CASE NOTE

Reconciling Judicial Review

Parmbir Gill[*]

J.N. v. British Columbia Commissioner for Teacher Regulation[1]

Administrative law — Natural justice — Duty of fairness — Procedural fairness — Opportunity to respond and make submissions — Judicial review — Standing — Administrative Tribunals Act (B.C.), s. 58 — Judicial Review Procedure Act (B.C.), s. 1 — Legal Profession Act (B.C.), s. 26 — Teachers Act (B.C.), ss. 1, 2, 3, 9, 10, 13, 14, 39, 41(3), 42(1), 44, 45, 46, 47, 49, 561-54, 56, 59, 60-61, 63-64

1. INTRODUCTION

For much of Canadian history, the "school" was the site of an unfolding genocide against Indigenous peoples. The Government of Canada estimates some 150,000 Indigenous children were forcibly removed from their homes and placed into residential schools in an effort to assimilate them.[2] Among the varied abuses these children suffered, many were beaten, chained or confined by their teachers as forms of corrective discipline. Invariably, those who survived did not forget what was done to them.

What happens when educators who teach Indigenous children today forget this history? When news spreads that these children are being disciplined in ways reminiscent of residential schooling, how are complaints to be handled? What rights do complainants and educators have in the ensuing investigations? In *J.N. v. British Columbia Commissioner for Teacher Regulation*,[3] the British Columbia Supreme Court grappled with these questions in the context of an application for judicial review that raised novel procedural fairness issues.

2. FACTUAL BACKGROUND

On May 13, 2015, a primary teacher at an independent Indigenous school approached her principal about two grade-two students in her class. The students, both Indigenous boys, had difficulty getting along at school and would on occasion get into physical fights. The teacher's efforts to resolve the conflicts were unsuccessful so she turned to the principal for help.

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[1] 2019 BCSC 2, 2019 CarswellBC 1406 (B.C. S.C.) [*J.N.*].

[2] *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 2.

[3] *Supra* note 1.

(a) The Plan

The principal proposed to the teacher that the two boys spend a day tied together at the ankle, three-legged race-style. This action, the principal ventured, might help them learn to communicate and behave cooperatively. The teacher assented. The principal then conveyed the plan to the parent and caregiver of the boys and obtained permission to proceed.

The next morning, the principal met with the two boys. She explained that they would be tied at the ankle and would have to use their words to work together. She told them they could untie themselves only to use the washroom; otherwise, they were to remain bound all day. The principal took out a strip of fabric, tied it around the boys' ankles, and sent them off to class.

For the rest of the day, the boys remained tied together while under the supervision of their teacher. The principal also checked in on them occasionally. At lunch, the boys were barred from using the playground equipment for safety reasons. It is otherwise unclear from the record how they fared while tied up, or how others in the school reacted to their treatment. The ankle-tying was not repeated the following day.

(b) The Complaints

The conduct of educators in British Columbia is governed by the *Teachers Act*.[4] Discipline is overseen by a state-appointed Commissioner. The disciplinary process begins when the Commissioner either initiates an investigation under s. 47(1)(b) of the *T.A.* or receives a "complaint" or "report" as defined in s. 39. In contrast to a "report," which only designated persons such as superintendents may issue, a "complaint" concerning the conduct of an educator may be made by any person. Upon receipt of a report or complaint, the Commissioner must order an investigation unless one of the exceptions under s. 47(1)(a) applies.

In mid-May 2015, the Commissioner was informed of the ankle-tying incident through officials in the Ministry of Children and Family Development ("MCFD") and the First Nation Education Department ("FNED"). On May 21, 2015, he exercised his power under s. 47(1)(b) of the *T.A.* to order an investigation of the principal. He did not pursue an investigation of the teacher at this time.

Two weeks later, a residential-school survivor and First-Nation community leader named J.N. learned of the incident. J.N., who was familiar with one of the boys' families, became upset that young Indigenous children could experience such treatment in a community with residential-school history. On July 9, 2015, she filed complaints against both the teacher and the principal. Two weeks later, the mother of one of the boys filed her own complaints against the teacher and the principal. The Commissioner reviewed the complaints and, pursuant to s. 47(1)(a), ordered investigations into each.

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[4] S.B.C. 2011, c. 19 [*T.A.*].

(c) The Investigations

The investigations were conducted by a lone employee of the Ministry of Education (the "investigator"), who exercised delegated authority under s. 3(1) of the *T.A.* Between the beginning of June 2015 and mid-February 2016, the investigator contacted various sources for information about the incident. These included MCFD and FNED officials, the West Vancouver Police Department, the teacher, legal counsel for the principal, and the mother who filed the complaints. The investigator also requested an interview with the mother of the other boy but did not receive a response. Notably, the investigator did not seek to interview or consult with J.N. at any point during the investigation.

On February 18, 2016, the investigator completed separate reports in relation to the teacher and the principal. Both documents were forwarded to the Commissioner. The Commissioner reviewed them and made two decisions. First, under s. 52 of the *T.A.*, he opted to take no further action against the teacher. Second, under s. 53 of the *Act*, he chose to pursue "consent resolution" with the principal. The *Act* permits "consent resolution" where the Commissioner believes there is a reasonable prospect of an adverse finding against the subject of the complaint if the matter is adjudicated at a hearing. Where a consent-resolution agreement is concluded, no further action may be taken against the subject of the complaint.

On March 14, 2017, while the consent resolution process in relation to the principal was underway, the Commissioner advised J.N. that he would not be taking further action against the teacher. J.N. responded in writing the following month. She stated that she did not agree with the Commissioner's decision with respect to the teacher and that she wished to provide information she felt had not been considered by the investigator. The Commissioner replied that his decision with respect to the teacher was final.

In the course of these exchanges, the consent-resolution process with the principal concluded. The principal signed a consent-resolution agreement on July 14, 2017. It became effective on August 3, when the Commissioner agreed to it. The principal admitted the material facts of the incident and acknowledged that her conduct constituted professional misconduct. She agreed to a reprimand and a condition to complete a course on creating positive learning environments. Provided she met the condition, no further action would be taken against her.

On August 9, 2017, J.N. received a redacted copy of the consent-resolution agreement. She was advised that no further action would be taken against the principal. J.N. responded by seeking judicial review of both of the Commissioner's decisions. She sought to have the decisions quashed on the basis that her right to procedural fairness was breached during the investigative process.

3. JUDICIALREVIEW

The Commissioner opposed *J.N.*'s judicial review application on three grounds. First, as a preliminary matter, he argued that his decision to take no further action against the teacher was not judicially reviewable because, by maintaining the *status quo*, it did not affect the rights, interests or privileges of *J.N.* or any other person. Alternatively, the Commissioner claimed that *J.N.* lacked standing to challenge either of his two decisions because the decisions did not directly affect *J.N.* Finally, in the event *J.N.* had standing, the Commissioner submitted that her right to procedural fairness was not breached.

Justice Burke of the Supreme Court of British Columbia rejected the Commissioner's arguments and granted *J.N.*'s application in part. Justice Burke's analysis of the issues and her decision with respect to remedy are summarized below.

(a) Reviewability

The *Judicial Review Procedure Act*[5] authorizes judicial review of the exercise of, or refusal to exercise, a "statutory power of decision" as defined in s. 1:

> **"statutory power of decision"** means a power or right conferred by an enactment to make a decision deciding or prescribing
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> (a) the legal rights, powers, privileges, immunities, duties or liabilities of a
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> person, or
>
> (b) the eligibility of a person to receive, or to continue to receive, a benefit or license, whether or not the person is legally entitled to it, and includes the powers of the Provincial Court

Justice Burke noted that s. 44 of the *J.R.P.A.* requires the Commissioner to review all complaints he receives. The *Act* also mandates investigations into complaints unless the Commissioner determines that an exception under s. 47(1)(a) applies. Drawing on the Ontario Court of Appeal's decision in *Endicott v. Ontario (Director, Office of the Independent Police Review)*,[6] which dealt with complainants' rights under similarly structured police oversight legislation, Justice Burke reasoned that the mandatory language in ss on complainants. 44 and 47(1)(a) of the *Act* confer a "legal right" to have their complaints investigated.

In *J.N.*'s case, this right to an investigation was "decided" by the Commissioner. That is, the Commissioner's choice to halt further action against the teacher and to execute a consent resolution agreement with the

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5 R.S.B.C. 1996, c. 241 [*J.R.P.A.*].

6 *Endicott v. Ontario (Director, Office of the Independent Police Review)*, 2014 ONCA 363, 2014 CarswellOnt 5857 (Ont. C.A.).

principal effectively closed the investigation and disposed of J.N.'s complaint. Justice Burke concluded that the Commissioner's authority thereby met the definition of "statutory power of decision" in s. 1 of the *J.R.P.A.*, such that his decisions were subject to review in court.

(b) Standing

Generally, to obtain standing on judicial review, a person must be aggrieved, affected, or have some other sufficient interest in relation to the impugned decision.[7] Justice Burke followed the British Columbia Court of Appeal's decision in *Allen v. College of Dental Surgeons (British Columbia)*[8] to conclude that *J.N.* met the test for standing in this case.

The appellant in *Allen* had filed a complaint against her dentist under the provisions of the *Dentists Act*.[9] The College of Dental Surgeons investigated the complaint but took no further action. The appellant, believing the College did not fairly consider her complaint, exercised a statutory right of appeal provided under s. 55 of the *Dentists Act* to any "person aggrieved by...[a] decision" of the College. The B.C. Supreme Court dismissed the appeal. It held that the phrase "person aggrieved" must be read narrowly to exclude people, like the appellant, who lack a legally recognized interest in College investigations.

This narrow interpretation was rejected by the Court of Appeal. In its view, because the *Dentists Act* gave no other recourse to a dissatisfied patient whose complaint was not considered fairly, a broad interpretation of "person aggrieved" was necessary to prevent injustice. Justice Burke applied this reasoning to determine the issue of standing raised by J.N.'s application. Because complainants like J.N. lack an internal means to remedy unfair investigations under the *T.A.*, they must, Justice Burke held, have standing to bring such claims in court. Otherwise, "the legislation would confer a right [to a fair investigation] without a remedy, thus rendering the complaint procedure futile."[10]

Justice Burke noted other case-specific facts supporting *J.N.*'s claim for standing. For one, *J.N.* was genuinely and sufficiently affected by the incident to go through the trouble of filing a complaint and then pursuing judicial review. She was also acting as a representative of the parents of one of the boys. Finally, Justice Burke observed that *J.N.* "is not ... a 'busybody' nor is she merely a member of the general public. She is ... a survivor of the residential school system, and the matriarch of [one of the boys'] families. She is a person who has

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7 *Lee & Lee Enterprises Ltd. v. British Columbia (Liquor Control & Licensing Branch)*, 2004 BCSC 1546, 2004 CarswellBC 2790 (B.C. S.C. [In Chambers]) at para. 18.

8 *Allen v. College of Dental Surgeons (British Columbia)*, 2007 BCCA 75, 2007 CarswellBC 232 (B.C. C.A.), additional reasons 2007 CarswellBC 915 (B.C. C.A.) [*Allen*].

9 R.S.B.C. 1996, c. 17.

10 *Supra* note 1 at para. 96.

suffered a particular grievance beyond a general grievance suffered in common with the rest of the public."[11]

For these reasons, Justice Burke concluded that the test for private-interest standing was met, albeit only with respect to challenging the fairness of the investigation. *J.N.* was not granted standing to challenge the reasonableness of the Commissioner's decisions.

(c) Procedural Fairness

J.N. claimed she was denied procedural fairness in two respects: she was denied a right to be heard, and she was denied adequate reasons from the Commissioner explaining his decisions. In particular, *J.N.* argued that the investigator's failure to interview or consult with her or other residential school survivors prevented the Commissioner from fully appreciating the unique Indigenous perspectives arising from the incident. His decisions were thus critically flawed.

Justice Burke began her analysis by reviewing the law of procedural fairness in the context of investigations. She noted that although the duty of fairness owed to complainants is generally low, the duty is also flexible and varies depending on the context of the statute and the rights affected.[12] The precise scope and content of the duty must be settled case by case.

Ultimately, Justice Burke held that the duty was breached in this case because *J.N.* was denied her right to be heard. She noted that s. 49 of the *T.A.* specifically contemplates the interviewing of complainants. Though the decision to interview a complainant is normally discretionary, Justice Burke held that, here, the duty of procedural fairness demanded it. The investigator ought to have engaged with "either [J.N.] or another witness who could provide input with respect to the residential school system."[13] The input would have helped the investigator properly determine whether the principal and teacher had committed professional misconduct in their treatment of the boys. Justice Burke continued,

> Apart from sending [J.N.] an opening letter and closing letter, the investigator appeared to ignore the complaints of both [J.N.] and [the] mother. He did not interview them and made no serious efforts to ascertain their interests. While the courts must be careful to not unduly burden investigations during the initial stages by imposing high expectations of procedural fairness, interviewing either [J.N.] or an appropriate representative from the First Nations' community is not particularly onerous nor does it impose an unduly high burden on investigators.[14]

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[11] *Ibid.* at para. 99.

[12] *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124, 1999 CarswellNat 1125, [1999] 2 S.C.R. 817 (S.C.C.) at paras. 21-22.

[13] *Supra* note 1 at para. 119.

[14] *Ibid.* at para. 127.

Justice Burke concluded that the Commissioner "did not meet the fairness standard applicable in the circumstances of this case."[15] She then briefly addressed and dismissed *J.N.*'s second procedural fairness complaint, finding that the Commissioner did not owe a duty to provide detailed reasons of his decision to pursue a consent-resolution agreement with the principal. Finally, Justice Burke dismissed *J.N.*'s challenge to the reasonableness of the Commissioner's decisions on the basis that the *T.A.* did not entitle *J.N.* to raise such challenges.

(d) Remedy

Having found a breach of procedural fairness, Justice Burke turned to the issue of remedy. She held, first, that the complaint against the teacher should be remitted to the Commissioner for redetermination in accordance with her reasons. However, with respect to the complaint against the principal, Justice Burke held that the Commissioner's decision should not be remitted for reconsideration. She offered three reasons for reaching this conclusion. First, reconsideration would be unfair to the principal, who voluntarily gave up some of her own procedural rights by agreeing to consent resolution. Second, setting aside a consent-resolution agreement in this context could have a chilling effect on the willingness of educators to admit misconduct and engage in consent resolution in the future. Third, the principal had been found guilty of misconduct and had resigned from the school. A significant measure of accountability was therefore achieved, which is what J.N. had wanted.

Justice Burke thus allowed the application for judicial review in part. It is unclear from the record whether the subsequent investigation of the teacher resulted in any adverse findings against her.

4. COMMENTARY

This case raises issues at the intersection of administrative law and reconciliation with Indigenous peoples. Justice Burke's decision should, first and foremost, encourage investigators working in the teacher-discipline context to learn about the political and historical dimensions of the matters they investigate. When those matters involve Indigenous people, nations, or histories, it may not be sufficient for investigators to simply gather information from the usual sources — police, Ministry officials, investigated parties, and direct complainants — and make decisions on that basis. More may be required by the duty of procedural fairness so that the stakes of the investigation are properly grasped, the appropriate sources are consulted, and the potential consequences of decisions on "third parties" are taken into account. Investigators and others involved in teacher complaints would be well advised to turn their mind to these issues proactively, before final decisions are made.

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[15] *Ibid.* at para. 128.

Justice Burke's decision also raises questions about state of the law on private interest standing. As noted, the *Teacher's Act* in British Columbia allows any person to make a complaint about an educator, and to have the complaint investigated. Following *Allen,* Justice Burke found these two statutory provisions sufficient to confer standing on *J.N.* in judicial review proceedings. But what if *J.N.* had not filed an initial complaint? Would she have been denied standing? Justice Burke appears to leave this question open. She acknowledges repeatedly in her decision that the Commissioner's actions affected not just the boys, their families, and *J.N.*, but all members of their shared Indigenous nation. Given these wider ramifications, it is at least arguable that *J.N.* could have secured standing as a *non-complainant* by showing she was sufficiently aggrieved by the Commissioner's decisions as an Indigenous person and residential school survivor. In that respect, Justice Burke may have left the door of private interest standing slightly more ajar in cases that implicate Canada's stated commitment to pursue reconciliation with Indigenous peoples.