professional Agrologist as set out in the Code of Ethics and Practice Standards of the Saskatchewan Institute of Agrologists.
>
> • That his continued unsubstantiated questioning of the integrity and honesty of other agrologists and his negative comments regarding the conduct of SIA Council members have demonstrated Mr. Cameron's disregard for his professional responsibility to abstain from *undignified or misleading public communication* about other members of the Saskatchewan Institute of Agrologists.
>
> • *That the public nature of the attacks on the integrity and honesty of individual agrologists could negatively affect the public perception of the Agrology Profession to the detriment of the Profession and the ability of agrologists to effectively serve the public. These attacks repeatedly over multiple issues of "Grassroots" increase the seriousness of the breach of the code of ethics and standard of practice.*
>
> • That there could have been ample opportunity to resolve the issues in a responsible rather than confrontational manner had Mr. Cameron and the SIA Council decided to do so rather than using an inappropriate forum.
>
> • Mr. Cameron has submitted this [*sic*] his Section 2(b) right to freedom of expression would be infringed upon if he were found guilty of professional misconduct.
>
> (Emphasis added)

[40] In its Penalty Decision, the DC further provided:

> 1) The nature and seriousness of the proven allegations; *The DC finds that while the infractions of professional misconduct occurred mainly within the membership of SIA making it not as obvious to public perception*, the incidences of professional misconduct within the SIA were equally or more serious because of the following findings:
>
> > a) Through his newsletter "Grassroots" Mr. Cameron has on numerous occasions used unsubstantiated questioning of the integrity and honesty in SIA and in particular those serving SIA in volunteer positions.
> >
> > b) *"Grassroots" was distributed to some 700 to 800 SIA members and should not be regarded as a private newsletter but public within the SIA,*

> *reflecting on how agrologists view other agrologists and their effectiveness to serve the public.*
>
> c) Mr. Cameron had previously plead guilty to a similar professional misconduct charge in December 2010. The similar continued behavior suggests the penalty for the previous misconduct was not adequate to initiate a behavioral change.
>
> d) Mr. Cameron is a senior member of the SIA and has served in top positions, contributing to the overall good of the SIA, however the route chosen by Mr. Cameron on repeated occasions has been adversarial and not conciliatory even when faced with opportunities to resolve issues. Mr. Cameron with his background and experience should have acted differently with greater sensitivity, understanding and respect for others.
>
> (Underlining in original, italics emphasis added)

[41] From the above, it is clear the DC based part of its decision to find Mr. Cameron guilty of professional misconduct on its finding that Mr. Cameron had engaged in undignified or misleading public communication about fellow members of the Institute. In support of this conclusion, the DC further found the public nature of these “attacks” could negatively impact public perception of the Institute. The DC’s approach to this issue makes it necessary to determine whether it was reasonable for the DC to have viewed Mr. Cameron’s newsletters as “public communication” in the manner that it did.

[42] During the discipline hearing, Mr. Cameron testified that 700 to 800 individuals received his newsletter. He also went on to state these 700 to 800 individuals were not solely members of the Institute. Mr. Cameron clarified that some individuals receiving the newsletter were lawyers and that he had sent copies to the Alberta and Manitoba Institutes. However, according to Mr. Cameron “[a]ll the rest were pretty well [members of the Institute].”

[43] The DC did not provide a specific definition of what constitutes “public communication”, but it clearly found that the distribution of Mr. Cameron’s newsletter constituted “public communication.” On a review of the evidence, and the decisions of the DC, this was a reasonable determination.

[44] Mr. Cameron argues the DC failed to establish how the Grassroots newsletters relate to the Institute’s statutory role to “protect the public.” While this is the Institute’s ultimate obligation, it is not its only role. Section 4 of *The Agrologists Act* lists protection of the public as only one of several objects of the Institute. Further, s. 28 of *The Agrologists Act*, which describes

conduct amounting to professional misconduct, does not require a member's conduct to endanger the public in order to be considered professional misconduct.

[45] Even so, in its decision, the DC found Mr. Cameron's conduct "could negatively affect the public perception of the Agrology Profession to the detriment of the Profession and the ability of agrologists to effectively serve the public." In coming to this conclusion, the DC highlighted the comments of Mr. Cameron that attacked and questioned the honesty and integrity of individual members of the association. In particular, the DC relied upon Mr. Cameron's comments in the Grassroots newsletter that (i) accused the council of unethical behavior and the Institute of having a "two-tiered" code of ethics, and (ii) suggested lawyers may be controlling the council. Taken as a whole, it was reasonable to conclude that Mr. Cameron's comments could negatively affect the public perception of the agrology profession.

[46] In conclusion, the DC's decision to find Mr. Cameron guilty of professional misconduct was reasonable in the circumstances. The DC is entitled to a degree of deference with regard to its interpretation and application of its home statute, which would include findings of professional misconduct as set out in s. 28 of *The Agrologists Act*. There exists justification, transparency and intelligibility in the DC's decision-making process and the decision falls within a range of acceptable outcomes. As the Supreme Court stated in *Canada (Canadian Human Rights Commission)* at para 55, "[a]t its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution."

[47] The DC's conclusion is surely one of the possible outcomes available to it and I would dismiss this ground of appeal.

B. Should Mr. Cameron be permitted to argue that the *Code* unjustifiably infringes his right to freedom of expression under s. 2(b) of the *Charter*?

[48] This issue requires the Court to decide whether Mr. Cameron made this argument before either the DC or the Court of Queen's Bench, and the consequences of a finding that he did not.

[49] Mr. Cameron states he has argued throughout that he has been challenging the constitutionality of the *Code* rather than the decision. For example, in his factum his counsel

writes: "Throughout this process, Mr. Cameron has challenged the constitutionality of a law, rather than of a decision." As I have indicated, the Institute takes the contrary position and argues that this is a new issue on appeal for which notice under *The Constitutional Questions Act* is required. In this case, the Institute has claimed if this Court allows Mr. Cameron to raise a new issue on appeal, namely the issue of the constitutionality of the *Code*, it will suffer prejudice. The Institute argues if this issue had been before the Chambers judge it would have submitted additional arguments on the matter, and provided additional evidence on the Institute's process for approving bylaws as well as the origins and applicability of the provision in question.

[50] I find myself in substantial agreement with the Institute that this is a new issue raised for the first time on appeal, which requires the Court to address, as a preliminary issue, the Institute's arguments regarding the need for notice under *The Constitutional Questions Act*.

[51] In *Saskatchewan Government Insurance v Gorguis*, 2013 SKCA 32, 360 DLR (4th) 607 [*Gorguis*], this Court examined s. 8 of *The Constitutional Questions Act*, RSS 1978, c C-29 [*The Constitutional Questions Act 1978*]. The relevant portions of that section provide:

> **8**(2) When, in a court of Saskatchewan:
>
> > (a) the constitutional validity or constitutional applicability of any law is brought into question; or
> >
> > (b) an application is made to obtain a remedy;
> >
> > the court shall not adjudge the law to be invalid or inapplicable nor shall it grant the remedy until after notice is served on the Attorney General of Canada and on the Attorney General for Saskatchewan in accordance with this section.
>
> (3) When, in a court of Saskatchewan, the validity or applicability of a proclamation, regulation or Order in Council made or purportedly made in the execution of a power given by an Act of the Legislature is brought into question on grounds other than those mentioned in subsection (2), the court shall not adjudge the proclamation, regulation or Order in Council to be invalid until after notice is served on the Attorney General for Saskatchewan in accordance with this section.

[52] *The Constitutional Questions Act 1978* was repealed and replaced by the current *Constitutional Questions Act* and, for purposes of this appeal, s. 13 and s. 14 are equivalent to s. 8 of the former *Act*.

[53] In *Gorguis*, the Court dealt with an appeal from a judgment of the Court of Queen's Bench declaring a subsection of *The Automobile Insurance Act*, RSS 1978, c A-35, inoperative. On appeal, the issue was that the plaintiff had failed to serve the Attorney General with the

requisite notice under *The Constitutional Questions Act*. Ultimately, Cameron J.A. for the Court concluded that, as a result, the judgment was a nullity and a rehearing was necessary. Further, Cameron J.A. stated the purpose of the notice requirement under *The Constitutional Questions Act 1978* was to:

> [22] ... ensure that no law enacted by or on the authority of the Legislature or Parliament, including no instrument having the force of law, is to be found to be defective by the judiciary on constitutional grounds without first giving the governments an opportunity to address the matter.

[54] However, Cameron J.A. did not dismiss the possibility of *de facto* notice, or that the Attorney General could waive notice:

> [37] Before leaving this aspect of the case on appeal, I should like to observe that nothing I have said about section 8 and its notice provisions is intended to have any bearing on the notions, mentioned in *Eaton*, that *de facto* notice equivalent to written notice might answer to the requirements of section 8, and that an Attorney General might be able to waive notice and consent to the determination of a constitutional question without the need for formal notice. (See, *R. v. Nome*, 2010 SKCA 147, 265 C.C.C. (3d) 145.)

[55] In this case, since Mr. Cameron has given no notice, nor has there been *de facto* notice or a waiver of notice by the Attorney General, this Court is prohibited from quashing s. 4(a) of the *Code* as Mr. Cameron has requested. At a minimum, it appears the matter would have to be remitted to the Court of Queen's Bench for rehearing after appropriate notice has been given. However, the fact that, notice was not given at any stage in the proceeding supports the conclusion that it was the decision of the DC that Mr. Cameron challenged, and not a specific provision of the *Code*.

[56] Furthermore, s. 15(8) of *The Constitutional Questions Act*, which deals with notice requirements, provides:

> **15**(8) If any administrative tribunal considers it appropriate in any matter, the tribunal may require that notice be given to the Attorney General for Saskatchewan in accordance with this section.

[57] This provision was a new addition to the legislation and the Hon. Don Morgan had the following to say at the Intergovernmental Affairs and Justice Committee's discussion of Bill No. 13 – *The Constitutional Questions Act, 2011* (Saskatchewan, Legislative Assembly, *Hansard Verbatim Report*, 27th Leg, 1st Sess (8 May 2012) at 186 (Hon. Mr. Morgan):

> A new provision is also added to permit an administrative tribunal to require that notice be given to the Attorney General if a constitutional issue is raised in a hearing.

Unfortunately, this appears to be the only mention of this section in *Hansard*.

[58] Both the use of "may" in s. 15(8) of *The Constitutional Questions Act* and the Hon. Don Morgan's use of "permit", suggest there is no mandatory notice obligation on a party seeking to challenge an enactment before an administrative tribunal. This is in contrast to the strict notice requirements that apply when parties raise the same issues in a Saskatchewan court as outlined in *Gorguis*. However, a possible explanation for this distinction is the fact administrative tribunals have a limited range of remedies available to them. The Supreme Court addressed this point in *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54, [2003] 2 SCR 504, where Gonthier J. provided:

> [31] ... [T]he constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases. ...

[59] Therefore, while it may be at the discretion of an administrative tribunal to require a party claiming the unconstitutionality of an enactment to provide notice, this is understandable given an administrative body lacks the authority to declare any enactment generally invalid, nor can it bind any future decision maker to its ruling. But where a party seeks a declaration of invalidity in the courts, which an administrative tribunal cannot provide, it will be necessary to provide notice to the Attorney General in accordance with *The Constitutional Questions Act*, and the controlling jurisprudence.

[60] In this case, at no point did the DC consider it appropriate to require notice to be given to the Attorney General of Saskatchewan. While it may not have been fatal for Mr. Cameron not to have filed notice pursuant to *The Constitutional Questions Act*, his failure to do so, and the DC's failure to raise this issue with him lends support to the conclusion that it was the constitutionality of the DC's decision and not the constitutionality of s. 4(a) of the *Code* that was argued at the discipline hearing and on appeal to the Court of Queen's Bench. For this reason, it appears Mr. Cameron is arguing the constitutionality of s. 4 of the *Code* for the first time on this appeal.

[61] Since I have concluded that the constitutionality of s. 4(b) is being raised for the first time on appeal to this Court, it must be pointed out that this Court in *Merck Frosst Canada Ltd. v Wuttunee*, 2008 SKCA 125, 314 Sask R 90 [*Wuttunee*], stated:

> [13] Notwithstanding having received extensive written and oral argument, *the Court can see no principled basis or exception to depart from the general rule that constitutional arguments should not be raised for the first time on appeal*. While it is possible to point to some cases in which constitutional attacks on legislation have been permitted to be raised for the first time in appellate courts, in general, it is an undesirable way in which to litigate constitutional issues, which by their nature almost invariably raise questions of general importance. See: *R. v. Gray.* It is "essential that all interested parties have an adequate opportunity to prepare submissions, and consider what evidence should be placed before the Court."
>
> (Emphasis added)

[62] This Court also declined to depart from the general rule against raising constitutional arguments for the first time in this Court in *LeCaine v Canada (Registry of Indian and Northern Affairs*), 2015 SKCA 43, 385 DLR (4th) 694 [*LeCaine*]. Here, the Court found:

> [59] In the Court of Queen's Bench, the LeCaines argued that s. 14.2(1) of the *Indian Act* does not apply because they were asserting a constitutionally protected right. Now the LeCaines argue that s. 14.2(1) itself is unconstitutional. Raising the constitutionality of s. 14.2(1) is a new argument. As a general rule, appellate courts do not hear constitutional arguments for the first time on appeal (see *Wuttunee v Merck Frosst Canada Ltd.*, 2008 SKCA 125 at para 13, (2008), 314 Sask R 90). Further, no notice was given to the Attorney General or the other respondents. In such circumstances, the Court declines to consider this issue.

[63] As with *Wuttunee* and *LeCaine*, I see no principled basis to depart from the general rule. Thus, I decline to hear Mr. Cameron's argument regarding the constitutionality of s. 4(a) of the *Code* for the first time on this appeal.

[64] I should also note that the Institute raised an additional argument before this Court that s. 4(a) of the *Code* is incapable of being constitutionally challenged, since the provision is not a law or regulation, but only an example of what may constitute professional misconduct. In my view of the conclusions reached above, it is not necessary to deal with this issue.

C. Did the Chambers judge err by concluding the costs portion of the DC's Penalty Decision was reasonable?

[65] With respect to the DC's decision to assess costs of $15,000, Mr. Cameron, argues it was an unjustified award on the basis that the Institute unreasonably incurred these costs.

Mr. Cameron concedes the Institute has the authority under *The Agrologists Act* to award costs and the awarding of costs is discretionary, but he emphasized this authority must be exercised reasonably.

[66] In particular, Mr. Cameron takes issue with the comments made by the DC in *obiter* stating this matter should not have reached the point of requiring a discipline hearing. Mr. Cameron argues this statement shows the costs in this matter were not incurred reasonably; and therefore – since the Institute controls its own process – the Institute should bear the costs incurred.

[67] In response, the Institute argues these remarks made in *obiter* alone do not make the cost award unreasonable. Furthermore, it was Mr. Cameron's actions that resulted in a fellow member filing a complaint against him and it was Mr. Cameron who refused to apologize and resolve the matter before the complaint was filed. Both parties agree that the DC's penalty decision is subject to review on the standard of reasonableness.

[68] On the issue of costs, the Chambers judge found:

> [23] … I am satisfied that the penalty decision was reasonable and supported by the evidence. The DC had the power to impose such a penalty pursuant to s. 27(1) and s. 27(2) of the *Act*. I find that the DC considered previous determinations of costs in other cases and that its finding is reasonable and supported by the evidence.

[69] Recently, in *Abrametz v The Law Society of Saskatchewan*, 2018 SKCA 37 [*Abrametz*], this Court examined the reasonableness of a cost award of $29,702.50. After finding the purpose of costs in the context of professional discipline hearings, "is not to indemnify the opposing party but for the sanctioned member to bear the costs … as an aspect ... of being a member," Schwann J.A. stated:

> [45] *That said, the burden of membership principle that underpins a costs order does not necessarily mean full indemnification. Costs should not be so prohibitive as to prevent a member from defending his or her right to practice in the chosen profession, or from being able to dispute misconduct charges*. As explained by Centa and Cooney, this consideration requires the discipline body to strike a careful balance:
>
>> At the same time, in a discipline hearing, the individual's right to practise as a professional is at stake. The costs of defending one's ability to practise one's chosen profession should not be so prohibitive as to prevent individuals from defending themselves. If there is a finding of misconduct and the individual loses the right to practise, a costs award in addition to the revocation of the licence can be devastating. Indeed, it can

> affect the ability to recover from the discipline and return to practice, if permitted. In this way, a costs award is not intended to be a punitive measure to supplement whatever penalties the panel imposes but a balancing measure that reflects the privilege of membership in a professional organization. (Emphasis added, "Trends in Costs" at 262)

(See also *Chuang v Royal College of Dental Surgeons of Ontario* (2006), 211 OAC 281 (Div Ct) [*Chuang*].)

[46] Apart from these broad principles, courts have taken a variety of factors into account in undertaking a reasonableness review of a costs award. The factors that emerge from case authority, as identified by Bryan Salte in *The Law of Professional Regulation*, (Markham: LexisNexis, 2015) at 262 [*Professional Regulation*], are the following:

> 1. Whether the costs are so large that the costs are punitive;
>
> 2. Whether the costs are so large that they are likely to deter a member from raising a legitimate defence;
>
> 3. The member's financial status;
>
> 4. *A member has an obligation to provide financial information to support a contention that a cost award will impose an undue hardship*;
>
> 5. The regulatory body should provide full supporting material for the amount of costs claimed;
>
> 6. The regulatory body should provide the individual with an opportunity to respond to the information and respond to the total quantum of costs which may be ordered before costs are imposed;
>
> 7. The regulatory body should provide reasons for reaching the decision that it made;
>
> 8. If the decision is made in British Columbia, it appears that the cost award will have to be based upon the tariff of costs that is awarded in court actions.

[47] A more concise statement of factors can be found in the Nova Scotia Court of Appeal decision of *Hills v Nova Scotia (Provincial Dental Board)*, 2009 NSCA 13, 307 DLR (4th) 341 [*Hills*]. There, the Court reduced the salient considerations to the following:

> [61] ... the Committee referred to the *Regulation* prescribing the sanctions which it could impose, summarized the expenses ... and identified and addressed the following factors:
>
> a. The balance between the effect of a cost award on the Appellant and the need for the Provincial Dental Board to be able to effectively administer the discipline process;
>
> b. The respective degrees of success of the parties;
>
> c. Costs awards ought not to be punitive;
>
> d. The other sanctions imposed and the expenses associated therewith;

> e. The relative time and expense of the investigation and hearing associated with each of the charges and in particular those on which guilt were entered and those where the Appellant was found not guilty.
>
> (Underlining added by Schwann J.A., italics emphasis added)

[70] Upon reviewing the written materials of both parties at the penalty hearing stage of the proceedings, the DC was aware the total costs incurred by the Institute in relation to this matter were $62,599.00. The PCC had argued for a costs award of $20,000 (however, the DC appears to have incorrectly stated in the Penalty Decision that the PCC was seeking costs of $15,000). Mr. Cameron did not provide any evidence of his financial situation, which the DC could have taken into account in the determination of costs.

[71] Based on the reasons provided by the DC in its Penalty Decision, and the principles outlined by Schwann J.A. in *Abrametz*, there is no reason to depart from the Chambers judge's finding that the DC's decision as to costs is reasonable. Assessing costs in this amount is in line with the principle that costs are reflective of a balancing measure consistent with the privilege of membership in a professional organization. For these reasons, I would dismiss this ground of appeal.

X. CONCLUSION

[72] The appeal is dismissed with costs to the Institute to be assessed under the appropriate Column.

"Herauf J.A."
Herauf J.A.

I concur. "Jackson J.A."
Jackson J.A.

I concur. "Schwann J.A."
Schwann J.A.