COURT OF APPEAL FOR ONTARIO

CITATION: Longueépée v. University of Waterloo, 2020 ONCA 830
DATE: 20201221
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Strathy C.J.O., Lauwers and van Rensburg JJ.A.

BETWEEN

Roch Longueépée

Applicant (Respondent)

and

University of Waterloo and Human Rights Tribunal of Ontario

Respondents (Appellant/Respondent)

Frank Cesario and Amanda P. Cohen, for the appellant

David Baker and Laura Lepine, for the respondent Roch Longueépée

Brian A. Blumenthal and Jason Tam, for the respondent Human Rights Tribunal of Ontario

Heard: June 1 and 5, 2020 by video conference

On appeal from the order of the Divisional Court (David L. Corbett, Graeme Mew, and Frederick L. Myers JJ.), dated September 20, 2019, with reasons reported at 2019 ONSC 5465, 439 D.L.R. (4th) 326, allowing an application for judicial review of a decision of the Human Rights Tribunal of Ontario dated May 25, 2017, with reasons reported at 2017 HRTO 575 and a reconsideration decision dated December 22, 2017, with reasons reported at 2017 HRTO 1698.

van Rensburg J.A.:

A. OVERVIEW

[1] This is an appeal of an order of the Divisional Court.

[2] The respondent, Roch Longueépée, brought an application to the Human Rights Tribunal of Ontario (the "HRTO") alleging discrimination under the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "Code") against the appellant, University of Waterloo (the "University"). He alleged that the University discriminated against him on the basis of his disabilities, in refusing him admission to the Faculty of Arts (the "Faculty") for the fall of 2013.

[3] Mr. Longueépée had attended Dalhousie University ("Dalhousie") several years before he applied for admission to the University, where he achieved grades that were well below the University's minimum admission requirements for transfer students. Accepting that Mr. Longueépée had undiagnosed and unaccommodated disabilities when he attended Dalhousie, the University convened an admissions committee (the "Admissions Committee") to consider his application, consisting of academic transcripts, information about his volunteer work, and reference letters, despite the fact that he did not meet the minimum admission requirements and had applied late. The Admissions Committee concluded that Mr. Longueépée's application did not demonstrate the ability to succeed at university, and he was refused admission.

[4] Vice Chair Jennifer Scott of the HRTO dismissed Mr. Longueépée's application alleging discrimination by the University. The Vice Chair accepted that the University's grades-based admissions standard had a discriminatory effect on Mr. Longueépée because he had unidentified and unaccommodated disabilities when he obtained the relevant grades. She concluded however that the University had reasonably accommodated Mr. Longueépée's disabilities in its admissions process. The Vice Chair also denied a request for reconsideration of her decision.

[5] On judicial review, a three-judge panel of the Divisional Court concluded that the HRTO erred in finding that the University had reasonably accommodated Mr. Longueépée when the Admissions Committee anchored its admission decision to the unaccommodated grades Mr. Longueépée had achieved at Dalhousie, when he had undiagnosed disabilities. The court remitted the matter back to the Admissions Committee with directions.

[6] The University appeals. The University contends that the Divisional Court erred in its application of the reasonableness standard of review, and, in the alternative, in remitting the matter to its Admissions Committee, rather than to the HRTO, as the administrative decision maker whose decision was under review.

[7] The HRTO, a respondent to the appeal, takes no position on the outcome of the appeal, but asserts that this court, post-*Vavilov (Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1), should

give effect to the "patently unreasonable" standard of review prescribed by s. 45.8 of the Code. Essentially the HRTO asks that this court revisit the leading authority, *Shaw v. Phipps*, 2010 ONSC 3884, 325 D.L.R. (4th) 701 (Div. Ct.) ("*Shaw (ONSC)*"), aff'd on other grounds at 2012 ONCA 155, 347 D.L.R. (4th) 616 ("*Shaw (ONCA)*"), that holds that decisions of the HRTO are to be reviewed on a "reasonableness" standard. The other two parties to this appeal assert that the standard of review is reasonableness. There is no dispute that the content of the reasonableness review has been modified by *Vavilov*.

[8] For the reasons that follow, I would allow the appeal only to the extent of setting aside the remedy imposed by the Divisional Court, and substituting an order declaring that the University discriminated against Mr. Longueépée and referring the question of remedy to the HRTO for determination.

[9] Briefly, in my view the Divisional Court was correct in setting aside the Vice Chair's decisions. Stepping into the shoes of the Divisional Court and applying the new framework for "reasonableness" described in *Vavilov*, I conclude that the Vice Chair's decisions were unreasonable. After confirming that the University adopted a procedure to accommodate Mr. Longueépée by permitting his application package to be considered by an Admissions Committee, the Vice Chair unreasonably concluded that the University met its duty to accommodate when the Admissions Committee then considered only Mr. Longueépée's unaccommodated grades in refusing him admission. The Vice Chair also unreasonably accepted that

the accommodation Mr. Longueépée was seeking would require the University to take unreasonable measures, in effect accepting an “undue hardship” defence where none was advanced by the University or supported by the record.

[10] It is both unnecessary and unwise in this appeal to determine whether, post-*Vavilov*, decisions of the HRTO are subject to a “patent unreasonableness” standard of review, and indeed whether, in this context, a review for “patent unreasonableness” is something different from a “reasonableness” review. Even assuming that “patent unreasonableness” has the pre-*Dunsmuir* (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190) meaning that the HRTO seeks to attribute to this term, the decisions of the Vice Chair were patently unreasonable. In this appeal, nothing turns on any distinction there might be between the different standards of review advocated by the parties.

B. FACTS

[11] Mr. Longueépée is a survivor of institutional child abuse. He suffered severe physical, psychological and sexual trauma during his childhood. Mr. Longueépée completed his high school equivalency in Nova Scotia in the form of a General Educational Development (“GED”) assessment in February 1999, receiving a grade ranking in the 52nd percentile for his writing skills. He also attended Dalhousie for two terms in 1999-2000, withdrawing after he received a D grade in both terms.

[12] Years later Mr. Longueépée was diagnosed with moderate traumatic brain injury and post-traumatic stress disorder ("PTSD"). He was not aware of these conditions when he completed his high school equivalency and when he attended Dalhousie.

[13] In July 2013, Mr. Longueépée contacted the University seeking admission as a full-time undergraduate student for the 2013-14 school year in the Faculty of Arts. He applied as a mature student. Mr. Longueépée had not applied through the normal Ontario Universities' Application Centre ("OUAC") process, and when he applied the University's admissions process had already closed for the 2013-2014 academic year, and it had filled all its student positions.

[14] Mr. Longueépée advised the University that when he attended Dalhousie, he had undiagnosed and unaccommodated disabilities which impacted his prior pursuit of post-secondary education. He explained that he was a survivor of institutional child abuse and had a moderate traumatic brain injury and PTSD. He provided evidence that this was the case. Mr. Longueépée's application package consisted of more than 100 pages, including transcripts, an outline of his experience and volunteer activities, reference letters and testimonials, writing samples, and medical information.

[15] Because of his prior studies at Dalhousie, the University considered Mr. Longueépée to be a transfer student, rather than a mature student, in the

admissions process. The University had established academic standards for an applicant to be considered for admission. For transfer students, the standard was 65% for university courses and 70% in Grade 12 English. If an applicant to the Faculty did not meet such criteria and identified extenuating circumstances, the Faculty's Admissions Committee could evaluate the application and grant or deny admission. Recognizing that Mr. Longueépée presented extenuating circumstances, and accepting that he had disabilities that were undiagnosed when he attended Dalhousie, the University convened the Admissions Committee to consider his application.

[16] In August 2013 the University's Assistant Registrar sent Mr. Longueépée an email advising: "[t]he Faculty of Arts Admissions Committee undertook a comprehensive review of your supporting documents, references and testimonials with a view to determining your admissibility. After careful consideration, the committee concluded that you are not admissible … and an offer of admission will not be extended to you." In response to an email from Mr. Longueépée requesting clarification, the Assistant Registrar confirmed that Mr. Longueépée did not "meet the minimum admission requirements needed for consideration to the … Program." The email also informed Mr. Longueépée that the Admissions Committee recommended that he consider academic upgrading through Athabasca University, Ryerson Continuing Education, or Guelph Open Learning (open universities/programs that offer distance education courses) by completing a

minimum of four courses at the university level, and stated that he would need to pass each course and achieve an overall average of 65 percent in order to be considered for admission to the University in the future.

[17] In November 2013, Mr. Longueépée filed an application with the HRTO under s. 34 of the Code, alleging discrimination on the basis of disability with respect to goods, services and facilities. His complaint alleged that the denial of his admission based on his past academic record was discriminatory. He sought various remedies, including monetary compensation, the option of admission to the University, and that the University develop more flexible assessment criteria to account for unusual situations where past academic results may not be a reliable predictor of future academic success.

C. THE DECISIONS BELOW

(1) The HRTO's Decision

[18] At the hearing before the Vice Chair, the University's witnesses were the Assistant Registrar and an Admissions Officer in the Faculty (both of whom were on the Admissions Committee), and the University's former registrar. Mr. Longueépée called Dr. Donna Ouchterlony, a specialist in the field of neurorehabilitation.

[19] The Vice Chair summarized the role of the Admissions Committee in determining the admissibility of individuals who do not meet the admissions criteria but present extenuating circumstances. She stated, at para. 15 of her reasons:

> The purpose of the Admissions Committee is to consider applications from individuals who do not meet the criteria for admission and who have identified extenuating circumstances. The issue before the Admissions Committee is whether an exception should be made to admit a student who has not met the academic criteria for admission. Members of the Admissions Committee are aware of the kinds of supports provided to students with disabilities by the [University's] Accessibility Services department. [Emphasis added.]

[20] Referring to the evidence of the Admissions Officer, the Vice Chair noted that applications that come before the Admissions Committee usually fall under a grey area – where a student is very close to meeting the academic standard: at para. 22. While there is no precise deviation from the grade standard for transfer students to fall within the grey area because the length and depth of their education varies, the Admissions Committee "takes into account everything that the student has done. It asks for the applicant's high school marks, university marks and a statement of what the applicant has been doing, in order to obtain a more holistic view of the applicant. The ultimate question before the Admissions Committee is whether the applicant will be successful in his/her academic studies": at para. 23. The Admissions Officer testified that he did not know why the applicant was "in the grey area" because he was ten percent below the academic standard, and that

Mr. Longueépée should be petitioning Dalhousie to get his grades revised: at para. 24.

[21] The Assistant Registrar testified about the reasons for the decision of the Admissions Committee. First, it was evident that Mr. Longueépée was not successful at high school and university. The gap between his 55 percent at Dalhousie and the University's admissions requirement of 65 percent was too large to make an exception. The Admissions Committee believed the best course of action was for Mr. Longueépée to attend an alternative institution to show academic success. Second, Mr. Longueépée had been offered admission to York University, and it was unknown whether he had attended. There was a reasonable amount of time between his diagnoses and his application for Mr. Longueépée to have pursued undergraduate studies with accommodation elsewhere, and he had not done so. The Assistant Registrar testified that it was not about the ten percent gap itself, but that Mr. Longueépée had not demonstrated that he would be successful at university: at para. 25.

[22] The Vice Chair noted that the issue to be determined was whether the University had discriminated against Mr. Longueépée in its admissions process: at para. 28.

[23] First, she considered whether Mr. Longueépée had a disability. Although the Admissions Committee had accepted that Mr. Longueépée had undiagnosed

disabilities that impacted his academic performance while at Dalhousie, at the HRTO hearing, the University accepted that Mr. Longueépée had PTSD, but not that he had suffered a brain injury. Dr. Ouchterlony testified that Mr. Longueépée had a moderate brain injury. There was no evidence to contradict her opinion, and it was accepted by the Vice Chair. She concluded that Mr. Longueépée's moderate brain injury and PTSD fell within the definition of "disability" under the Code and existed at the time he applied for admission to the University: at paras. 30-34.

[24] The Vice Chair then turned to whether Mr. Longueépée was discriminated against in the admissions process and his argument that the University's admissions standard of 65 percent for transfer students was discriminatory because he had undiagnosed and unaccommodated disabilities when he obtained his grades at Dalhousie. She accepted that "[Mr. Longueépée's] disabilities impacted his ability to meet the [University's] admissions standard for transfer students and in this way, he was adversely impacted by the standard": at para. 35.

[25] Having made a finding of *prima facie* discrimination (that is not challenged in this appeal), the Vice Chair identified the issue as "whether the [University] accommodated [Mr. Longueépée] in the admissions process to the point of undue hardship pursuant to section 11 of the Code": at para. 36.

[26] Section 11 of the Code provides:

> 11 (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited

> ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> > (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
> >
> > (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
>
> (2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[27] The Vice Chair agreed with Mr. Longueépée that the duty to accommodate has both procedural and substantive components. She concluded that the University met its procedural duty to accommodate Mr. Longueépée by considering his application for admission although it was submitted late, and not through the normal OUAC process, and after all the student positions in the Faculty had been filled. The University convened a meeting of the Admissions Committee to consider Mr. Longueépée's application because he presented extenuating circumstances. The Admissions Committee was aware of his academic background, his disabilities, and the fact that his disabilities were diagnosed after he attended Dalhousie: at para. 38.

[28] The Vice Chair also concluded that the University met its substantive duty to accommodate. She noted that the purpose of the Admissions Committee is to

determine whether a student will be successful in the academic program to which he applies. She referred to the significant gap between the University's admission requirements and Mr. Longueépée's past academic performance, and his failure to take any university courses after his diagnoses. The Vice Chair noted that it was clear that the Admissions Committee considered Mr. Longueépée's previous academic performance when assessing his ability to be successful at school. Addressing Mr. Longueépée's argument that his grades are not reflective of his academic abilities, she observed: "That may be true. But, we cannot expect the [University] to presume that [Mr. Longueépée] would be successful in university merely because his grades were unaccommodated by another university. Unaccommodated grades and academic success are two separate issues": at para. 42.

[29] The Vice Chair rejected the argument that the Admissions Committee should have involved the University's Accessibility Services department in the assessment of Mr. Longueépée's application. In her view, the failure to involve Accessibility Services was part of the procedural duty to accommodate and did not mean that the University failed in its duty to substantively accommodate Mr. Longueépée. She concluded that, in any event, there was no evidence that the decision to deny Mr. Longueépée admission would have been different had Accessibility Services been involved in the assessment process: at paras. 43-44. The Vice Chair also rejected the argument that the Admissions Committee should

have determined whether Mr. Longueépée could have been successful in part-time studies. The University had assessed the application Mr. Longueépée made, which was specifically for full-time studies: at para. 45.

[30] The Vice Chair considered the evidence of Dr. Ouchterlony about what the Admissions Committee should have done in considering Mr. Longueépée's application. The Vice Chair noted that the University had treated Mr. Longueépée with compassion and recognized that his marks were obtained when his disabilities were unknown and unaccommodated and accepted that he would need support. She stated: "The only way the Committee deviated from Dr. Ouchterlony's view is there is no indication that it considered [Mr. Longueépée's] volunteer work on behalf of child abuse survivors and reference letters given for that work as relevant to his ability to succeed in university." According to the Vice Chair, "that was a judgment call the Committee was able to make. It did not breach its substantive duty to accommodate": at para. 48.

[31] The Vice Chair concluded that there was "no information" before the Admissions Committee that Mr. Longueépée could succeed at university. She stated that the University did not breach its substantive duty to accommodate in requiring some indicator of academic success and by not simply assuming that Mr. Longueépée could succeed based on the fact that he was not accommodated when he attended university in the past: at para. 49. The University accepted that Mr. Longueépée had undiagnosed and unaccommodated disabilities when he

attended Dalhousie and that this would have impacted his grades. Indeed, it was because of these "extenuating circumstances" that he "received an individualized assessment by the Admissions Committee": at para. 50. The Vice Chair concluded that grades are reflective of the ability to succeed academically and that it was appropriate for the University to impose academic standards. She stated at para. 51:

> The [University] has academic standards for admission because it believes past academic performance is the best indicator of future academic performance. [Mr. Longueépée] challenged the [University's] use of grades as a measure of his ability to succeed. The difficulty is that in an academic setting, the ability to succeed is measured by grades: there is no other measure to evaluate success. In this way, academic standards are different from other standards that may be assessed in a number of different ways. All students, including students with disabilities, must provide sufficient information to show that they have the ability to succeed. This is especially so when the gap between the student's qualifications and the academic standard is large. [Mr. Longueépée] failed to provide sufficient information to the Admissions Committee to show he could succeed at university. [Emphasis added]

[32] The application was accordingly dismissed.

(2) The HRTO's Reconsideration Decision

[33] Mr. Longueépée argued that the test for reconsideration was met because the Vice Chair's decision failed to properly analyze the procedural duty to accommodate by not identifying its components and not assessing whether the University had satisfied its procedural duty to accommodate when, among other

things, it had not involved the Accessibility Services department in the assessment of his application.

[34] The Vice Chair denied Mr. Longueépée's request for reconsideration. She reaffirmed her findings that the involvement of Accessibility Services, whether part of the substantive duty to accommodate or the procedural duty to accommodate, would not have changed the decision of the Admissions Committee. She rejected the assertion that a different process, involving Accessibility Services, would have made a difference: at paras. 10-12.

[35] The Vice Chair also rejected the challenge to her finding that "the Admissions Committee was entitled to disregard reference letters and volunteer work as indicators of potential academic success": at paras. 11, 16. She confirmed that Mr. Longueépée, like all students, was required to show that he could be successful in university and she rejected his argument that her decision created a "Catch-22" for students with disabilities applying for admission to post-secondary education based on grades achieved while they were unaccommodated. She noted that her decision, like all decisions, was based on the facts of the particular case. Although Mr. Longueépée did not meet the required academic standard, his application was considered precisely because his grades were obtained at a time when his disabilities were unknown and unaccommodated. The Vice Chair observed that to accept his argument "would have the effect of requiring universities to complete an in-depth assessment of every application by every

student with a disability regardless of the extent of the gap between the admissions standard for the particular program and the individual student's grades": at paras. 16-17. This would require universities to involve accessibility services in every admission application made by a student with a disability so that the university could determine whether the student would be successful in meeting the academic requirements of the program. In Mr. Longueépée's case, where his previous grades were obtained at another university, it would effectively require one university to sit in review of how another university accommodated its students: at para. 18.

[36] The Vice Chair confirmed that, while the University was responsible for accommodating Mr. Longueépée in the admissions process, it met its procedural duty to accommodate by conducting an individualized assessment of his application and it met its substantive duty to accommodate by recognizing that his previous grades were obtained at a time when his disabilities were unknown and unaccommodated and by accepting the fact that he would need support if admitted: at para. 19.

(3) The Decision of the Divisional Court

[37] The Divisional Court allowed Mr. Longueépée's judicial review application, concluding that the University failed in its duty to accommodate his disabilities in its admissions process.

[38] Mew J., in reasons concurred in by Corbett and Myers JJ., began by reviewing the matter's background and confirming that the applicable standard of review was reasonableness. The court noted that "the reasonableness standard accords 'the highest degree of deference … with respect to [the HRTO's] determinations of fact and the interpretation and application of human rights law'": at para. 34, citing *Shaw (ONCA)*, at para. 10. The court then set out the issues and the parties' submissions and explained that "the heart" of the application was whether "[the University] discriminated against [Mr. Longueépée] by anchoring its admission decision to the grades he obtained at Dalhousie at a time when his disability had not been diagnosed and, hence, had not been accommodated": at para. 45.

[39] The Divisional Court referred to the three-part test in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*"), at para. 20, that applies when a requirement or standard has been shown to be *prima facie* discriminatory. The responding party must prove on a balance of probabilities that:

> 1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
>
> 2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
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> 3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant

> cannot accommodate persons with the characteristics
> of the claimant without incurring undue hardship.

[40] The Divisional Court was satisfied that the University had discharged the first two elements. The adoption of an academic standard for admission based on past academic performance as the best indicator of future academic performance is rational. It reflects the good faith belief that the standard is necessary to fulfil the purpose of admitting students who have the ability to succeed in their university studies.

[41] The Divisional Court was not satisfied, however, that the University met the third prong of the *Grismer* test. The Court noted that the Admissions Committee had professed an "accommodation dialogue", but the dialogue was "firmly anchored to the very grades which [the Admissions Committee] implicitly, if not expressly, recognised as not being reflective of Mr. Longueépée's abilities": at para. 53. In the court's view, the Admissions Committee "seem[ed] to have deflected its responsibility to evaluate Mr. Longueépée's application as presented": at para. 53. While it purported to consider information other than Mr. Longueépée's grades, the explanation for its decision was bereft of any evaluation of that information: at paras. 54-56. The University did not have to presume that Mr. Longueépée would be successful in university merely because his previous grades were unaccommodated, but it did have to establish that it accommodated him in the admissions process to the point of undue hardship: at para. 55.

[42] The Divisional Court concluded that because the University acknowledged that it could not interpret Mr. Longueépée's grades free from their discriminatory effect, it either had to: (1) assess Mr. Longueépée's candidacy without recourse to his marks; or (2) establish that it would result in undue hardship for it to do so: at para. 57. It failed to do either of these things: at para. 58. The University did not consider an approach that placed no reliance on prior marks, and so it could not now establish that no such approaches are available or would cause it undue hardship: at para. 60.

[43] The Divisional Court noted that, in her reconsideration decision, the Vice Chair had suggested that accommodation of Mr. Longueépée's disabilities in the admissions process could lead to undue hardship (in the requirement to conduct an in-depth assessment of every application from a person asserting a disability). However, undue hardship had not been advanced by the University and there was no evidence in the record to support this conclusion: at para. 61.

[44] The Divisional Court acknowledged that this was an unusual case because Mr. Longueépée was unaware of his disabilities in high school and at Dalhousie, and so he could not seek accommodation at that time: at para. 62. Given the passage of time, accommodation for his high school and undergraduate marks was not reasonably available from the original institutions, so it was the University's obligation to accommodate Mr. Longueépée in the admissions process to the point of undue hardship: at para. 62.

[45] The Divisional Court allowed the judicial review application, set aside the Vice Chair's decisions, and remitted the matter to the Admissions Committee "for consideration by way of an accommodated admissions process that is consistent with [the court's] reasons": at para. 63.

D. ISSUES

[46] The following issues are raised in this appeal:

1. Did the Divisional Court appropriately identify "reasonableness" as the standard of review or is the standard post-*Vavilov* "patent unreasonableness"?
2. Did the Divisional Court correctly apply the standard of review? And, if the standard was "reasonableness", does a post-*Vavilov* approach lead to a different result?
3. If the Vice Chair's decisions were properly set aside, did the Divisional Court err in its remedy, in sending the matter back to the Admissions Committee rather than to the HRTO?

E. ANALYSIS

[47] On an appeal of a judgment of the Divisional Court disposing of a judicial review application, this court must determine whether the Divisional Court identified the appropriate standard of review and applied it correctly. In doing so, this court will "step into the shoes" of the Divisional Court and focus on the

administrative decision under review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47; *Groia v. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1, at para. 49, rev'd on other grounds 2018 SCC 27, [2018] 1 S.C.R. 772; *Ball v. McAulay*, 2020 ONCA 481, at para. 5.

[48] Accordingly, what is required in order to address the issues on appeal is for this court: (1) to determine the appropriate standard of review; (2) to apply that standard of review to the decisions of the Vice Chair; and if her decisions were properly set aside, (3) to determine the appropriate remedy.

[49] I turn to the first question, the appropriate standard of review.

(1) What Is the Applicable Standard of Review of the Vice Chair's Decisions?

[50] When this matter was before the Divisional Court, all three parties agreed that the appropriate standard of review on the judicial review application of the decisions of the HRTO was reasonableness. After the Divisional Court allowed the application for judicial review, and before this appeal was heard, the Supreme Court released its decision in *Vavilov*.

[51] The University and Mr. Longueépée agree that the reasonableness standard of review applies to the judicial review of a decision of the HRTO, although they accept that the framework and approach to determining whether a decision is

reasonable has been modified by the Supreme Court's decision in *Vavilov*. They differ only on the application of the reasonableness standard of review, and hence the outcome of the appeal.

[52] The HRTO asserts that post-*Vavilov*, its decisions should be reviewed under the "patent unreasonableness" standard, which is the standard of review prescribed by s. 45.8 of the Code. Section 45.8 functions as a privative clause and, as applied to the decision affecting Mr. Longueépée, provides that the HRTO's decision is final, not subject to appeal, and "shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable."

[53] The Divisional Court's decision in *Shaw (ONSC)* held that "patent unreasonableness" in s. 45.8 of the Code, which was enacted pre-*Dunsmuir* but proclaimed in force post-*Dunsmuir*, must be interpreted to mean "reasonableness" as defined in *Dunsmuir.* That standard has been applied since 2010. The HRTO has accepted the "reasonableness" standard of review in numerous reported cases since *Shaw (ONSC)*[1]*.*

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[1] See for example: *Audmax Inc. v. Ontario Human Rights Tribunal*, 2011 ONSC 315, 328 D.L.R. (4th) 506 (Div. Ct.), at para. 32; *Stepanova v. Human Rights Tribunal of Ontario*, 2017 ONSC 2386 (Div. Ct.), at para. 18, leave to appeal to Ont. C.A. refused, M47977 (January 19, 2018); *Abbey v. Ontario (Community and Social Services)*, 2018 ONSC 1899, 408 C.R.R. (2d) 219 (Div. Ct.), at para. 20; and *Konesavarathan v. Middlesex-London Health Unit*, 2019 ONSC 3879 (Div. Ct.), at para. 42, leave to appeal to Ont. C.A. refused, M50638 (November 26, 2019).

[54] The HRTO now seeks to revisit the standard of review applicable to its decisions post-*Vavilov.* It has done so in three recent cases before the Divisional Court: *Intercounty Tennis Association v. Human Rights Tribunal of Ontario*, 2020 ONSC 1632, 446 D.L.R. (4th) 585 (Div. Ct.), *Ontario v. Association of Ontario Midwives*, 2020 ONSC 2839 (Div. Ct.), leave to appeal to Ont. C.A. granted, M51703 (December 16, 2020), and *Xia v. Board of Governors of Lakehead University*, 2020 ONSC 6150 (Div. Ct.), leave to appeal to Ont. C.A. requested, M52029. In each case the Divisional Court rejected the HRTO's argument and confirmed that reasonableness is the standard of review for the decisions of the HRTO post-*Vavilov.*

[55] The HRTO defines a decision that is patently unreasonable as one that is "clearly irrational" and "evidently not in accordance with reason", citing *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, and, although it takes no position on the outcome of the appeal, it urges this court on this appeal to apply this and other pre-*Dunsmuir* authorities to the assessment of whether the Vice Chair's decisions were patently unreasonable. The HRTO advances a number of arguments in support of its position that *Vavilov* has reanimated a separate "patent unreasonableness" standard of review for its decisions.

[56] In my view, it is both unwise and unnecessary for the proper disposition of this appeal, to embark on the analysis that the HRTO asks this court to undertake:

that is, to determine whether post-*Vavilov* the statutory standard of review in s. 45.8 of the Code should be given effect, and if so, whether a court's review of an administrative decision for "patent unreasonableness" would be different from a review for "reasonableness". It is unwise to do so because these issues should be decided in a case where the standard of review makes a difference to the outcome, and where the parties with a stake in the dispute have joined issue on the point. It is unnecessary in this case because the result would be the same under both standards of review. Even assuming that "patent unreasonableness" can be given a pre-*Dunsmuir* meaning as proposed by the HRTO, for the same reasons that I find that the decisions of the Vice Chair were unreasonable, I also find that the decisions were patently unreasonable. The reasoning and logical errors are immediate and obvious, such that the decisions are "clearly irrational" and "evidently not in accordance with reason".

(2) Did the Divisional Court correctly apply the reasonableness standard of review?

(a) Reasonableness Review Under *Vavilov*

[57] The parties point to the majority reasons in *Vavilov* to describe what constitutes a reasonable decision and to define the role of the reviewing court in conducting a reasonableness review.

[58] The majority in *Vavilov* describes the review for reasonableness as one that focuses on the decision actually made by the decision maker and considers both the rationale for the decision and the outcome to which it led: at para. 83. A principled approach to a reasonableness review puts the reasons first. The reasons must be examined by a reviewing court with "respectful attention", seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: at para. 84. The court notes that "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": at paras. 85, 102-4. The shortcomings or flaws relied on to challenge the decision must be "sufficiently central or significant to render the decision unreasonable": at para. 100.

(b) Were the Vice Chair's decisions reasonable?

[59] As noted earlier, this court must step into the shoes of the Divisional Court when considering this appeal. As such, the focus is not on the reasoning of the Divisional Court, and whether it reveals error, but on the reasoning in the Vice Chair's decisions and their result. That said, and despite the fact that the Divisional Court conducted its review for reasonableness pre-*Vavilov*, I am in substantial agreement with that court's analysis and conclusions: in effect that the logical errors in the Vice Chair's decisions, and her implicit finding of undue hardship when

the University had not relied on this defence, rendered her decisions unreasonable.

(i) Positions of the Parties

[60] The University submits that the Vice Chair's decisions were reasonable: her analysis is internally rational and coherent and is justified on the facts and the law. The University asserts that the Divisional Court erred by focusing on grades out of context, by failing to take proper account of the University's academic standards, and by failing to defer to the Vice Chair's findings about the role and weight to be given to the supplemental or non-academic materials provided by Mr. Longueépée.

[61] Mr. Longueépée submits that the Vice Chair's decisions were unreasonable. Specifically, he contends that the Vice Chair's reasons contain a logical error: once she concluded that the 65 percent grade standard for transfer students was discriminatory, she could not rationally conclude that the application of that standard to him constituted reasonable accommodation of his disabilities. The error was in determining that the University accommodated Mr. Longueépée when it based its admissions decision on his unaccommodated grades. He also argues that the decisions were unreasonable because the Vice Chair applied the defence of undue hardship when this defence had not been pleaded by the University and no evidence had been tendered on this point.

(ii) Discussion

[62] I agree with Mr. Longueépée that the Vice Chair's decisions were unreasonable. In essence, after accepting that the University had met what the Vice Chair characterized as the procedural duty to accommodate Mr. Longueépée's inability to comply with its grades criteria for admission due to disability by conducting an individualized assessment of his application, the Vice Chair concluded that the University met its substantive duty to accommodate when it considered only the unaccommodated grades to be relevant to his ability to succeed in university. The Vice Chair's reasons do not support her conclusion that the University met its obligation to accommodate Mr. Longueépée's disabilities in its admissions process. As I will explain, the Vice Chair ultimately failed to grapple with the core issue, and the effect of her decision was to recognize that the University, although embarking on a process to provide accommodation, in fact had no duty to carry through with that process to accommodate Mr. Longueépée in his application for admission. Further, the Vice Chair effectively recognized an undue hardship defence, even though the University did not argue or present evidence of undue hardship. These shortcomings rendered the Vice Chair's decisions unreasonable.

[63] As *Vavilov* instructs, the reasonableness review begins with the reasons of the decision maker, which must be examined with respectful attention, seeking to understand the reasoning process.

[64] I begin with what is not in dispute.

[65] The Vice Chair accepted that Mr. Longueépée had established a *prima facie* case of discrimination. She determined that "[Mr. Longueépée's] disabilities impacted his ability to meet the [University's] admissions standard for transfer students and in this way, he was adversely impacted by the standard": at para. 35. The finding of *prima facie* discrimination resulting from the University's grades-based admissions standard was not challenged by the University in this court.

[66] I also note that there is no disagreement between the parties as to the proper framework that was to guide the Vice Chair's analysis. Although not articulated in her reasons, the three-step test prescribed by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*") and *Grismer* applies to determine whether a *prima facie* discriminatory requirement is reasonable and *bona fide*. Under the *Meiorin/Grismer* test, the University had the obligation to establish:

a. that the grades standard for transfer students was adopted for a purpose or goal that is rationally connected to the function being performed;
b. that it adopted the grades standard in good faith in the belief that it was necessary for the fulfilment of that purpose or goal; and

c. that the standard was reasonably necessary to accomplish its purpose, in the sense that the University could not accommodate persons with the characteristics of Mr. Longueépée without incurring undue hardship.

[67] There is no question that the first two steps were met by the University in this case. This was accepted by the Divisional Court as implicit in the Vice Chair's decisions, and the respondent does not take issue with this conclusion. The University's grades-based admission standard for transfer students is rationally connected to the admissions process as a predictor of the ability to succeed at university, and the standard was adopted in an honest belief that it was necessary to ensure that admitted students would have the ability to succeed.

[68] The issue before the HRTO was whether the University accommodated Mr. Longueépée in its admissions process to the point of undue hardship. As McLachlin J. (as she then was) stated in *Grismer:* "Failure to accommodate may be established by evidence of arbitrariness in setting the standard, by an unreasonable refusal to provide individual assessment, or perhaps in some other way. The ultimate issue is whether the employer or service provider has shown that it provides accommodation to the point of undue hardship": at para. 22. Indeed, in this case, the University asserted that it had accommodated Mr. Longueépée by providing an individualized assessment of his application by the Admissions Committee with a view to determining whether he was likely to succeed at university.

[69] The parties are also in agreement that the duty to accommodate can be said to have both procedural and substantive components. This distinction was briefly made by McLachlin J., at para. 66 of *Meiorin*, where she wrote, in the context of an employment standard, that "it may often be useful as a practical matter to consider separately, first, the procedure, if any, which is adopted to assess the issue of accommodation and, second, the substantive content, of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard" (emphasis in original).

[70] The procedural component typically involves the identification of the process or procedure to be adopted in providing accommodation to the person who would be subject to the discriminatory standard: see *Lane v. ADGA Group Consultants Inc.* (2008), 295 D.L.R. (4th) 425 (Ont. Div. Ct.), at para. 106; *Roosma v. Ford Motor Co. of Canada* (2002), 164 O.A.C. 252 (Div. Ct), at para. 210, *per* Lax J. (dissenting, but not on this point). Because it requires an understanding of the person's needs, and requires the person to provide information, procedural accommodation is sometimes referred to as the "accommodation dialogue": see *Liu v. Carleton University*, 2015 HRTO 621, at para. 18. Once the institution has an understanding of the claimant's specific needs, it must ascertain and seriously consider possible accommodations that could be used to address those needs, including the option of undertaking an individualized assessment in the case of a discriminatory standard: see *Grismer*, at para. 42; *ADGA*, at para 106. The

substantive component of accommodation can refer to the steps taken to implement the accommodation to the point of undue hardship. It involves the consideration of what was actually done in the accommodation process to meet the individual's needs: see *Roosma*, at para. 210.

[71] It is sometimes difficult, and not always helpful to the analysis, to separate out the procedural and substantive components of accommodation. What is identified as procedural accommodation can shade into substantive accommodation because it is the particular measure or method of accommodation identified through procedural accommodation that is to be assessed as substantive accommodation. In this case there was no indication that the University engaged in an "accommodation dialogue" with Mr. Longueépée or undertook any other measures to assess how his disabilities might impact his ability to meet the University's grade standard. Instead, it decided that Mr. Longueépée's application would be assessed by an Admissions Committee to determine his ability to succeed in university. This was considered by the Vice Chair to have fulfilled the procedural component of accommodation – a conclusion that is not challenged by the respondent in this court. How the Admissions Committee went about the assessment of Mr. Longueépée's application was then considered as the substantive component of the University's accommodation. In the end however the issue was whether the University reasonably accommodated Mr. Longueépée's disabilities in its admissions process.

[72] I turn to how the Vice Chair analyzed the issue of accommodation and why I consider her decisions to be unreasonable.

[73] The Vice Chair concluded that the University met the procedural component of its duty to accommodate when, in response to his extenuating circumstances, it accepted Mr. Longueépée's application for consideration even after it was submitted late and outside of the normal process, and convened the Admissions Committee to determine Mr. Longueépée's ability to succeed in university: at paras. 23, 38. In her reconsideration decision the Vice Chair observed that the University met its procedural duty to accommodate when the Admissions Committee conducted an individualized assessment of Mr. Longueépée's application for admission: at para. 19.

[74] The Vice Chair then turned to what she identified as the issue in the case – whether the University met its substantive duty to accommodate: at para. 39.

[75] The Vice Chair concluded that the Admissions Committee met its substantive duty to accommodate when it considered only Mr. Longueépée's unaccommodated grades and disregarded the other non-academic materials he had submitted with his application. Yet, there was no indication that the Admissions Committee made any effort to understand how Mr. Longueépée's disabilities might have affected his Dalhousie grades, or to analyze whether his grades, interpreted in light of his disabilities, might assist in showing his ability to succeed at university.

[76] The Admissions Committee's failure to question how it should interpret Mr. Longueépée's Dalhousie grades amounted to a decision to take those grades at face value. This was symptomatic of the underlying contradiction in the Committee's approach. In the words of the Divisional Court, the Admissions Committee professed an "accommodation dialogue", but the dialogue was "firmly anchored to the very grades which [the Admissions Committee] implicitly, if not expressly, recognized as not being reflective of Mr. Longueépée's abilities: at para. 53.

[77] The fact that the Admissions Committee considered only Mr. Longueépée's grades was inconsistent with the "individualized" and "holistic" (based on "everything that the student has done") process that was described by the University's witnesses and relied on by the Vice Chair when she concluded that the University met its procedural duty to accommodate.

[78] The University argues that the Admissions Committee did in fact consider all of the materials Mr. Longueépée submitted, and that the Vice-Chair did not err in deferring to Waterloo's exercise of "academic judgment" in evaluating the weight to be given to the non-academic materials.

[79] I disagree. The Admissions Committee did not consider whether Mr. Longueépée's supplementary materials demonstrated an ability to succeed at university. It is true that the University's email to Mr. Longueépée refusing him

admission stated that the Admissions Committee had "[undertaken] a comprehensive review of [his] supporting documents, references and testimonials with a view to determining [his] admissibility", and the Admissions Committee's summary of its meeting stated that it concluded that Mr. Longueépée was not admissible "after a comprehensive review of the supporting documents, references and testimonials". The Vice-Chair however found at para. 48 that "there is no indication that [the Admissions Committee] considered [Mr. Longueépée's] volunteer work on behalf of child abuse survivors and reference letters given for that work as relevant to his ability to succeed in university", which she considered to be "a judgment call the Committee was able to make". Further, at para. 11 of her reconsideration decision, the Vice Chair referred to her "finding that the Admissions Committee was entitled to disregard reference letters and volunteer work as indicators of potential academic success." In other words, she found that the Admissions Committee considered everything other than grades to be irrelevant to Mr. Longueépée's ability to succeed in university, and that the Committee was entitled to have done so.

[80] There is no evidence in the case the University presented to the HRTO that the Admissions Committee had actively engaged with the additional material provided by Mr. Longueépée in order to determine whether it demonstrated his ability to succeed at university. As the Divisional Court correctly observed, while the Admissions Committee purported to consider information other than

Mr. Longueépée's grades, the explanation for its decision was bereft of any evaluation of that information: at paras. 54-56.

[81] The core issue before the Vice Chair was the following: if the Admissions Committee only considered Mr. Longueépée's unaccommodated grades to be relevant to his ability to succeed in university, and considered irrelevant the other materials that it had undertaken to review, how could the University demonstrate that it had reasonably accommodated Mr. Longueépée in the admissions process?

[82] The Vice Chair did not grapple with this core issue. Instead, she adopted the University's point of view, stating that there was "no information" before the Admissions Committee that Mr. Longueépée could succeed: at para. 49. She accepted, at para. 51, that "in an academic setting, the ability to succeed is measured by grades: there is no other measure to evaluate success". This conclusion was incompatible with the Vice Chair's finding that the University's grades standard was discriminatory because Mr. Longueépée's Dalhousie grades were achieved when he had unaccommodated disabilities. In the absence of any process for interpreting those grades, it was not open to the Vice Chair to find that the consideration of only those grades could constitute reasonable accommodation.

[83] Based on the record, the Vice Chair's decisions were constrained by several facts. First, Mr. Longueépée applied with unaccommodated grades and other non-

academic materials. The grades were, as the Divisional Court said, “marks that were the process of an unaccommodated disability.” Second, although the Faculty had established grade standards for admission, recognizing that Mr. Longueépée had a disability and that his grades were unaccommodated, the Admissions Committee was meant to use a “holistic” process to evaluate his application. Yet, the Vice Chair concluded that there was substantive accommodation based on the finding that the Admissions Committee was entitled to rely solely on Mr. Longueépée’s unaccommodated grades in refusing him admission.

[84] The Vice Chair’s decisions do not reflect an internally coherent chain of analysis justified on these facts because she simultaneously accepted that Mr. Longueépée’s grades were unaccommodated and that the Admissions Committee was entitled to disregard his other application materials and to base its decision to deny him admission solely on his unaccommodated grades. Without resolving these contradictory findings, her conclusion that there was substantive accommodation is unreasonable. It is not in fact a finding that the University had reasonably accommodated Mr. Longueépée, but a finding that there was no duty to accommodate. The Vice Chair in effect bypassed the third step of the *Grismer* test when she concluded that it was sufficient for the University to consider only Mr. Longueépée’s grades in refusing him admission. Reasonable accommodation could not take the form of simply applying the discriminatory grade standard to his

unaccommodated grades. If the University was going to do so, it needed to establish undue hardship.

[85] This brings me to the second significant problem with the Vice Chair's reasons. In her reconsideration decision the Vice Chair stated, at para. 17: "[t]o accept [Mr. Longueépée's] argument would have the effect of requiring universities to complete an in-depth assessment of every application by every student with a disability regardless of the extent of the gap between the admissions standard for the particular program and the individual student's grades." She observed that in Mr. Longueépée's case, because his previous grades were obtained at another university, it would effectively require one university to sit in review of how another university had accommodated its students: at para. 18. Although the Vice Chair did not express her conclusion in terms of "undue hardship", that is one way of construing what she concluded.

[86] The University however did not rely on an undue hardship defence before the HRTO. Had it done so, it would have had the burden of leading evidence on that issue: see *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, 279 D.L.R. (4th) 1, at paras. 109, 142, and 226; *Grismer*, at paras. 41-42. By addressing the issue through the lens of an undue hardship analysis, the Vice Chair decided an issue that was not before her and for which she had no evidence.

[87] In summary, the Vice Chair's reasons contain a fundamental gap that renders them unreasonable. Rather than inquiring into the steps taken by the Admissions Committee in response to the *prima facie* discrimination that would result from the application to Mr. Longueépée of the Faculty's grade standard, she accepted that Mr. Longueépée had been substantively accommodated when the Admissions Committee had based its decision solely on his unaccommodated grades. The Vice Chair also effectively gave credit to an undue hardship argument when the University did not present evidence on or rely on this defence. For these reasons, I conclude that the decisions of the Vice Chair that led to her dismissal of Mr. Longueépée's application under the Code were unreasonable and patently so, such that the Divisional Court was correct in setting aside the decisions on judicial review.

[88] Before leaving this issue, I note that nothing in these reasons is intended to discourage or disparage the University's grades-based admissions standards. The conclusion that the University did not accommodate Mr. Longueépée's disabilities does not impugn its academic standards or its usual discretion in applying such standards. The issue before this court was the reasonableness of the Vice Chair's finding in the context of his human rights complaint, that the University discharged its duty to accommodate Mr. Longueépée's disabilities in its admissions process. The finding was unreasonable because the University fell short in the performance of its express undertaking to provide accommodation in the ways I have described.

(3) What is the appropriate remedy in the circumstances?

[89] The order of the Divisional Court allowing the application for judicial review of the decisions of the HRTO, states at para. 1:

> **THIS COURT ORDERS THAT** the application for judicial review is allowed; the decision and reconsideration decisions of the HRTO dated 25 May 2017 and 22 December 2017 (respectively) are set aside; and the matter is remitted to the Admissions Committee for consideration by way of an accommodated admissions process that is consistent with the Court's reasons.

[90] In considering the question of remedy, the majority in *Vavilov* held that "where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons": at para. 141. However the court went on to say that "[d]eclining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose": at para. 142. Indeed, this is what the Supreme Court did in *Vavilov.*

[91] By contrast, in *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025, 148 O.R. (3d) 705, leave to appeal refused, [2020] S.C.C.A. No. 59, this court quashed the decision of the administrative decision maker and remitted the matter for reconsideration. An important factor was that the administrative decision maker had not had a genuine opportunity to weigh in on the issue in question.

[92] The University argues that it was inappropriate for the Divisional Court to bypass the HRTO and to remit the matter directly to the Admissions Committee without conducting an analysis as to whether this was an exceptional case where such a remedy was warranted. It submits that this approach is incompatible with the approach required under *Vavilov*.

[93] Mr. Longueépée submits that the Divisional Court was right to send the matter back to the Admissions Committee. Although the court did not have the benefit of the majority reasons in *Vavilov*, this is an exceptional case where a particular outcome is inevitable: the University discriminated in its admissions process when it relied on Mr. Longueépée's unaccommodated grades and reasonable accommodation would require the reassessment of Mr. Longueépée's application without relying on the gap between his prior grades and the 65 percent grade standard. Mr. Longueépée also notes that because all of the parties are publicly funded, the Divisional Court's remedy avoids wasting public funds litigating an issue where there is only one possible result.

[94] The Divisional Court did not explain why, having allowed the application for judicial review, it was sending the matter back to the Admissions Committee with directions on how to assess Mr. Longueépée's application, and not to the HRTO to determine the appropriate remedy. I am satisfied that the conclusion that the University discriminated against Mr. Longueépée in the admissions process is inevitable on the record that was before the Vice Chair. That said, the appropriate

remedy is not. In my view, in these early post-*Vavilov* days, it is preferable to return the matter to the HRTO for its further disposition in light of these reasons so that it may fashion the remedy that, in its opinion, would promote compliance with the Code.

F. CONCLUSION AND DISPOSITION

[95] For these reasons, I would allow the appeal but only to the extent that I would substitute for para. 1 of the order of the Divisional Court an order: (1) setting aside the decision and reconsideration decision of the HRTO, (2) declaring that the University, contrary to the Code, discriminated against Mr. Longueépée when it failed to reasonably accommodate his disabilities in its admissions process in the 2013-14 academic year, and (3) remitting the matter back to a different member of the HRTO to determine, with such directions respecting additional evidence and/or submissions as may be required, the appropriate remedy under the Code.

[96] If the parties cannot agree on the costs of this appeal, the court will accept written submissions no more than five pages in length beginning with Mr. Longueépée, to be served and filed with the court at coa.e-file@ontario.ca within two weeks of the release of this decision, followed one week later by the respondents' costs submissions, and any reply within one further week thereafter.

"K. van Rensburg J.A."
"I agree. G.R. Strathy C.J.O."

Lauwers J.A. (concurring):

[97] I concur without reservation with my colleague's reasons. I wish to add some reflections on the unique position of universities in the landscape of public institutions.

[98] Universities enjoy a measure of autonomy in the pursuit of their mission that must be understood and respected. This consideration forms the context of this appeal. In my view, a measure of deference is owed to universities with respect to core academic decisions including admissions. Deference does not completely insulate academic decisions from public scrutiny, including the scrutiny applied by tribunals for compliance with the *Human Rights Code*, R.S.O. 1990, c. H.19, but it must inform that scrutiny.

[99] Courts have treated universities with some caution. The borders of university autonomy are implicated by legal debates over the proper limits to be placed on executive and judicial oversight into the internal affairs of universities, for example, whether and how universities are subject to the *Charter*: See *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Yashcheshen v. University of Saskatchewan*, 2019 SKCA 67, leave to appeal to S.C.C. refused, [2020] S.C.C.A. No. 320; *BC Civil Liberties Association v. University of Victoria*, 2016 BCCA 162, leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 289; *Pridgen v. University of Calgary*, 2012

ABCA 139, 350 D.L.R. (4th) 1. There are also ongoing debates about the degree to which university actions are subject to judicial review in accordance with administrative law principles: See for example *UAlberta Pro-Life v. Governors of the University of Alberta*, 2020 ABCA 1, 441 D.L.R. (4th) 423. And this court was recently required to examine the interaction between university discipline and labour law principles when the employees in question are also students: *Ball v. McAulay*, 2020 ONCA 481.

[100] There are historical and functional reasons for a cautious approach. In Ontario, as this court explained in *Ball*, at para. 59, the backdrop was set by the seminal *Report of the Royal Commission on the University of Toronto* (Toronto: Queen's Printer, 1906). The court noted that universities in Ontario enjoy a considerable measure of self-governance flowing from the principle of university autonomy. Affirming that principle, the Report recommended that the internal administration of the University of Toronto be separated from the provincial government where it had previously reposed. Subsequent university legislation in Ontario is built on the same template. As this court noted in *Ball*, the autonomy of universities "must be taken seriously": at para. 59.

[101] The feature of university autonomy at issue in this case is the admissions process. I see the admissions process as a core feature of university autonomy. The *University of Waterloo Act*, *1972,* S.O. 1972, c. 200 invests internal control over the admissions process in the Senate, at s. 22(d). That the conditions of

admission are determined by the Senate confirms that the admissions process is at the heart of the university's academic mission and should attract a high degree of deference. As this court stated in *Mulligan v. Laurentian University*, 2008 ONCA 523, 302 D.L.R. (4th) 546, at paras. 20-21:

> [I]t has long been accepted that courts should be reluctant to interfere in the core academic functions of universities. [Citations omitted.]
>
> Here, the decision whether to admit the appellants to the Department of Biology M.Sc. Program was a decision going to the core of a university's functions.

See also *Gauthier c. Saint-Germain*, 2010 ONCA 309, 325 D.L.R. (4th) 558, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 257.

[102] The deference owed to academic decisions reflects both the legal autonomy of universities as institutions and the important normative value society attaches to academic freedom, as La Forest J. wrote in *McKinney*. In *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, Beetz J. noted, at p. 594: "The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy."

[103] In my view, tribunals and courts should be equally careful to preserve the integrity of the university admissions process. As this court noted in *Mulligan,* at para. 16:

> The school has considerable discretion in choosing who among the pool of persons who meet the admission

> standards will be admitted. In exercising that discretion the school may take into account matters that it believes will best enable it to provide the highest quality program in the interests of the students and to enhance the calibre and reputation of the school itself. [Emphasis added.]

[104] Although Ontarians have a right to elementary and secondary publicly funded education, they do not have the same right to university education. Because admission to university is not a right or entitlement, an applicant's obligation to demonstrate the cognitive capacities and the other competencies to succeed at university plays a role throughout the admissions process and is not entirely displaced by the positive duty to accommodate that is cast on the university under the Code.

[105] The difficult reality is that certain claimants will still fall short of the standards that universities have set, even with accommodation. For example, even if every possible accommodation were investigated and assessed, a claimant might still be evaluated as lacking the cognitive capacity and other competencies necessary to succeed at university and would therefore not be eligible for admission.

[106] The deference owed to universities does not completely insulate academic decisions from tribunal or judicial scrutiny, but the Human Rights Tribunal of Ontario must be cautious not to override the admissions standards of universities in its mission to ensure accommodation. In this case, the HRTO was too cautious. Other cases will be different and we will be feeling our way on how these tensions of deference to university decisions in the core areas of their mandates and the

duty to accommodate get worked out on the ground. I add these observations to explain why I agree strongly with my colleague's statement that: "nothing in these reasons is intended to discourage or disparage the University's grades-based admissions standards."

Released: December 21, 2020 ("G.R.S.")

"P. Lauwers J.A."