COURT OF KING'S BENCH FOR SASKATCHEWAN

QBG-PA-00252-2021

Allan Adam on behalf of Athabasca Health Authority Inc. and Allan Adam on his own behalf v Athabasca Health Authority Inc. Board of Directors, Claire Larocque, Pauline Thatcher, Kevin Mercredi, John Toutsaint, Coreen Sayazie, Mervin MacDonald and Sheila Robillard

Will Willier	for the applicants
Jessica Buhler	for the respondents

FIAT - April 3, 2023 - HILDEBRANDT J.

Introduction

[1] Allan Adam [Mr. Adam] brought an originating application, initially returnable in Chambers on January 4, 2022, seeking judicial review of the decision of the Athabasca Health Authority Inc. [AHA] Board to terminate Mr. Adam's employment as CEO of the AHA and appoint Sheila Robillard [Ms. Robillard] as the interim CEO. Following adjournments due to service issues, the matter came before me in Chambers on January 25, 2022, at which time Mr. Willier, counsel for Mr. Adam, indicated his intention to bring an application alleging conflict and seeking to remove MLT Aikins LLP from the file. Ms. Buhler also advised that her clients had provided her with instructions regarding two applications, one of which was in relation to the originating application itself. Concern was also expressed regarding the contents of the affidavits filed on behalf of Mr. Adam, and whether such were in compliance with *The Queen's Bench Rules*.

[2] Time frames were set, in relation to service and filing of the application regarding the alleged conflict, which time periods permitted opportunity for cross-examination on affidavits. However, further adjournments ensued. On April 26, 2022, two applications ultimately came before me in Chambers.

[3] On behalf of Mr. Adam, an order is sought disqualifying Ms. Buhler, or any other member of the MLT Aikins LLP firm, from representing the respondents in this matter. Counsel for Mr. Adam says the grounds for this application are that: one of the MLT Aikins LLP lawyers is a witness or potential witness in these proceedings; as the respondents have differing interests, one lawyer/firm cannot represent them all; representing all of the respondents is in breach of the law firm's loyalty to the AHA; MLT Aikins LLP is not meeting its fiduciary obligations owed to all of its clients; MLT Aikins LLP cannot act against Mr. Adam as he has not consented to them so doing; and MLT Aikins LLP cannot "cherry pick" their clients from an organization they represent

and that Sandra Hansen, a non-party director of the AHA, was declined representation.

[4] The respondents, on the other hand, seek an order dismissing and/or striking out Mr. Adam's application alleging conflict as well as an order dismissing and/or striking out the originating application issued December 17, 2021. Both applications are alleged to be scandalous, frivolous, vexatious, or otherwise an abuse of the process of the court, with the originating application also disclosing no reasonable basis for judicial review. While the respondents still have concerns regarding the affidavit evidence filed in support of Mr. Adam's applications, in the interests of proportionality, they have elected to merely highlight their numerous concerns in their submissions rather than bringing a further application.

[5] The various applications arise from Mr. Adam's employment with the AHA, which commenced March 15, 2021 and was terminated on December 2, 2021. While several factual matters are disputed, a few facts are uncontroverted and provide context for the various applications, which will be addressed in separate headings below. The AHA is a non-profit corporation, incorporated pursuant to *The Non-profit Corporations Act, 1995*, SS 1995, c N-4.2, which was in effect at the time. On March 1, 2021, the AHA hired Mr. Adam as Chief Executive Officer [CEO], with a commencement date of March 15, 2021, as outlined in the copy of the fully signed employment agreement found at Exhibit "A" to the affidavit of Ronnie Augier. On December 2, 2021, the AHA terminated Mr. Adam's employment. A letter of that same date was provided to him, advising him that termination was for "just cause and/or unsuitability". Also on December 2, 2021, Ms. Robillard was requested to assume the role of interim CEO for the AHA.

Cautionary use of affidavits

[6] As noted, other factual allegations have been raised on behalf of Mr. Adam. However, the question of what reliance may be placed on the affidavits filed in support of Mr. Adam's applications has been raised by the respondents, given the degree of argument and speculation found in them. Although no formal application was made to strike portions of the affidavits, counsel for the respondents raised the matter in oral argument and highlighted the impugned portions of the evidence in Schedule "A" of her written brief. She encouraged the court not to consider such improper evidence in determining the applications.

[7] Rule 13-30 of *The Queen's Bench Rules* states:

> 13-30(1) Subject to subrule (2), an affidavit must be confined to facts that are within the personal knowledge of the person swearing or affirming the affidavit.
>
> (2) In an interlocutory application, the Court may admit an affidavit

that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.

(3) If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subrule (2), the source of the information must be disclosed in the affidavit.

(4) The costs of every affidavit that unnecessarily sets forth matters of hearsay or argumentative matter, or copies of or extracts from documents, must be paid by the party filing the affidavit.

(5) If an affidavit based on information and belief is filed and does not adequately disclose the grounds of that information and belief, the Court may direct that the costs of the affidavit shall be paid personally by the lawyer filing the affidavit.

(6) An affidavit filed in a subsequent proceeding for the same action must not repeat matters filed in earlier affidavits, but may make reference to earlier affidavits containing those matters.

[8] At para 18 of *Cowessess First Nation No. 73 v Phillips Legal Professional Corporation*, 2018 SKQB 156, aff'd 2020 SKCA 16, the court commented on Rule 13-30:

> [18] Rule 13-30 is concerned with both rules of evidence, and rules governing practice and procedure. Opinion evidence and argument, other than opinion evidence which falls within recognized exceptions, is not admissible. Inadmissible opinion evidence and argument are not facts, and are no more acceptable in an affidavit than in *viva voce* testimony. Rule 13-30(1) confirms this basic notion, providing that affidavits must be "confined to facts". ...

[9] The affidavits filed in support of Mr. Adam's applications are, indeed, replete with opinion and argument, along with some hearsay, so do not comply with Rule 13-30 of *The Queen's Bench Rules*. Just by way of example, in para. 2 of Mr. Adam's affidavit sworn December 15, 2021, the last two sentences present his opinion and argument regarding the status of his employment. Similarly, his opinion in the last sentence of para. 6, regarding Ms. Larocque's authority to call a board meeting, is not appropriate for inclusion in an affidavit. An irrelevant argument is included at subpara. 7 i). Further argument is found in paras. 11, 12, 14 i), 14 ii), 15, and 19 of the December 15, 2021 affidavit.

[10] Similar concerns relating to the inclusion of opinion and argument apply to paras. 3, 4, 5, 6, 7, 11 and 12 of Mr. Adam's affidavit sworn December 16, 2021. Mr. Adam and his counsel have not limited his affidavits to facts within his personal knowledge, as required by Rule 13-30.

[11] Considerable argument is also found in the affidavit of Sandra Hansen sworn January 4, 2022, including the contents of paras. 8–12, 14 and 17.

[12] In the context of a judicial review application, affidavit evidence is only admissible in relation to issues of jurisdiction, bias, or fraud, as was discussed in *Atlas Industries Ltd. v Sheet Metal Workers' International Association, Local Union 296, Saskatchewan*, 2005 SKQB 297. As bias has been alleged in the originating application, the submission of appropriate affidavit evidence is warranted. However, the free-ranging, opinion-laden affidavits filed in this case are not appropriate. Accordingly, the evidence presented on behalf of Mr. Adam will be considered cautiously, with a view to ensuring that only facts within the personal knowledge of each respective affiant are sifted from the chaff of opinion and argument.

[13] With this caution in mind, I turn now to a consideration of Mr. Adam's allegation that MLT Aikins LLP is in a conflict position and therefore "disqualified" from acting for the respondents.

Application to remove MLT Aikins LLP from representing the respondents

[14] As mentioned earlier, at para. 3 of this decision, counsel for Mr. Adam has enumerated several grounds for the request for the prohibition of Ms. Buhler, or any other lawyer from MLT Aikins LLP, from acting for the respondents in this case. In his affidavit sworn February 8, 2022, Mr. Adam says, at paras. 6 and 7:

> 6. Robert Frost-Hinz of MLT Aikins has represented AHA in his capacity as the Human Resource lawyer and did work with me briefly. When he quit working with me, he started advising the AHA Board.
>
> 7. Jessica Buhler of MLT Aikins is now representing all of the Defendants and I believe that the issues of the Defendants are different and possibly go against one another. Even though Robert Frost-Hinz has stepped back from representing any of the parties I believe that the information he has from representing AHA in his capacity as Human Resource Lawyer is confidential and could be available to MLT Aikins in general. I believe that MLT Aikins and Jessica Buhler should not represent any of Defendants as there is a conflict and confidential information may be used to prejudice my position.

[15] While these comments, particularly in para. 7 of the affidavit, constitute opinion and argument and, as such, are improper, they also seem to suggest that Human Resources is an entirely separate corporate entity and not merely a department within the AHA. There are no grounds for such a view. Thus, a lawyer, such as Robert Frost-Hinz [Mr. Frost-Hinz] providing legal services to the department of Human Resources would indeed be providing services to the AHA. As such, it is difficult to see how the MLT Aikins LLP firm could now be considered in conflict if

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either he or others from his firm act for the AHA.

[16] In Chambers, Mr. Willier, on behalf of Mr. Adam, submitted that Mr. Frost-Hinz attended the December 1, 2021 meeting of the AHA Board as the lawyer for Black Lake Denesuline First Nation [Black Lake], which is a member of the AHA, and was not acting for the AHA at that meeting. The December 1, 2021 meeting, and the decisions made therein, are challenged by Mr. Adam, as they resulted in the termination of his employment, as noted above. When asked by this court as to whether a lawyer would be prohibited from acting for both Black Lake and AHA, Mr. Willier indicated that "if they were at odds, they would be prohibited". However, there is nothing in the evidence to suggest Black Lake was at odds with the AHA. Thus, again, there is nothing to suggest a conflict on the part of Mr. Frost-Hinz.

[17] Mr. Willier also emphasized Mr. Frost-Hinz's involvement in the meetings which occurred in June and September, which appear to have been part of the review of Mr. Adam as a probationary employee. When asked by this court if these meetings, and perhaps the December 1, 2021 one as well, were part of a 360 degree review of Mr. Adam, Mr. Willier's response was "good question". Mr. Willier also referenced the possibility that Mr. Frost-Hinz would be a witness as to what occurred at these meetings.

[18] In this regard, given Mr. Frost-Hinz's apparent involvement as counsel for AHA, through even his advising and work for the Human Resources department, some question of solicitor client privilege regarding the advice given to the AHA would arise. Thus, it is virtually inconceivable that Mr. Frost-Hinz would be called upon as a witness.

[19] Further, on judicial review, generally speaking it is only the record which is admissible, albeit there are some limited exceptions where extrinsic evidence is permitted, as discussed in *Saskatchewan (Workers' Compensation Board) v Gjerde*, 2016 SKCA 30 at paras 41 and 44:

> [41] A key component of any judicial review is the record. In determining whether that record should be supplemented, it is important to keep in mind the distinct roles played by administrative bodies and the courts. The provincial Legislatures and Parliament have seen fit to create a wide variety of administrative bodies and put into their hands all manner of decision-making that directly affects the rights, privileges and obligations of citizens. On an application for judicial review it is the s. 96 courts' role to ensure "the legality, the reasonableness and the fairness of the administrative process and its outcomes" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 28, [2008] 1 SCR 190 [*Dunsmuir*] The scope of administrative decision-making which may give rise to judicial review is extensive. Judicial review may come about in a wide variety of circumstances including

review of an administrative tribunal's adjudication of a matter; the exercise of a ministerial discretion; the making of political and policy decisions, or non-adjudicative (purely administrative) decisions. Accordingly, what constitutes the "record" for the purpose of judicial review will vary considerably depending on the context in which the decision arises. For this reason, in my view, there can be no "one size fits all" rule with respect to what amounts to the record for judicial review purposes or when that record should be supplemented.

. . .

[44] In my view, the appropriate approach to when the "record" should be supplemented on judicial review was set out by Stratas J.A. of the Federal Court of Appeal in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at paras 19 and 20, 428 NR 297. After acknowledging the general rule that judicial review should be restricted to the evidentiary record that was before the Board when it made its decision, Stratas J.A. went on to recognize there will be exceptions to that general rule, including evidence (i) that provides general background (as opposed to addressing the merits) in circumstances where that information might assist in understanding the issues for judicial review, (ii) to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record such as fraud, bribery, or bias, and (iii) to highlight the complete absence of evidence before the administrative decision maker when making a particular finding. (See also *Keeprite Workers' Independent Union and Keeprite Products Ltd.* (1980), 1980 CanLII 1877 (ON CA), 29 OR (2d) 513 (CA); *Mr. Shredding Waste Management v New Brunswick (Minister of Environment and Local Government)*, 2004 NBCA 69 at para 64, 274 NBR (2d) 340; *Connolly v Canada (Attorney General)*, 2014 FCA 294 at para 20, 466 NR 44.) To these I would add the exception highlighted by *Hartwig* and *SELI* where, in appropriate circumstances, evidence may be received by a reviewing court to elucidate the record upon which the administrative body's reasons were based.

[20] Therefore, again, extrinsic evidence proffered by Mr. Frost-Hinz would, at best, be highly unlikely. Indeed, in the specific circumstances of this case, such is non-existent. The applicant and respondents have already filed their evidence on the judicial review application and there is no affidavit evidence from Mr. Frost-Hinz or any lawyer at MLT Aikins LLP.

[21] Mr. Willier, later in his submission, noted that the purpose of the December 1, 2021 meeting is in issue and would be part of the judicial review. He, however, also acknowledged that, given the judicial review pertains only to the decision emanating from the December meeting, perhaps the conflict does not arise.

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[22] In response, Ms. Buhler suggested that this statement by Mr. Willier would be sufficient to dismiss the application alleging conflict, particularly as the issue of conflict does not arise in the context of the judicial review application. A review of the originating application supports this view. None of the particulars of the application, none of the remedies sought, and none of the grounds listed for the applications, reference conflict concerns.

[23] On behalf of the respondents, it is argued that the application alleging conflict on the part of Mr. Frost-Hinz and MLT Aikins LLP is entirely devoid of merit and "nothing more than an improper attempt to gain a tactical advantage".

[24] In *Canadian National Railway Co. v McKercher LLP*, 2013 SCC 39 at para 8 [*McKercher*], the Supreme Court of Canada applied its earlier decision, in *R v Neil*, 2002 SCC 70, stating:

> [8] The case at hand requires this Court to examine the lawyer's duty of loyalty to his client, and in particular the requirement that a lawyer avoid conflicts of interest. As we held in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, the general "bright line" rule is that a lawyer, and by extension a law firm, may not concurrently represent clients adverse in interest without obtaining their consent — regardless of whether the client matters are related or unrelated: para. 29. ...

[25] Later in *McKercher*, the Supreme Court of Canada outlined the limited scope of the bright line rule:

> [33] First, the bright line rule applies only where the *immediate* interests of clients are *directly* adverse in the matters on which the lawyer is acting. ...
>
> ...
>
> [35] Second, the bright line rule applies only when clients are adverse in *legal* interest. The main area of application of the bright line rule is in civil and criminal proceedings. *Neil* and *Strother* illustrate this limitation. The interests in *Neil* were not legal, but rather strategic. In *Strother*, they were commercial:
>
> > . . . the conflict of interest principles do not generally preclude a law firm or lawyer from acting concurrently for different clients who are in the same line of business, or who compete with each other for business. . . .
> >
> > The clients' respective "interests" that require the protection of the duty of loyalty have to do with the practice of law, not commercial prosperity. Here the alleged "adversity" between concurrent clients related to business matters. [paras. 54-55, *per* Binnie J.]

[36] **Third, the bright line rule cannot be successfully raised by a party who seeks to abuse it. In some circumstances, a party may seek to rely on the bright line rule in a manner that is "tactical rather than principled"**: *Neil*, at para. 28. The possibility of tactical abuse is especially high in the case of institutional clients dealing with large national law firms. Indeed, institutional clients have the resources to retain a significant number of firms, and the retention of a single partner in any Canadian city can disqualify all other lawyers within the firm nation-wide from acting against that client. As Binnie J. remarked,

> [i]n an era of national firms and a rising turnover of lawyers, especially at the less senior levels, the imposition of exaggerated and unnecessary client loyalty demands, spread across many offices and lawyers who in fact have no knowledge whatsoever of the client or its particular affairs, may promote form at the expense of substance, and tactical advantage instead of legitimate protection. [Emphasis added; para. 15.]

Thus, clients who intentionally create situations that will engage the bright line rule, as a means of depriving adversaries of their choice of counsel, forfeit the benefit of the rule. Indeed, institutional clients should not spread their retainers among scores of leading law firms in a purposeful attempt to create potential conflicts.

[Emphasis added]

[26] As noted earlier, the interests of Black Lake do not appear to be out of alignment with those of the AHA. There is also no foundation for any suggestion that the legal interests of the various respondents are adverse. Most significantly, it appears that Mr. Adam is seeking to create a situation that engages the bright line rule for his own benefit. Such cannot be countenanced.

[27] A brief consideration of Mr. Adam's allegations is in order. Along with the suggestions of Mr. Frost-Hinz potentially being a witness and the interests of the respondents not being aligned, noted above, Mr. Adam asserts that MLT Aikins LLP is in breach of loyalty to the AHA in representing the respondents. However, the AHA is not a properly named applicant in these proceedings. Mr. Adam has no authority to act on behalf of the AHA, whether in his capacity as former CEO of the AHA or in the context of an application for judicial review, as will be discussed further below.

[28] With respect to the allegation that MLT Aikins LLP has not met its fiduciary obligations owed to all clients, such is a bald assertion with no supporting evidence.

[29] Mr. Adam also alleges that MLT Aikins LLP cannot act against him. There is, however, no rule against a law firm acting adverse to former employees of the

corporations the lawyers represent.

[30] Finally, Mr. Adam claims that MLT Aikins LLP cannot "cherry pick" clients and alleges that Sandra Hansen has been denied representation by the firm. The import of this allegation is unclear as Sandra Hansen is not named as a party.

[31] Allegations of acting in circumstances of a conflict of interest are serious and can impugn a lawyer's integrity and ethical standing. Where, as here, the allegations are unfounded and ill-motivated, it is not only appropriate to dismiss the application but also to award significant costs against Mr. Adam, such as occurred in *Sun Life Trust Co. v Bond City Financing Ltd.* (1997), 36 OR (3d) 758 (Ont Ct J).

Application to dismiss/strike the originating application

[32] The respondents seek an order dismissing and/or striking out the originating application. Rule 7-9 of *The Queen's Bench Rules*, which, as noted in *Ryan v KDGO Holdings Ltd.*, 2020 SKQB 170 at para 10, is a codification of the court's inherent jurisdiction to strike pleadings. Rule 7-9 states:

> 7-9(1) If the circumstances warrant and one or more conditions pursuant to subrule (2) apply, the Court may order one or more of the following:
>
> (a) that all or any part of a pleading or other document be struck out;
>
> (b) that a pleading or other document be amended or set aside;
>
> (c) that a judgment or an order be entered;
>
> (d) that the proceeding be stayed or dismissed.
>
> (2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:
>
> (a) discloses no reasonable claim or defence, as the case may be;
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) is immaterial, redundant or unnecessarily lengthy;
>
> (d) may prejudice or delay the fair trial or hearing of the proceeding; or
>
> (e) is otherwise an abuse of process of the Court.
>
> (3) No evidence is admissible on an application pursuant to clause (2)(a).

[33] Although applications pursuant to Rule 7-9 generally deal with statements of claim, this court has exercised its authority thereunder to strike originating applications. See, for example, *Monture v Southend Community Trust (Trustee of)*, 2013 SKQB 101; *Point2 Technologies Inc. v Vendasta Technologies Inc.*, 2009 SKQB 199; and *Fisher v Fisher Estate*, 2007 SKQB 407. In *Nadler v College of Medicine, University of Saskatchewan*, 2017 SKCA 89 at paras 40-42 [*Nadler*], the Saskatchewan Court of Appeal underscored the court's inherent jurisdiction to dismiss an originating application.

[34] In *Esgenoôpetitj (Burnt Church) First Nation v Canada (Human Resources & Skills Development)*, 2010 FC 1195 at para 32, a case referenced in the *Nadler* decision, the Federal Court stated that an application for judicial review could be struck out where it "is so fundamentally flawed that it has no chance of success".

[35] As noted in subrule 7-9(3), where the claim is that the originating application discloses no reasonable claim, no evidence is admissible. In this case, the respondents' assertion that the originating application has no chance of success is readily apparent without the assistance of affidavit evidence.

[36] The originating application brought by Mr. Adam is effectively a complaint about a corporation's decision to terminate an employee. This is apparent on the face of the document. Such an employment decision is not subject to judicial review.

[37] In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 14 [*Highwood*], the Supreme Court of Canada confirmed the limits in which judicial review is available, neither of which apply in Mr. Adam's case:

> [14] Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. **Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character.** Even public bodies make some decisions that are private in nature — such as renting premises and hiring staff — and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (*ibid.*). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.
>
> [Emphasis added]

[38] Firstly, the AHA is not a public body or state authority. The AHA is a

non-profit corporation incorporated pursuant to *The Non-profit Corporations Act, 1995*. Although the AHA is considered as a "local authority" under sections 6 and 7 of *The Public Health Act, 1994*, SS 1994, c P-37.1, it is neither a health district nor a health region in the context of Saskatchewan's statutory scheme for the delivery of health care. This was recognized in *CUPE, Local 1561 v Athabasca Health Authority Inc.* (2007), 144 CLRBR (2d) 81 at paras 9 and 52:

> [9] The area of operation of AHA Inc. is customarily referred to as the Athabasca Health Authority Region, but it is not a "regional health authority" as defined by *The Regional Health Services Act*, S.S. 2002, c. R-8.2 (nor was it a "health district" pursuant to repealed provisions of *The Health Districts Act*, S.S. 1993, c. H-0.01). SAHO is not designated by regulation as the representative employers' organization for AHA Inc. but AHA Inc. holds a form of membership in SAHO for certain purposes including access to the bulk discount purchase of supplies.
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> . . .
>
> [52] Mr. Brook explained that the common reference to "Athabasca Health Authority" is not as a "health region" as defined by legislation, but as a vehicle for the practical delivery of health services to residents of the Athabasca Basin. For example, while a statute-created health district is not required to report to individual communities in the district or obtain approval of its budget by such communities but is required only to report to the provincial government, pursuant to the UM agreement, AHA Inc. must report to and obtain budgetary approval from a majority of the directors representing its five member communities. AHA Inc. must similarly obtain approval for deficit borrowing from its directors and from the provincial government but is not required to obtain federal government approval for these purposes.

[39] Notwithstanding the funding the AHA receives from both the provincial and federal governments in relation to the provision of healthcare services, the corporate structure is governed by the legislation applicable to private non-profit corporations. Nonetheless, even if the AHA could be considered a public body, the termination of one of its employees is not a decision of sufficiently public character to engage the judicial review process.

[40] Commencing with the Supreme Court of Canada's decision in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], Canadian courts have consistently held that judicial review is not available for cases of employee termination where the relationship is governed by a contract of employment. It is apparent from the originating application that there was an employment agreement in this case. See, for example, paras. 19 and 21 of the originating application.

[41] The principles in *Highwood* and *Dunsmuir* were applied in *Makis v Alberta Health Services*, 2020 ABCA 168 at para 48, and operate in the current case:

> [48] Alberta Health Services may well not be the type of body or engage in the type of activities that engage public law remedies: see *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para. 14, [2018] 1 SCR 750. In any event, its relationship with its officers and employees is a matter of private law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras. 112-4, [2008] 1 SCR 190. ...

[42] The employment relationship between Mr. Adam and the AHA is a matter of private law. In terminating his employment, the AHA, even if it could be considered as a public body, was acting like a private business. In *Air Canada v Toronto Port Authority*, 2011 FCA 347 at paras 52-53 [*Air Canada*], the Federal Court stated:

> [52] Every significant federal tribunal has public powers of decision making. But alongside these are express or implied powers to act in certain private ways, such as renting and managing premises, hiring support staff, and so on. In a technical sense, each of these powers finds its ultimate source in a federal statute. But, as the governing cases cited below demonstrate, many exercises of those powers cannot be reviewable. For example, suppose that a well-known federal tribunal terminates its contract with a company to supply janitorial services for its premises. In doing so, it is not exercising a power central to the administrative mandate given to it by Parliament. Rather, it is acting like any other business. The tribunal's power in that case is best characterized as a private power, not a public power. Absent some exceptional circumstance, the janitorial company's recourse lies in an action for breach of contract, not an application for judicial review of the tribunal's decision to terminate the contract.
>
> [53] The Supreme Court has recently reaffirmed that relationships that are in essence private in nature are redressed by way of the private law, not public law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In that case, a government dismissed one of its employees who was employed under a contract governed by the ordinary laws of contract. The employee brought a judicial review, alleging procedural unfairness. The Supreme Court held that in the circumstances the matter was private in character and so there was no room for the implication of a public law duty of procedural fairness.

[43] In *Air Canada*, at para. 60, the Federal Court noted several factors which might be considered in weighing the circumstances on the "public-private issue". However, none of these assist Mr. Adam, given the non-governmental nature of the AHA and the private employment agreement between the AHA and Mr. Adam.

[44] Accordingly, Mr. Adam's claim for judicial review of the termination of his employment cannot be sustained. Similar reasoning applies in relation to his request for judicial review of the appointment of Sheila Robillard as interim CEO of the AHA.

[45] As the originating application discloses no claim for which judicial review is available and, as such, has no chance of success, the respondents' application for an order dismissing the originating application is granted.

[46] The respondents also assert that the originating application brought by Mr. Adam is scandalous, frivolous, vexatious, and an abuse of process. Although, given the above determination, it is unnecessary to address each of these grounds, I will provide some comment regarding the allegation of abuse of process.

[47] Mr. Adam, by his originating application, purports to be applying on his own behalf and on behalf of the AHA. The AHA is not a properly named applicant, for several reasons.

[48] Mr. Adam has neither sought nor obtained leave to bring a derivative action on behalf of the AHA. Although in his affidavit of December 15, 2021, at paras. 1 and 2, he asserts he is still the CEO—and this claim is maintained in his later affidavits—these claims are inconsistent with the relief he seeks by the originating application. Indeed, Mr. Adam, by virtue of the wording of the originating application, is well aware of the termination of his employment as CEO of the AHA. As such, he does not have authority to bring an action on behalf of the AHA.

[49] In order for Mr. Adam to pursue an originating application on behalf of the AHA, he would have had to obtain leave, pursuant to s. 223(1) of *The Non-profit Corporations Act, 1995*, which was in effect at the time his application was launched. By s. 223(2) of that Act, to obtain leave to commence a derivative action, Mr. Adam would have to: give reasonable notice to the directors of his intention to apply for leave if the directors did not do so; act in good faith; and demonstrate that it appears to be in the interest of the corporation that the action be brought. None of these requirements have been met.

[50] Mr. Adam not only did not give the board of the AHA notice of his intended action, he attempted to obtain the relief by way of an application without notice in mid-December 2021, which was dismissed by Zuk J. It also cannot be said that Mr. Adam is acting in good faith or in the best interests of the AHA. He is seeking a personal remedy, reinstatement to a position, in circumstances where the record—the letter of termination found at Exhibit "E" to Mr. Adam's affidavit of December 15, 2021—indicates he was dismissed for "just cause and/or unsuitability".

[51] Mr. Adam has no standing to bring the originating application on behalf

of the AHA. However, even if he had such standing to bring a derivative claim, the AHA cannot seek judicial review of its own decision. As was noted by the Manitoba Court of Appeal in *Manitoba Chiropractors Assn. v Alevizos,* 2003 MBCA 80 at para 21:

> 21 A professional association incorporated by statute is a person in the eyes of the law. Like a human being, such an association has but a single personality. Absent an express statutory provision to the contrary, it cannot sue itself directly or through the medium of one of its committees. Nor, by way of extension of that principle, can it seek a court review of its own decision or that of a committee.

[52] The same rationale applies to AHA, a corporate entity. Further, neither the legislation under which it was incorporated, *The Non-profit Corporations Act, 1995*, nor *The Public Health Act, 1994*, provide the AHA with a statutory right to appeal its own decisions.

[53] In the circumstances, Mr. Adam's pursuit of the originating application both on his own behalf and purportedly on behalf of the AHA can only be considered as an abuse of process, thus providing an additional ground for dismissal of the originating application in its entirety.

Costs

[54] The respondents seek an order of costs on a solicitor-client basis, payable jointly and severally by Mr. Adam and his counsel, Mr. Willier, on both the conflict application and the application to strike/dismiss the originating application. The respondents have been entirely successful, both in responding to the conflict application and in having the originating application dismissed in its entirety.

[55] The respondents are correct in their submission that the conduct of Mr. Adam and his counsel "have resulted in the parties and the Court expending significant time and resources". Counsel for the respondents notes the comments of Caldwell J.A. in *Cowessess First Nation No. 73 v Brabant and Company Law Office*, 2016 SKCA 35 at paras 7-8, particularly when considering the unsubstantiated allegations of conflict of interest made against the lawyers of MLT Aikins LLP:

> [7] Moreover, in the context of this case, we conclude Brown J.'s factual finding that there was a lack of evidence to support the appellant's allegations of misrepresentation, fraud or other dereliction of duty is wholly supported by the evidence—or, correctly, the absence of it. These were *bare allegations* that were repeated on appeal without an application to adduce fresh evidence to support them. As such, on this central issue, we conclude there is no basis whatsoever to interfere with the following finding of Brown J.:

[59] In the circumstances, Mr. Adam is ordered to pay the respondents' costs, which I set at $6,000.

Order

[60] For the reasons outlined in the foregoing, I make the following order:

a. The application by Allan Adam to disqualify MLT Aikins LLP, and any of its lawyers, from representing any of the respondents in this matter is dismissed.

b. The originating application dated December 17, 2021 is dismissed in its entirety.

c. The applicant, Allan Adam, shall forthwith pay costs to the respondents, which costs are set at $6,000.

J.
B.R. HILDEBRANDT

EMAILED ON 4/3/23
W. WILLIER
J. BUHLER

> [49] As indicated by Klebuc J. in *Isley*, this type of allegation must be supported by full particulars. This is so even with the now less stringent fairness based standard referenced in *Doig* and *Machula*. While there are complaints by Cowessess about the amount of fees charged, the threshold set by Klebuc J. and still, in essence, applicable given the content of the allegation, is lacking here. *I do not find any properly supported allegations of misrepresentation, fraud or dereliction of duty by Brabant.* There are, however, a number of affidavits from former Chiefs and Council members confirming the quality and effectiveness of Brabant's legal services during the time they worked with him as Cowessess' legal counsel.
>
> [Emphasis added]

[8] Pointedly, we remark that parties and counsel would be well-advised to avoid making allegations of this nature before a Court without establishing the full particulars thereof on the record. No member of the Law Society of Saskatchewan should be put to answering allegations of misrepresentation or fraud made in open court without a proper evidentiary foundation having first been established therefor.

[56] In his reply argument in Chambers, Mr. Willier's responses to some of the significant substantive arguments made on behalf of the respondents demonstrated that careful consideration to Mr. Adam's application had not been made. For example, he seemed surprised at the assertion the AHA was not a health authority or health region within the statutory framework of the delivery of health care in Saskatchewan, saying "Saskatchewan does not have private health care". He further suggested that he trusted this court "could handle this review" but, if not, he could "just as well be in Federal Court", adding that the matter was "properly before the court" for judicial review as the circumstances were "not a lawsuit for wrongful termination".

[57] Costs are, however, discretionary, as noted in Rule 11-1 of *The Queen's Bench Rules*. Although I am concerned with the approach both Mr. Adam and his counsel have taken in response to the AHA's termination of Mr. Adam's employment, including the attempt to have judicial review remedies awarded in the context of an application without notice, such approach may have been more out of ignorance than malicious intent. Such does not excuse the conduct but may explain it.

[58] As was the case in *Mayer Holdings Inc. v Mayer Estate*, 2001 SKQB 322, I am not persuaded that the conduct is so reprehensible, scandalous, or outrageous as to warrant an award of costs on a solicitor and client basis. I am also not persuaded that Mr. Willier's conduct is comparable to that of Mr. Jodoin in *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, 408 DLR (4th) 581. Further, to put the respondents to the time and effort involved in a taxation would not be useful.