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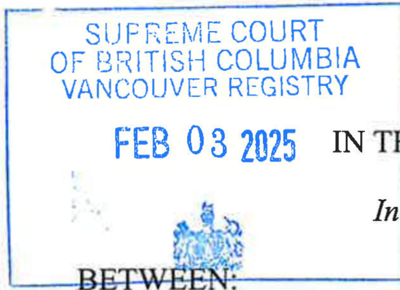
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of the Judicial Review Procedure Act

BETWEEN:

NAVID POOYAN, FARHAD BARAZANDEH NOVEYRI, and VAHID NILFOURUSHAN

PETITIONERS

AND:

HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AS REPRESENTED BY THE MINISTRY OF HEALTH, UNIVERSITY OF BRITISH COLUMBIA, CANADIAN RESIDENT MATCHING SERVICE, ASSOCIATION OF FACULTIES OF MEDICINE OF CANADA, THE COLLEGE OF PHYSICIANS AND SURGEONS OF BRITISH COLUMBIA, BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL

RESPONDENTS

PETITION TO THE COURT

#7230773-4

ON NOTICE TO:

His Majesty the King in Right of the Province of British Columbia (as represented by the Ministry of Health)
c/o Ministry of Attorney General
PO Box 9290 Stn Prov Govt
Victoria, BC, V8W 9J7
Attn: Zachary Ansley and Joanne Kim

University of British Columbia
c/o Harris & Company LLP
14th Floor, Bentall 5
550 Burrard Street
Vancouver, BC V6C 2B5
Attn: Kacey A. Krenn

Canadian Resident Matching Service
c/o Gowling WLG (Canada) LLP
1850 - 745 Thurlow Street,
Vancouver, BC V6E 0C5
Attn: Michael Schalke

Association of Faculties of Medicine of Canada
c/o Alexander Holburn Beaudin + Lang LLP
2700 – 700 West Georgia Street
Vancouver, BC V7Y 1B8 Canada
Attn: Diana S. Hwang and Esher Madhur

The College of Physicians and Surgeons of British Columbia
c/o Lovett + Westmacott
2544-12 Dunlevy St.
Victoria, BC V8R 5Z2
Attn: Angela R. Westmacott, K.C. and Alandra Harlingten

British Columbia Human Rights Tribunal
1270-605 Robson Street
Vancouver, BC V6B 5J3

Attorney General of British Columbia
PO Box 9044 Stn Prov Govt
Victoria, BC V8W 9E2

The address of the registry is: 800 Smithe Street, Vancouver, BC V6Z 2E1

The Petitioners estimate that the hearing of the Petition will take 2 days.

x This matter is an application for judicial review.

☐ This matter is not an application for judicial review.

This proceeding is brought for the relief set out in Part 1 below, by

x the person(s) named as Petitioners in the style of proceedings above

☐ N/A

If you intend to respond to this Petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this Court within the time for response to petition described below, and

(b) serve on the Petitioners

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the Petitioners,

(a) if you were served with the Petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the Petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the Petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the Court, within that time.

(1) The ADDRESS FOR SERVICE of the Petitioners is:

Hunter Litigation Chambers
2100 - 1040 West Georgia Street
Vancouver, BC V6E 4H1

Fax number address for service (if any) of the Petitioners: 604 647 4554

E-mail address for service (if any) of the Petitioners: cvanwilt@litigationchambers.com

(2) The name and office address of the Petitioners' lawyer is:

Chantelle van Wiltenburg
Hunter Litigation Chambers Law Corporation
Barristers and Solicitors
2100 - 1040 West Georgia Street
Vancouver, BC V6E 4H1
Telephone: 604 891 2400

CLAIM OF THE PETITIONERS

Part 1: ORDER(S) SOUGHT

1. A declaration that the British Columbia Human Rights Tribunal (the "Tribunal") failed to observe the principles of natural justice and procedural fairness in respect of its dismissal decision in file no. CS-001589 dated August 22, 2024 (the "Dismissal Decision"), including by:

    a. Violating the Petitioners' legitimate expectations; and

    b. Dismissing the complaint without first making efforts to directly contact the Complainants;

2. A declaration that the Tribunal erred in law in its decision in file no. CS-001589 dated December 5, 2024 (the "Reconsideration Decision"), including by:

    a. Ignoring the legal principle that litigants should not be deprived of their rights on account of an error of counsel;

    b. Disregarding the legal distinction between counsel and client;

    c. Misapprehending controlling appellate authority and applying a narrow definition of "fairness";

    d. Disregarding the Tribunal's own test, as adopted in policy, to set aside a dismissal for non-communication; and

e. Failing to consider and/or give effect to the purposes of the *Human Rights Code* under s. 3;

3. A declaration that the Reconsideration Decision was patently unreasonable;

4. An order in the nature of *certiorari* quashing and setting aside the dismissal order dated August 22, 2024 in respect of all complainants, without remittal;

5. In the alternative to the order sought in paragraph 4:

   a) An order in the nature of *certiorari* quashing and setting aside the Reconsideration Decision in respect of all complainants and remitting it for reconsideration with a direction pursuant to s. 5 of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241 ("*JRPA*") that the dismissal order dated August 22, 2024 be set aside;

6. In the alternative to the order sought in paragraph 5:

   b) An order in the nature of *certiorari* quashing and setting aside the Reconsideration Decision in respect of all complainants; and

   c) An order in the nature of *mandamus* requiring the Tribunal to set aside the dismissal order dated August 22, 2024;

7. In the alternative to the order sought in paragraph 6:

   a) An order in the nature of *certiorari* quashing and setting aside the Reconsideration Decision in respect of all complainants, and remitting it for reconsideration with other directions from the Court under s. 5 of the *JRPA*; and

   b) An order in the nature of *certiorari* quashing and setting aside the Dismissal Decision in respect of all complainants, and remitting it for reconsideration with other directions from the Court under s. 5 of the *JRPA*;

8. An order that any reconsideration be heard by a different Tribunal member than the original Tribunal member who issued the Dismissal Decision and Reconsideration Decision;

9. An order pursuant to s. 17 of the *JRPA* that the record of the proceeding in respect of the Decision be filed in the court by the Tribunal or its counsel;

10. Costs; and

11. Such further and other relief as counsel may advise and this Honourable Court may permit.

Part 2: FACTUAL BASIS

12. This case concerns the question of fairness "in the ordinary sense of the word." The petitioners, all foreign-born and internationally trained physicians, filed a human rights complaint challenging certain restrictions on medical licensing as discrimination. While they initially filed their complaint without the assistance of a lawyer, they subsequently retained counsel to represent them.

13. More than three years after filing their complaint, and unbeknownst to the petitioners, their lawyer failed to attend a pre-hearing conference and did not respond to repeated Tribunal correspondence over a period of approximately three months. The Tribunal responded to counsel's silence by dismissing the Petitioners' complaint.

14. The same day of the dismissal order, the Petitioners' lawyer wrote to the Tribunal advising that the silence was her fault and not the fault of her clients. She requested a reconsideration of the dismissal decision.

15. The Tribunal declined to reconsider or set aside its dismissal order. The Tribunal indicated that the most significant factor in declining to reconsider the dismissal was that counsel's explanation for losing communication with the Tribunal was not reasonable. Although the Tribunal found that the complainants all "intended to pursue their complaints", and noted that the result "appears unfair to the complainants in the ordinary sense of the word", the Tribunal determined that this was "an issue to for them to take up with their counsel, not a basis for reconsideration".

The Complaint

16. The human rights complaint giving rise to this judicial review (Tribunal file no. CS-001589, or the "Complaint"), concerns allegations of systemic discrimination that target internationally trained immigrant physicians.

17. The Complaint alleges that the respondents have collaborated to create a complex, non-transparent system of access to medical licensure to advance their individual and collective interests, and which prevents the complainants from being licensed to practice medicine in British Columbia.

18. More specifically, the Complaint alleges that the rules designed and implemented by the respondents create significant barriers to immigrant physicians competing for positions to work as resident physicians, which is a pre-requisite to becoming fully licensed to practice medicine.

The Alleged Discrimination

19. The alleged discriminatory barriers to medical licensing center on the respondents' differential treatment of graduates of Canadian and American medical schools ("CMGs") and International Medical Graduates ("IMGs").

20. The Complaint alleges that the two streams (the CMG stream and IMG stream) are vastly different in the opportunities and obligations they provide.

21. The alleged discriminatory barriers to medical licensing for IMGs include:

   a) Requiring higher standards of demonstrated competence of IMGs than CMGs;

   b) Limiting IMGs to only underserviced medical disciplines (4 out of the 29 disciplines available to CMGs) and primarily family medicine (52 out of 58 positions);

   c) Denying IMGs the opportunity to sub-specialize;

   d) Refusing IMGs access to 85% of resident physician jobs in British Columbia after having proven themselves qualified to work as resident physicians (a quota of 58 positions for international medical graduates); and

   e) Requiring IMGs to "agree" to work where the Ministry directs (in rural and underserviced parts of the province) upon full licensure as a condition of working as a resident physician ("return of service contracts"). These return to service contracts carry non-compliance penalties that can range from approximately $480,000 to nearly $900,000.

The Complainants

22. The complainants are each foreign born and educated graduates of international medical schools who have emigrated to Canada, become Canadian citizens, and sought to become licensed to practice medicine in Canada.

23. All the complainants are alleged to face systemic barriers directed IMGs which are not imposed on CMGs.

24. These barriers are alleged to have the effect of preventing most immigrant physicians from becoming licensed to practice medicine.

25. The Complaint was originally brought by a total of five complainants, three of whom are petitioners in the within judicial review. The Complaint describes the petitioners as follows:

   a) Dr. Vahid Nilforushan is a Canadian citizen who was born, educated and medically trained in Iran as an anaesthesiologist. There are no residency positions in anesthesiology in British Columbia, which is the only pathway to licensure available to Dr. Nilforushan.

   b) Dr. Farhad Barazandeh Noveyri is a Canadian citizen who was born, educated and medically trained in Iran in internal medicine and gastroenterology. He was unsuccessful in obtaining one of two or three residency positions available annually for internal medicine in British Columbia. He is also ineligible as an

IMG to sub-specialize in gastroenterology. Dr. Barazandeh has returned to Iran to practice medicine while his family remains in British Columbia.

c) Dr. Navid Pooyan is a Canadian citizen who was born, educated and medically trained in Iran as a general physician. He obtained a residency position in family medicine and became fully licensed to practice in 2019. He is signatory to a return of service agreement.

(collectively, the "Petitioners")

26. In addition to the Petitioners, the Complaint was brought by two additional complainants:

a) Dr. Asal Vahabimoghaddam, who has since withdrawn from the Complaint.

b) Dr. Shailendra Singh, a Canadian citizen and Indian-trained trained general/oncological surgeon, who remains a party to the Complaint.

27. The Complaint outlines the licensing status of the complainants as follows:

a) With the exception of Dr. Pooyan, none of the complainants have been fully licensed to practice medicine in British Columbia.

b) There is **no** pathway in British Columbia for 3 of the 4 complainants, Dr. Nilforushan, Dr. Barazandeh, and Dr. Singh, to be licensed to practice in their disciplines: namely, anesthesiology and gastroenterology, and general/oncological surgery.

c) Dr. Pooyan has overcome the odds by obtaining one of the few residency positions available to IMGs, and is licensed to practice family medicine. But to obtain this opportunity to be licensed, he had no choice but to sign the return of service agreement, which is alleged to be oppressive.

The Respondents

28. The Complaint is brought against the following respondents:

a) The respondent His Majesty the King in Right of the Province of British Columbia as represented by the Ministry of Health ("the Ministry"), which controls and funds resident physician positions in British Columbia;

b) The respondent University of British Columbia ("UBC") which provides the academic component of residency training in British Columbia;

c) The respondent College of Physicians and Surgeons (the "College"), which sets requirements and standards for medical licensure in British Columbia, including establishing residency as a pre-requisite of full licensure;

d) The respondent, Canadian Resident Matching Service ("CaRMS"), is a society created to run the residency match program in Canada, including the residency match programs for BC residency positions; and

e) The respondent, The Association of Faculties of Medicine of Canada ("AFMC"), an association comprised of the university faculties of medicine in Canada.

29. The Respondents are alleged, both individually and together, to impose discriminatory barriers to medical licensing in British Columbia for International Medical Graduates.

Remedies Sought

30. The complainants seek both individual and systemic remedies in their Complaint.

31. Stated at a high level, the individual remedies sought by the complainants include:

a) Compensation for injury to dignity, feelings, and self-respect;

b) Directions issued to certain respondents pertaining to Drs. Nilforushan, Singh, and Barazandeh that:

i. Confirm the complainants' eligibility for residency training;

ii. Compel the complainants' enrollment in residency training; and

iii. Compel the complainants' registration as resident physicians;

c) A declaration that the return to service agreement signed by Dr. Pooyan is null and void and unenforceable.

32. Stated at a high level, the systemic remedies sought by the complainants include:

a) A statement that the current system of access to residency training is discriminatory;

b) Directions, orders, and declarations that the respondents cease the segregation of IMGs and CMGs and promote equal opportunity in residency position competitions;

c) A direction that the respondents re-evaluate certain licensure pre-requisites for IMGs;

d) An order that the Ministry cease requiring return of service contracts for IMGs, and a declaration that return of service contracts imposed on IMGs as a condition of access to licensure to practice medicine are null and void and unenforceable; and

e) Directions for oversight and education to promote anti-discriminatory residency selection processes.

Procedural History

33. The complainants filed the Complaint on June 8, 2020. They brought their complaint with the assistance of community groups and were unrepresented.

34. At the time of filing, the complainants provided the Tribunal with their personal contact information, including their mailing address, respective telephone numbers, and email addresses.

35. The complainants subsequently retained counsel in or around November 2020 to represent them in advancing the Complaint.

Errors of Counsel

36. On April 29, 2024, the complainants' legal counsel did not attend a prehearing conference.

37. Complainants' counsel also failed to respond to the following Tribunal correspondence and notices:

   a) A Tribunal letter dated May 9, 2024 directing the complainants to update the Tribunal by May 23, 2024 as to their intention to pursue their complaint and the status of Dr. Vahabimoghaddam's document disclosure.

   b) A Tribunal letter dated June 25, 2024 directing the complainants to update the Tribunal by July 8, 2024 as to their intention to pursue their complaint and the status of outstanding document disclosure. In its letter, the Tribunal observed that "I am not concerned that the Complainants may be facing barriers in the process because they are represented by legal counsel."

   c) A Tribunal notice dated July 22, 2024 under Rule 4(5) of the Tribunal's *Rules of Practice and Procedure* (the "*Rules*") that if the complainants did not confirm they will diligently pursue their complaints and answer the outstanding disclosure question by August 12, 2024, the Tribunal may dismiss their complaints under s. 27.5 of the *Code.*

38. The complainants were unaware of the Tribunal's correspondence. Complainants' counsel did not provide the Tribunal's correspondence to the complainants prior to the dismissal of the Complaint.

39. The Tribunal did not make any demonstrated efforts to provide this correspondence directly to the Complainants using their personal contact information on file with the Tribunal.

40. On August 22, 2024, the Tribunal dismissed the Complaint pursuant to s. 27.5 of the *Code* (the "Initial Dismissal Decision").

Application to Set Aside Dismissal on Reconsideration

41. On the same day of the dismissal order, August 22, 2024, the complainants' counsel wrote a letter to the Tribunal requesting a reconsideration of the Initial Dismissal Decision. Counsel advised that the failure to respond to the Tribunal was entirely that of counsel and not the complainants, who were "ready, willing, and able to proceed" with their complaint.

42. On September 5, 2024 the complainants filed submissions in support of an order setting aside the Initial Dismissal Decision on reconsideration. The complainants' application included, among other things, the following:

    a) An affidavit from complainants' counsel taking full responsibility for the lack of response to the Tribunal from May to August 2024;

    b) Letters to the Tribunal written by four of the complainants, explaining in their own words their diligence in pursuing their complaint; their reasonable reliance on counsel; and the impact of the dismissal on them, their families, and the broader community of International Medical Graduates and British Columbians receiving healthcare;

    c) Submissions on the substantial public interest dimension of the systemic complaint, which impacts all International Medical Graduates;

    d) Submissions on the substantial efforts of community members in assembling and organizing the relevant documentary record to advance the Complaint; and

    e) Submissions on the purposes of s. 3 of the *Code,* and the lack of a meaningful or systemic remedy to redress discrimination through any claim against their counsel.

Decision to Decline to Set Aside Dismissal on Reconsideration

43. On December 5, 2024, the Tribunal issued its decision declining to set aside the dismissal on reconsideration (the "Reconsideration Decision" or "Decision").

44. In its reasons, the Tribunal accepted that:

    a) "four of the five complainants intended to pursue their complaints … and did not know that the Tribunal was seeking confirmation that this was the case" (Decision, para. 77);

    b) "it is not the complainants' fault that their intentions were not conveyed to the Tribunal" (Decision, para. 78);

    c) the dismissal was "an unfortunate result" for the complainants (Decision, para. 57);

d) the dismissal "appears unfair to the complainants in the ordinary sense of the word" (Decision, para. 50).

45. Notwithstanding these findings, the Tribunal concluded that it was not in the interests of fairness and justice to reconsider or set aside the dismissal order on the following bases:

e) The "resulting unfairness to the Complainants [of dismissal] is an issue for them to address with their counsel, not a basis for reconsideration" (Decision, para. 50);

f) Counsel did not have a reasonable explanation for her loss of communication with the Tribunal (Decision, para. 51, 64, 70, 77);

g) The Tribunal determined the Initial Dismissal Decision was not procedurally unfair to the complainants (Decision, para. 37);

h) This case was distinguishable from the BC Court of Appeal's decision in *Zutter v. British Columbia (Council of Human Rights),* 1995 CanLII 1234 on the basis that, in the present case, there was no procedural unfairness;

i) Tribunal's reconsideration power is restricted by the finality principle (Decision, para. 69); and

j) That "it is likely" that the resulting delays and lack of clarity from non-communication will prejudice the other parties (Decision, para. 84-85).

Judicial Review

46. Out of an abundance of caution, to avoid any potential limitations defence, complainants' previous counsel filed a petition for judicial review in respect of the Initial Dismissal Decision within 60 days of the dismissal order on October 21, 2024 (BC Supreme Court, Vancouver Registry, File No. 247223). This petition has not been served on any of the respondents.

47. The Petitioners propose to advance their judicial review of both the Initial Dismissal Decision and Reconsideration Decision exclusively in the within petition.

Part 3: LEGAL BASIS

A. Standard of Review

48. The standard of review is governed by s. 59 of the *Administrative Tribunals Act,* S.B.C. 2004 c. 45 ("*ATA*") pursuant to s. 32 of the *Code.*

49. Section 59 of the *ATA* provides that:

> 59 (1)In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the

> application of the common law rules of natural justice and procedural fairness.
>
> (2)A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
>
> (3)A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
>
> (4)For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
>
> > (a)is exercised arbitrarily or in bad faith,
> >
> > (b)is exercised for an improper purpose,
> >
> > (c)is based entirely or predominantly on irrelevant factors, or
> >
> > (d)fails to take statutory requirements into account.
>
> (5)Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

50. Readily extricable findings of fact and issues of law underlying discretionary decisions are reviewable on a standard of reasonableness and correctness, respectively: *Morgan-Hung v. British Columbia (Human Rights Tribunal),* 2011 BCCA 122, para. 28.

51. Questions of mixed fact and law are reviewed on a correctness standard: *Lavender Co-Operative Housing Association v. Ford,* 2011 BCCA 114, para. 47.

52. A discretionary decision is arbitrary (and thus patently unreasonable under s. 59(4) of the *ATA*) where it fails to address a central issue (*Byelkova v. Fraser Health Authority,* 2021 BCSC 1312, para. 74) or is grounded on an erroneous conclusion with respect to a material consideration (*Environmental Services, ULC v. Suen,* 2019 BCCA 46, para. 34).

53. The standard of review for procedural unfairness can be characterized as one of correctness (*Murray Purcha & Son Ltd. v. Barriere (District),* 2019 BCCA 4, para. 3).

B. The Tribunal erred by applying the incorrect legal test for reconsideration

54. The Tribunal's analysis discloses several interrelated legal errors. Those errors have overlapping elements and are identified below.

i. ***The Tribunal ignored the legal principle that litigants should not be deprived of their rights on account of an error of counsel***

55. The Tribunal held that the "resulting unfairness" to the complainants due to counsel's error was "not a basis for consideration" of the dismissal order (Decision, para. 50). This is an error of law.

56. The Supreme Court of Canada has held it is a principle of justice and fairness that, in cases involving lawyer error, "a party must not be deprived of his rights on account of an error of counsel where it is possible to rectify the consequences of such error without injustice to the opposing party" (*Construction Gilles Paquette ltée v. Entreprises Végo ltée,* [1997] 2 SCR 299 at 311; *Bowen v. City of Montreal,* [1979] 1 S.C.R. 511 at 519; *Québec (Communauté urbaine) v. Services de santé du Québec,* [1992] 1 SCR 426 at 435).

57. The imperative that counsel's error should not be visited upon a litigant is central to an evaluation of the interests of fairness and justice. As noted by the Court of Appeal, "a party should not be penalized by its lawyer's conduct unless the delay has caused irremediable prejudice to the other side" (*Preferred Steel Construction Inc. v. M3 Steel (Kamloops) Ltd.,* 2015 BCCA 16, para. 51). As explained by Lord Denning (and adopted by the BC Court of Appeal):

> We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side.
>
> (*Loughlin v. Nichol and GMAC Leasco Ltd. et al,* 2004 BCCA 328, para. 15 citing *Doyle v. Olby [Ironmongers] Ltd.,* [1969] 2 All E.R. 119 (C.A.) at 121.)

58. This same approach of rectifying counsel error applies with equal force to human rights complaints. As seen in *Zutter v. British Columbia (Council of Human Rights),* 1995 CanLII 1234 (BCCA) ("*Zutter*"), where a litigant intends to pursue their complaint but it is dismissed due to lawyer error, the Tribunal has a jurisdiction and imperative to remedy such unfairness (para. 23).

59. As noted by the BC Court of Appeal, "the interests of justice means primarily that of the litigants concerned" (*Eidsvik v. Shepherd,* [1975] 4 W.W.R. 105 at 107). In cases of lawyer error, the interests of justice must be assessed with regard to the perspective of the rights holder, who must bear the consequences of their counsel's error (*St-Hilaire,* p. 87). This approach is reaffirmed by the BC Court of Appeal in *Zutter,* which directs that that fairness be assessed "from [the complainant's] point of view" (para. 23).

60. The present case is indistinguishable from *Zutter*. Like *Zutter,* the dismissal in this case was solely the result of lawyer error and unfair to the complainants "in the ordinary sense of the word" (*Zutter,* para. 23; Decision, para. 50). However, contrary to the BC Court of Appeal's direction in *Zutter,* the Tribunal held that lawyer error was "not a basis for

reconsideration" of the dismissal order, but instead "an issue for [the complainants] to address with their counsel" (para. 50).

61. This conclusion runs contrary to established principles of justice and fairness in cases of lawyer error. Not only is lawyer error "a basis for reconsideration"; lawyer error must not deprive a client of their rights unless it would result in irremediable prejudice to the other side, which is not the case here (see Decision, para. 85). Failing to give effect to this principle represents a failure to apply the correct legal test and constitutes an error of law.

ii. The Tribunal erred by disregarding the legal distinction between counsel and client

62. The Tribunal disregarded the legal distinction between counsel and client when evaluating the complainants' explanation for non-communication with the Tribunal. This is an error of law.

63. According to the Tribunal, the "most significant" factor in its decision to decline reconsideration was that counsel's explanation for failing to respond to the Tribunal was not reasonable (Decision, paras. 51, 52, 58, 60, 62, 64, 70). The explanation for delay identified and analyzed by the Tribunal was:

> "... that counsel was focused on giving Dr. Vahabimoghaddam more time to determine whether she wanted to pursue her complaint, did not put relevant dates and deadlines in her calendar, was busy with hearings and submissions in other matters, and did not understand the significance of the [n]otice" (Decision, para. 51).

64. The Tribunal erred in its analysis by evaluating the explanation of *counsel,* rather than the explanation of *the complainants* for their failure to communicate with the Tribunal.

65. The explanation of the *complainants* for their non-communication with the Tribunal was different from that of counsel. The complainants' explanation—like that of many litigants in cases of lawyer error—was that they reasonably relied on counsel to act on their behalf, and had no knowledge and no ability to act on the notice. The Tribunal's conflation of counsel and client diverted the Tribunal from assessing the *complainants'* explanation for non-communication on its own terms.

66. In the context of lawyer error, the Supreme Court of Canada has affirmed that a legal distinction should be drawn when evaluating the ability to act of the agent (lawyer) and principal (client).

67. In *St-Hilaire et al. v. Bégin*, [1981] 2 SCR 79, the Supreme Court of Canada considered a statutory discretion to extend a deadline to commence an appeal in circumstances of lawyer error. The Court observed that "where a party itself acted with diligence and the error was solely attributable to counsel, relief should not be denied "because of a fiction whereby the possibility to act of the agent would be held to be that of the principal" (p. 87).

68. This distinction between counsel and client is reflected within the Tribunal's own *Rules of Practice and Procedure* ("*Rules*"). The Tribunal's *Rules* distinguish between a "participant", "party", or "complainant", on the one hand, and a participant's "representative", such as a lawyer, on the other (see *Rules* 3, 7). Under the Tribunal's *Policy on a Complainant's Duty to Communicate with the Tribunal,* the Tribunal must evaluate "the <u>complainant's</u> explanation for failing to respond", rather than the explanation of the representative. By failing to give effect to this legal distinction, the Tribunal applied the incorrect legal test.

69. The Tribunal's conflation of counsel and client is further evidenced by its analysis contrasting the circumstances of the complainants to that of a self-represented litigant (Decision, para. 58). Such an analogy is inapposite because, unlike the complainants, a self-represented complainant is not in an agency relationship. A self-represented litigant would not find themselves in the complainants' position, because any notice from the Tribunal would be sent to the self-represented litigant directly.

70. Simply put, in the Tribunal's attempt to achieve parity in its treatment of self-represented litigants, the Tribunal failed to appreciate the distinctive injustice that can result from representation by negligent counsel, or the legal imperative to remedy it.

71. In sum, it was both incorrect and unreasonable for the Tribunal to conclude that the complainants lacked a reasonable explanation for not communicating with the Tribunal. The Tribunal made the following findings of fact in its analysis:

    a. Four of the five complainants intended to pursue their complaints (Decision, para. 77);

    b. Four of the five complainants did not know the Tribunal was seeking confirmation they intended to pursue their complaint until their complaint had been dismissed (Decision, paras. 50, 77);

    c. It was not the complainants' fault that their intention was not conveyed to the Tribunal (Decision, para. 78).

    d. The dismissal was "unfair" to the complainants "in the ordinary sense of the word" (Decision, para. 50).

72. In light of these findings, legal authorities, and the evidence as a whole, the only available conclusion was that the complainants had a reasonable explanation for failing to respond diligently to the Tribunal's notice. The Tribunal made an extricable error of law in concluding otherwise.

iii. The Tribunal erred by misapprehending controlling appellate authority and applying a narrow definition of "fairness"

73. The test for reconsideration applied by the Tribunal under s. 27.5 is "whether it is in the interests of fairness and justice" to reconsider the dismissal decision (*Gichuru v. Vancouver Swing Society,* 2021 BCCA 103, para. 97).

74. By declining to consider fairness "in the ordinary sense of the word", the Tribunal erred by applying an impermissibly narrow definition of fairness contrary to controlling appellate authority of the BC Court of Appeal in *Zutter*.

75. The Tribunal's analysis of fairness is focused on unfairness arising from the Tribunal's process. As the Tribunal explains at paragraphs. 77-78:

> ... I accept that four of the five Complainants intended to pursue their complaints and that they did not know that the Tribunal was seeking confirmation that this was the case. The difficulty with learning this only after the complaints were dismissed is that this result did not occur because of any unfairness in the Tribunal's process. Consequently, I do not find that it is in the interests of fairness and justice for the Tribunal to remedy it when this would require exercizing the narrow reconsideration discretion to give an exception to complainants with legal counsel in the absence of a reasonable explanation.
>
> In short, it is not the Complainants' fault that their intentions were not conveyed to the Tribunal, but neither is it the result of any unfairness in the Tribunal's process... (emphasis added)

76. This reasoning discloses that the Member misconceived the scope of her equitable jurisdiction. The Tribunal's equitable jurisdiction is not only available to prevent *procedural* unfairness, but unfairness in the ordinary sense of the word, irrespective of whether it arose from the Tribunal's own processes or otherwise (*Zutter,* paras. 22, 23).

77. The Tribunal's narrow focus on procedural unfairness is compounded by the Tribunal's misapprehension of the facts and holdings of *Zutter.* The BC Court of Appeal was explicit that in *Zutter,* "nothing which the law recognizes as a breach of procedural fairness arose as a result of the unfortunate series of events which ultimately deprived Zutter of the opportunity to present evidence and make submissions" (para. 22, emphasis added). The court nonetheless held that reconsideration was in the interests of justice.

78. In the present case, the Tribunal mistakenly distinguished *Zutter* on the basis that the facts of *Zutter* disclosed unfairness in the Tribunal's process. As stated by the Tribunal, "it appears that [in *Zutter*] some unfairness may have existed in the process between the Council and the complainant's counsel." The Tribunal held that, in contrast, "in this case I have found there was no unfairness in the Tribunal's process", and concludes "[t]his is why the result in this case is different from the result in *Zutter*" (Decision, para. 87).

79. This attempt to distinguish *Zutter* on the basis of procedural fairness plainly discloses a misapprehension of both the facts and holding of *Zutter*. It also misunderstands the scope of the Tribunal's equitable jurisdiction, and demonstrates an application of the incorrect legal standard for reconsideration in the interests of fairness and justice. This discloses further error of law.

iv. *The Tribunal erred by disregarding the Tribunal's legal test to set aside a dismissal order*

80. The Tribunal has developed a set list of factors that it must consider in deciding whether to set aside a dismissal order for non-communication with the Tribunal. Those factors, which originate from a Tribunal decision in 2004, have been expressly adopted and reaffirmed by the Tribunal's *Policy on a Complainant's Duty to Communicate with the Tribunal* (amended July 15, 2014) (the "*Policy*") (see also *Saunders v. Dan Eggen and Allcare Auto Protection Centres Ltd.*, 2004 BCHRT 79).

81. As stated in the *Policy*:

> The Tribunal will determine whether it appears that the complainant is not diligently pursuing their complaint by failing to maintain communications with the Tribunal. The Tribunal will consider:
>
> 1) the complainant's explanation for failing to respond to the notice to diligently pursue, including whether the complainant received the notice required under s. 27.5 of the Code or received it in time to act upon it,
>
> 2) how long the complainant has been out of contact with the Tribunal or not responding to its communications,
>
> 3) the reason for the loss of communication with the Tribunal and whether that explanation is reasonable,
>
> 4) the complainant's history of compliance since filing the complaint including timelines, and maintaining and responding to communications,
>
> 5) how quickly the complainant contacted the Tribunal after learning of the dismissal of their complaint,
>
> 6) whether there has been any prejudice to the respondent as a result of the complainant's default, and
>
> 7) any other relevant factors arising in the circumstances of the particular case.
>
> [collectively, the "Factors"]

82. In the present case, the Tribunal accepted that the Factors were relevant to the Tribunal's analysis on reconsideration (Decision, para. 28). However, the Tribunal erred in law by misapplying and disregarding the Factors in its analysis, including as set out below:

a) The Tribunal erred in its analysis of factor (4) ("the complainant's history of compliance since filing the complaint including timelines, and maintaining and

responding to communications"). The Tribunal held that the Complainants' history of 3.5 years of compliance with the Tribunal was not a basis to warrant reconsideration of the dismissal order for 3 months of non-communication. This was because compliance history was not the basis for the initial dismissal decision, and because the Tribunal did not misunderstand the compliance history at the time of the initial dismissal (Decision, para. 46). This conclusion was contrary to the Tribunal's own policy, which indicates the relevance of compliance history, irrespective of whether it was considered (or misunderstood) at first instance.

b) The Tribunal erred in respect of factor (1) (the "explanation for failing to respond to the notice") and (3) ("the reason for the loss of communication with the Tribunal") by failing to distinguish between complainant and counsel in its analysis, as outlined above.

v. *The Tribunal erred by failing to consider or give effect to the purposes of the* Code

83. The Tribunal erred in law by failing to consider or give effect to the purposes of the *Code* in its analysis of the interests of fairness and justice. This also represents an error of law.

84. The purposes of the *Code* are set out in s. 3, which provides:

> The purposes of this Code are as follows:
>
> a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> c) to prevent discrimination prohibited by this Code;
>
> d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
>
> e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

85. The purpose of the *Code* is "to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices" (*Zutter*, para. 24, citing *Robichaud v. Canada (Treasury Board),* [1987] 2 S.C.R. 84 ("*Robichaud*")).

86. The *Code* has a quasi-constitutional status and must be interpreted broadly, liberally, and purposefully to advance the broad policy considerations underlying it (*University of British Columbia v. Berg,* [1993] 2 S.C.R. 353 at 370). "That task should not be

approached in a niggardly fashion but in a manner befitting the special nature of the legislation" (*Zutter* at para. 24, citing *Robichaud*).

87. The Tribunal failed to adhere to these interpretive principles in evaluating whether to reconsider its dismissal order.

88. Each of the purposes of the *Code* weigh in favour of adjudicating the allegations of discrimination on the merits. The Complaint alleges both individual and systemic discrimination by several public institutions on the basis of place of origin, race, colour, and age. This discrimination impacts the right of the complainants and all International Medical Graduates to pursue a livelihood and profession, which implicates their liberty, dignity, and self-worth (*Wilson v. Medical Services Commission of British Columbia,* 1988 CanLII 177 (BCCA), p. 22). It also impacts their choice of residence, which may "have a determinative effect on the very quality of one's private life" (*Godbout v. Longueil (City),* [1997] 3 S.C.R. 844, para. 68).

89. Notwithstanding that each of the purposes of the *Code* weighed in favour of setting aside the dismissal, the Tribunal provided no analysis of the purposes of the *Code* beyond its summary statement that it was considered (Decision, paras. 48. 68).

90. In particular, the Tribunal's failure to consider s. 3(e) of the *Code* discloses legal error. On their application for reconsideration, the Complainants submitted that maintaining the dismissal would be contrary to the *Code* because any cause of action they may have against their counsel cannot provide systemic redress for discrimination. The remedies available to the Tribunal under s. 37 are largely unique to the *Code* and unavailable in other proceedings in other forums.

91. The Tribunal failed to engage with the Complainants' submission pursuant to s. 3(e) of the *Code* that upholding the dismissal order left them without a meaningful remedy. But over and above this omission, the Tribunal *expressly held* that "the resulting unfairness to the Complainants is an issue for them to address with their counsel, not a basis for reconsideration" (Decision, para. 50). This analysis belies a purposeful application of s. 3 of the *Code* and discloses legal error.

C. The Tribunal's decision to dismiss the complaint without attempting to contact the Complainants was procedurally unfair

92. The Tribunal erred by neglecting to attempt to contact the complainants directly before (1) determining that the complainants were not maintaining communications with the Tribunal, and (2) dismissing the complaint.

93. The Tribunal's *Policy* provides a set of factors the Tribunal will consider in determining whether the Complainant is not maintaining communications. The *Policy* states:

Determination that Complainant Not Maintaining Communications

> The Tribunal will determine whether it appears that the complainaint is not diligently pursuing their complaint by failing to maintain communications with the Tribunal. The Tribunal will consider:
>
> - The number of unsuccessful attempts to communicate with the complainant,
> - The time elapsed since there was last contact with the complainant,
> - The nature of the defaults in communication,
> - The results of a limited search of selected public phone and address registries for British Columbia and Canada, and
> - Any other apparently reliable information which the Tribunal may have as to the complainant's whereabouts.
>
> (emphasis added)

94. As set out in the *Policy,* the complainants (who were self-represented at the time) would have received "an information sheet about this policy when receipt of their complaint is acknowledged by the Tribunal".

95. The Tribunal has affirmed that in cases where it appears a complainant is not diligently pursuing their complaint, "the Tribunal will, as a matter of policy, attempt to locate the complainant before taking any further steps" to dismiss the complaint: *Deol v. Stewart and Specialty Building Products,* 2005 BCHRT 210, para. 11 ("*Deol*").

96. In *Deol,* the Tribunal set aside a dismissal under s. 27.5 of the *Code* on the basis that the Tribunal was "unable to conclude" that the Tribunal attempted to locate the complainant with all information available in the Tribunal's file before dismissal (para. 11). In *Deol,* the complainant represented herself, but had provided alternative contact information of a representative. No letter was ever filed appointing the representative as the complainant's agent. Nonetheless, the Tribunal observed that it had a record of the representative's phone number, which "remained the same throughout" the complaint period (*Deol,* para. 11). The Tribunal concluded it was not satisfied that the Tribunal had made efforts to contact the complainant through her representative before dismissing the complaint, and set aside the dismissal on that basis (para. 11).

97. Similar circumstances apply here. The complainants had provided their personal contact information to the Tribunal, which remained on file. Contrary to the Tribunal's *Policy,* the Tribunal failed to make any effort to contact the Complainants directly before dismissing their complaint. This is notwithstanding the fact that the Tribunal has on at least one occasion copied both the complainants' counsel and the complainants themselves on Tribunal correspondence.

98. It was procedurally unfair for the Tribunal to dismiss their complaint for non-communication without first making any effort to contact the complainants themselves. The Tribunal's process violated the Petitioners' legitimate expectations as to the Tribunal's own published procedures as set out in the *Policy* and previous decisions. This process also denied the Petitioners an opportunity to be heard and to know the case to meet before their complaint was dismissed.

99. This breach of procedural fairness in respect of the original dismissal decision represents an independent basis for setting aside the dismissal (*ATA,* s. 59(3)).

100. Finally, in light of this procedural unfairness in failing to make efforts to contact the Complainants themselves, the Tribunal erred in its determination on reconsideration that the dismissal process was not procedurally unfair (Decision, para. 31).

D. The Tribunal's extricable errors of law render its reconsideration decision patently unreasonable

101. The Tribunal made several extricable errors of law in its decision on reconsideration. These errors were each material to the Tribunal's analysis. Taken alone or together, as a result of these errors, the Tribunal's decision was arbitrary, was based entirely or predominantly on irrelevant factors, and failed to take statutory requirements into account. The Tribunal's decision was patently unreasonable within the meaning of s. 59(4) of the *ATA,* and must be set aside.

102. When these legal errors are corrected, the result of the application to set aside dismissal on reconsideration is inevitable. Based on the factors outlined in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at para. 142, the Petitioners request that this Court set aside the Tribunal's dismissal order dated August 22, 2024.

103. The Petitioners plead and rely on:

a) *Human Rights Code,* R.S.B.C. 1996, c. 210;

b) *Administrative Tribunals Act,* S.B.C. 2004, c. 45;

c) *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241;

d) *BC Supreme Court Civil Rules,* B.C. Reg. 168/2009;

e) BC Human Rights Tribunal *Rules of Practice and Procedure* (dated January 15, 2016 and amended November 15, 2024);

f) BC Human Rights Tribunal *Policy on a complainant's duty to communicate with the Tribunal* (dated December 3, 2004 and amended July 15, 2014).

104. The Petitioners request that no costs be ordered against them on the basis that they are public interest litigants: *Victoria (City) v. Adams,* 2009 BCCA 563, para. 182.

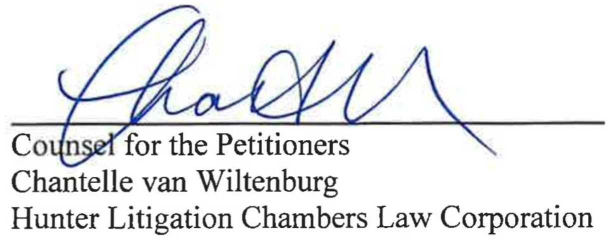
Part 4: MATERIAL TO BE RELIED ON

105. Affidavit #1 of Maureen Pepin, dated February 3, 2025.

106. The Tribunal's record of proceedings, to be filed by the Tribunal.

107. Such further and other material as counsel may advise and this Honourable Court may permit.

Dated: February 3, 2025



Counsel for the Petitioners
Chantelle van Wiltenburg
Hunter Litigation Chambers Law Corporation

To be completed by the Court only:

Order made

☐ in the terms requested in paragraphs ________________ of Part 1 of this petition

☐ with the following variations and additional terms:

____

____

____

Date: ________________ ________________________
Signature of ☐ Judge ☐ Associate Judge