CITATION: BizTech v. Accreditation Canada, 2025 ONSC 2689
DIVISIONAL COURT FILE NO.: DC-25-00000091-00JR
DATE: 20250522

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

S. Bale, S. Nakatsuru, S. Shore JJ.

BETWEEN:	
BIZTECH INSTITUTE INC.	*David Levangie, Teodora Obradovic, Shannon Reid,* Counsel for the Applicant
Applicant	
- and -	
ACCREDITATION CANADA, COLLEGE OF MEDICAL RADIATION AND IMAGING TECHNOLOGISTS OF ONTARIO, AND SUPERINTENDENT OF CAREER COLLEGES	*R. Aaron Rubinoff, John Siwiec, Joshua Nutt,* Counsel for the Respondent Accreditation Canada
Respondents	*Benjamin Kates, Amy Block,* Counsel for the Respondent College of Medical Radiation and Imaging Technologists of Ontario
	Christopher Thompson, Liam Dart, Counsel for the Respondent Superintendent of Career Colleges
	HEARD at Toronto: April 9, 2025

REASONS FOR DECISION

S. Nakatsuru J.

A. OVERVIEW

[1] BizTech Institute Inc. ("BizTech"), the Applicant, is a private for-profit career college that offers paramedical education to the public including a Diagnostic Medical Sonography Program (the "DMS Program").

[2] The College of Medical Radiation and Imaging Technologists of Ontario ("CMRITO" or "the College"), one of the respondents herein, is a self-governing body that regulates the practice of the profession of medical radiation and imaging technology in Ontario. CMRITO also regulates the entry requirements into the profession, which includes the requirement that candidates have successfully

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completed a medical radiation and imaging technology program in the specialty, offered at a Canadian institution and approved by CMRITO Council or a body or bodies approved by Council.

[3] Through policy, CMRITO Council has determined that for a program to be an "approved" program, the program must be accredited by Accreditation Canada. Accreditation Canada, another Respondent herein, is an independent, non-governmental, not-for-profit corporation contracted by CMRITO to conduct such program evaluations.

[4] For the past four years that the DMS Program had been offered by BizTech, due to identified deficiencies, the program was only conditionally accredited by Accreditation Canada. During this time, BizTech sought to improve its delivery of the DMS Program.

[5] On January 27, 2025, after further evaluation and assessment by Accreditation Canada, it accorded the DMS Program a "Not Accredited" status (the "Decision").

[6] The Superintendent of Career Colleges ("Superintendent"), the last Respondent in these proceedings, responsible for the regulation of career colleges in Ontario, had previously granted BizTech's DMS Program approval with conditions: one being that it maintained the program's accreditation status with Accreditation Canada. On March 31, 2025, after being informed of Accreditation Canada's Decision, the Superintendent revoked the program's approval (the "Superintendent's Decision"). This triggered a statutory right by BizTech students in the DMS Program to a full refund of their fees leading to what BizTech claims are dire financial straits.

[7] BizTech applies for a judicial review of the Decision by Accreditation Canada and the Superintendent's Decision. Although the two are interrelated, they are best assessed separately. In these reasons, I will deal first with the judicial review of the Decision, then the judicial review of the Superintendent's Decision.

[8] BizTech's position is that the Decision was procedurally unfair and unreasonable. However, while the Respondents reject that position, they also raise several preliminary issues. They submit that the Decision is not subject to judicial review because the subject matter of the dispute is essentially a private contractual one between Accreditation Canada and BizTech. In the alternative, if properly judicially reviewable, the court should decline to hear the application because Biztech has adequate alternative remedies. Moreover, Accreditation Canada brings a motion to stay the judicial review proceedings pursuant to s. 7(1) of the *Arbitration Act, 1991*, S.O. 1991 c. 17, relying on an arbitration clause in the contract signed between Accreditation Canada and BizTech.

B. BACKGROUND

1. The Parties and the Governing Statutory Frameworks

BizTech: a Career College

[9] BizTech is a private career college under the *Ontario Career Colleges Act, 2005*, S.O. 2005, c. 28, Sched. L (the "*OCCA*"). BizTech operates various educational, vocational, and training programs, including the DMS Program which it has administered since 2020. Harpal Dharna is the President of BizTech.

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The Superintendent

[10] The Minister of Training, Colleges and Universities is authorized under the *OCCA* to appoint a Superintendent. The Superintendent, appointed under s. 2 of the *OCCA*, registers and oversees the institutions falling within the *OCCA.* Under s. 23 of the *OCCA*, if a career college wishes to offer a vocational program, they must apply to the Superintendent for approval of the program. The Superintendent shall approve the provision of a specified vocational program, if the Superintendent is satisfied that: (a) the program will provide the skills and knowledge required to obtain employment in a prescribed vocation; and (b) the program is likely to meet the applicable standards and performance objectives set out in the Superintendent's policy directives. The Superintendent may approve of a program subject to conditions and may revoke the approval of a vocational program where it fails to meet the conditions of program approval or the applicable standards or performance objectives set out in the Superintendent's policy directives.

[11] By virtue of s. 53 of the *OCCA*, the Superintendent is authorized to issue legally binding directives setting out standards for vocational programs or classes of vocational programs. The Superintendent has recognized CMRITO as the regulator for sonography programs under its policy directive dated January 1, 2024, titled "*Career college programs that require regulator approval or accreditation*". The Superintendent has recognized Accreditation Canada as the sole accreditor for sonography programs under the directive.

CMRITO

[12] CMRITO is a self-governing body that regulates the practice of the profession of medical radiation and imaging technology in Ontario. As the self-governing body, among other things, CMRITO sets standards and qualifications for individuals to be registered as medical radiation and imaging technologists in the province.

[13] The role of CMRITO, its authority and powers are set out in legislation including the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 ("*RHPA*"), and the *Health Professions Procedural Code*, which is Schedule 2 to the *RHPA* (the "*Code*"). Its mandate is to serve and protect the public interest by regulating the practice of the profession and governing its members: ss. 3(1)1, 3(1)2 of the *Code*.

[14] The profession of medical radiation and imaging technology as set out in the *Medical Radiation and Imaging Technology Act, 2017*, S.O. 2017, c. 25, Sch. 6, s. 3, is the use of ionizing radiation, electromagnetism, soundwaves, and other prescribed forms of energy for the purposes of diagnostic or therapeutic procedures, the evaluation of images and data relating to the procedures, and the assessment of an individual before, during, and after the procedures. Those licensed to practise the profession (i.e., registered members of CMRITO) are authorized to perform controlled acts that may be potentially harmful to patients.

[15] One of the duties of CMRITO, as set out in the *Code*, is to develop, establish, and maintain standards and qualifications for persons to be issued certificates of registration, which allow registrants to practice as regulated health professionals in Ontario. In discharging its duties, CMRITO must set standards and qualifications for registration that seek to ensure the public interest is protected.

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[16] To this end, using its statutory power under the *Code*, CMRITO passed *Ontario Regulation 31/24* ("*O. Reg. 31/24*"), in effect since July 1, 2024, as the registration regulation governing the registration of applicants to the profession of medical radiation and imaging technology. This regulation prescribes the standards and qualifications for registration and provides for certificates related to defined specialties, and the qualifications for those certificates. The prescribed qualifications include requirements pertaining to education, examination, currency of practice, good character, language proficiency, and the completion of a jurisprudence course.

[17] The regulation prescribes specific requirements for the issuance of specialty certificates of registration, including the specialty of diagnostic medical sonography. With respect to the education requirement, the registration regulation prescribes either completion of an "approved" program in Canada or completion of an international program that is substantially similar to an approved program in Canada. Under s. 4(1)1(i) of *O. Reg. 31/24*, CMRITO is authorized to approve medical radiation and imaging technology programs, or to delegate the approval power to another body:

> 4. (1) The following are additional registration requirements for a specialty certificate of registration:
>
> 1. The applicant must have successfully completed a medical radiation and imaging technology program in the specialty where the program is,
>
> i. offered at a Canadian institution, and was approved by Council or a body or bodies approved by Council for that purpose at the time the applicant successfully completed the program, …

[18] Through its internal policy, CMRITO Council has determined that "for a program to be an 'approved' program for the purposes of s. 4(1)1(i), the program must be accredited by Accreditation Canada." Effectively, CMRITO Council's registration policies provide that only Canadian programs accredited by Accreditation Canada will meet this registration requirement.

Accreditation Canada

[19] Accreditation Canada is an independent, non-governmental, not-for-profit corporation incorporated under the *Canada Not-for-Profit Corporations Act*, S.C. 2009, c. 23. It operates globally as an affiliate of the Health Standards Organization, which is a not-for-profit corporation that develops standards, assessment programs, and other tools for healthcare providers. Accreditation Canada delivers a wide range of assessment programs for health and social services organizations.

[20] As of March 10, 2025, Accreditation Canada provided accreditation services to 279 healthcare educational programs in 19 professions, in partnership with over 30 regulatory bodies and alliances across all Canadian provinces. Accreditation is an established industry-recognized method of assuring quality of educational programs.

[21] Accreditation Canada manages between 75 to 100 accreditation assessments across the 19 allied health professions it serves, including paramedicine, medical laboratory technology, diagnostic medical and diagnostic cardiac sonography, cardiology technology, and respiratory therapy.

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[22] As of February 2018, Accreditation Canada was designated as the approved accreditation body pursuant to CMRITO's accreditation policy and approved programs policy. Accreditation Canada provides accreditation services for a fee.

2. The Accreditation Criteria Used by Accreditation Canada

[23] Accreditation Canada's accreditation process involves a six-stage process set out in its Implementation Guide. Each stage measures whether the educational program complies with 31 criteria contained in Accreditation Canada's Program Manual (and Decision Guidelines therein). Ten of these criteria are "high priority", and the rest are considered "normal priority".

[24] To receive accredited status, the Decision Guidelines state that an educational program must satisfy 100% of the "high priority" criteria and at least 80% of the remaining requirements. If the program meets between 50% to 99% of the "high priority" and 60-79% of the total criteria, it will be "Accredited with Condition".

[25] Programs accredited with condition are allowed to operate for a two-year period but must submit additional evidence to Accreditation Canada in a follow-up report demonstrating improved compliance with any unsatisfied criteria. A team of surveyors under Accreditation Canada will then assess this evidence and recommend one of the following status decisions to be finally approved by the Accreditation Decision Committee ("ADC"):

> **Accredited**: if the education program's follow up report provides clear evidence of compliance.
>
> **A second term of accredited with condition**: if the evidence indicates that the educational program has made progress toward achieving compliance but is still in partial compliance with one or more requirements.
>
> **Withdrawal of accreditation**: if the evidence in the education program follow-up report indicates that the education program has not made progress towards compliance with one or more requirements within a 2-year term of accreditation or if the educational program is in non-compliance with one or more requirements.

3. The Procedural Background to the Decision

The Initial Application

[26] Even before BizTech applied to have the DMS Program accredited, Accreditation Canada and BizTech had a relationship. They had signed an agreement on January 31, 2018, covering BizTech's Cardiovascular Sonography Technologist education program (now BizTech's "DCS Program") for accreditation services.

[27] On May 20, 2020, BizTech submitted its application to accredit its DMS Program.

[28] In the fall of 2022, Accreditation Canada performed off-site and on-site reviews of the DMS Program in the usual course. Following its on-site review, Accreditation Canada issued its Accreditation Report, granting the DMS Program a status of "Accredited with Condition" until January 31, 2025. This was based on its conclusion that the DMS Program met seven of the ten "high

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priority" criteria and 26 total criteria. The outstanding "high priority" criteria were Criteria Nos. 1.1.6, 4.1.3, and 5.1.2.

[29] Accreditation Canada's cover email to BizTech, dated December 7, 2023, attached the BizTech Proposal, Fee Schedule, Specific Terms and Conditions, and General Terms and Conditions (together the "Accreditation Contract"). The Accreditation Contract was accepted by BizTech on March 14, 2024.

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BizTech's Progress After Receiving Conditional Accreditation

[30] Over the ensuing two years after the November 2022 report, BizTech's task was to implement changes to comply with the three outstanding "high priority" criteria, as well as to track its own progress toward doing so.

[31] The accreditation of the DMS Program was overseen by Accreditation Canada's Accreditation Specialist, Jon Pascoe. Mr. Pascoe facilitated communication and the transfer of information between BizTech and the surveyors who were assessing BizTech's application. Mr. Pascoe provided the requisite direction and guidance on Accreditation Canada's procedures throughout the accreditation cycle including the submission by BizTech of annual reports.

[32] Since its DMS Program was "Accredited with Condition", BizTech was required to submit a follow-up report confirming compliance with the outstanding criteria by May 15, 2024, which was extended to October 15, 2024.

[33] In anticipation of the follow-up review, Accreditation Canada put together a team of surveyors who would review BizTech's evidence and submissions in support of accreditation. The surveyors are volunteers selected based on their qualifications, subject matter expertise, and their independence/objectivity. The survey team consists of a diverse group of subject matter experts with significant expertise in academia, health care regulation and certification, professional practice, and program evaluation. Conflicts of interest are avoided. Although surveyor teams are typically composed of three surveyors, five surveyors were assigned to review BizTech's evidence.

[34] After another brief extension, BizTech submitted its evidence on October 16, 2024. In total, it produced 101 documents related to criterion 1.1.6; 280 documents related to criterion 5.1.2; and 116 documents for criterion 4.1.3. It also provided 111 documents related to progress on the outstanding "normal priority" criteria.

[35] On November 8, 2024, a representative for Accreditation Canada emailed BizTech outlining 12 comments and a review of the outstanding high priority criteria along with additional questions. BizTech replied with its responses on November 15, 2024, to the criterion-specific questions.

[36] On November 22, 2024, Accreditation Canada submitted a draft surveyors' report to BizTech with its recommendation that the DMS Program receive a status of "Not Accredited". BizTech then submitted a response on November 29, 2024, disagreeing with the recommendation, and elaborated on its DMS Program's continued compliance and progress with Criteria Nos. 1.1.6, 4.1.3, and 5.1.2.

4. The Decision

[37] The surveyors' report goes to the ADC, which is a separate unit within Accreditation Canada. The ADC has its own independent reviewers with expertise in education, healthcare, assessment, and decision making. The ADC's role is to review the quality of the report, whether the accreditation process was followed, and whether the conclusion reached is defensible. On December 2, 2024, the surveyors' report was sent to the ADC for its consideration.

[38] On January 27, 2025, Accreditation Canada emailed BizTech to advise that the DMS Program had been accorded a status of "Not Accredited" and enclosed a copy of the surveyors' report. All parties in this case have treated the ADC letter and the attached surveyors' report and recommendation as the Decision. Given the specific circumstances presented here, I agree that this should be treated as the decision under judicial review.

[39] The Decision ultimately determined that the DMS Program satisfied 70% of the "high priority" criteria and 84% of the total criteria. However, it concluded that the DMS Program had not presented sufficient evidence of progress in satisfying its remaining "high priority" accreditation requirements, stating:

> Based on the survey's team unanimous findings, the program has not presented sufficient evidence of progress in demonstrating conformity with the previously unmet High Priority criteria. As a consequence, in keeping with the program's Manual Decision Guidelines, the program does not meet the requirements for the status of "Accredited" or a further term of "Accredited with Condition". The Survey team therefore respectfully submits its recommendation of "unsuccessful follow-up review/Accreditation Withdrawn" for the Accreditation Decision Committee's consideration.

[40] BizTech can reapply for accreditation one year after the date of this notification.

5. The Superintendent's Decision

[41] In October 2020, the Superintendent granted BizTech approval to offer the DMS Program on the condition that it remain in good standing with CMRITO, including obtaining and maintaining accredited status with Accreditation Canada. The condition expressly provided that the Superintendent may revoke DMS Program's approval if the program's accreditation application was unsuccessful or, where accreditation was obtained, if the program's accreditation was revoked or not renewed by Accreditation Canada.

[42] On August 13, 2024, the Superintendent wrote to BizTech about concerns arising from a related but separate program offered by BizTech. Given that the Superintendent was of the view that these concerns also affected the DMS program, conditions were imposed on the DMS program that BizTech was prohibited from offering the program for a fee to any new students.

[43] On January 30, 2025, the Superintendent was notified by BizTech that Accreditation Canada had revoked its DMS Program accreditation status (i.e., changed its status to "Not Accredited"). BizTech stated that it planned to challenge the Decision in the Divisional Court and requested that the Superintendent pause any revocation of the DMS Program's approval pending disposition of the emergency stay motion.

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[44] On March 11, 2025, the Superintendent wrote to BizTech advising that, having regard to the loss of accreditation of the program, the Superintendent proposed to revoke the DMS Program's approval. The Superintendent provided their proposed reasons for doing so, and offered BizTech an opportunity to provide any additional information it believed the Superintendent should have before rendering a decision.

[45] On March 14, 2025, BizTech provided submissions to the Superintendent in response to the proposal to revoke the DMS Program's approval.

[46] On March 31, 2025, the Superintendent wrote to BizTech revoking the DMS Program's approval, relying on the discretionary authority under s. 24(1) of the *OCCA* to revoke program approval where the program fails to meet the conditions of the approval.

6. The Motion to Stay the Superintendent's Decision

[47] On April 9, 2025, the date scheduled for the judicial review of the Decision, BizTech brought a motion to stay the Decision and the Superintendent's Decision pending the court's decision on the judicial review application. Given the tight timelines, BizTech was not ready to argue its application for judicial review of the Superintendent's Decision, which had only recently been released. Following argument of the stay motions, the judicial review of the Superintendent's Decision was scheduled to be heard April 24, 2025, and an interim stay was granted to that date.

[48] However, before April 24, 2025, an agreement was reached between BizTech and the Superintendent that the hearing date of April 24, 2025, was not required and the date was vacated. For the reasons given in *BizTech Institute Inc. v. Accreditation Canada*, 2025 ONSC 2455 (Div. Ct.), we dismissed BizTech's motion for a stay of the Superintendent's Decision pending the release of these reasons.

C. THE ISSUES ON JUDICIAL REVIEW OF THE DECISION

[49] The following preliminary issues and issues were raised by the parties at the hearing of the application for judicial review:

- Should the affidavit evidence presented on the judicial review be admitted?
- Is the Decision subject to judicial review?
- Should Accreditation Canada's motion for a stay of proceedings under s.7(1) of the *Arbitration Act* be granted?
- Should the Court exercise its discretion not to hear the judicial review on its merits?
- Did Accreditation Canada violate the duty of procedural fairness?
- Was Accreditation Canada's Decision unreasonable?

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[50] For the following reasons, I find that the majority of the affidavit evidence is admissible and that the Decision is subject to judicial review. I would grant Accreditation Canada's motion for a stay of proceedings under the *Arbitration Act* and order that the judicial review application be stayed. As such, an examination of the merits of the application is not required.

D. THE AFFIDAVITS ON THE JUDICIAL REVIEW

[51] Evidence on an application for judicial review is ordinarily restricted to the evidence that was before the administrative decision-maker. However, additional evidence may be adduced in very limited circumstances, such as where there is a complete absence of evidence on an essential point, where the evidence addresses a breach of natural justice that cannot be proven by the record, or to provide general background or context to the issues on the application: *Sierra Club Canada v. Ontario (Ministry of Natural Resources and Ministry of Transportation)*, 2011 ONSC 4086 (Div. Ct.), at paras. 13-14; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 F.T.R 297, at para. 21; *Rockcliffe Park Residents Association v. City of Ottawa*, 2024 ONSC 2690 (Div. Ct.), at paras. 35-36.

[52] Common ground exists between the parties that much of the affidavit evidence appropriately falls within the exceptions. Other evidence like aspects of Mr. Dharna's evidence is not controversial as it only better organizes what was already before the decision-maker.

[53] That said, the portions of the affidavit material that are irrelevant, mere opinion, unnecessary, or argumentative will be ignored: *Jaffer v. Ontario (Health Professions Appeal and Review Board)*, 2019 ONSC 6770 (Div. Ct.), at para. 38. An example of this would be a settlement offer made by BizTech.

[54] I will address two specific objections made at the judicial review hearing.

[55] Accreditation Canada objects to the production of the annual report of 2025 Sonography Canada exam results of BizTech students. These results post-date the Decision and therefore are irrelevant to the judicial review. Moreover, Mr. Pascoe's evidence, which I accept, is that such exam results only form a piece of the criterion of accreditation. Said differently, the educational process in achieving those results is just as important. The annual report will not be considered on the judicial review.

[56] BizTech objects to the evidence found in Accreditation Canada's affidavits about BizTech's history of struggling to meet the accreditation requirements of its DCS Program from 2015 to 2024. This too will be disregarded by the panel. While this evidence may be relevant as overall background regarding BizTech's familiarity with the accreditation process, Accreditation Canada deliberately did not share this information with the DMS Program surveyors, to ensure their objectivity. Thus, it forms no part of the Decision made. While it may have some probative value as context, the potential prejudice in considering it on the judicial review outweighs that probative value.

E. THE AVAILABILITY OF JUDICIAL REVIEW

[57] CMRITO and Accreditation Canada raise a preliminary issue of jurisdiction. They submit that the Decision is a private contractual matter and not amenable to judicial review: *Astro Zodiac Enterprises Ltd. v. Exhibition Place (Board of Governors)*, 2022 ONSC 1175 (Div. Ct.), 28 M.P.L.R. (6th) 20, at paras. 22-37.

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[58] BizTech responds that Accreditation Canada exercised a "statutory power of decision" as defined in s. 1 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 ("*JRPA*").

[59] Subsection 2(1) of the *JRPA* sets out this court's jurisdiction to hear an application for judicial review:

> 2 (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may ... grant any relief that the applicant would be entitled to in any one or more of the following:
>
> 1. Proceedings by way of application for an order in the nature of *mandamus*, *prohibition* or *certiorari*.
>
> 2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

[60] Section 1 of the *JRPA* defines "statutory power" to include a power or right conferred by or under a statute "to exercise a statutory power of decision." "Statutory power of decision" is defined in s. 1 to mean a power or right conferred by or under a statute to make a decision deciding or prescribing;

> (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
>
> (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not ….

[61] A statutory power of decision is required before the remedy of a declaration can be ordered. While this remedy is included in their Notice of Application, the effective remedy BizTech seeks is the quashing of Accreditation Canada's decision not to accredit the DMS program. Jurisdiction to issue an order in the nature of *certiorari* under s. 2(1)1 of the *JRPA* is not limited to statutory powers of decision, and not all statutory powers of decision are subject to judicial review.

[62] Hence, it is not necessary to show that Accreditation Canada has exercised a statutory power of decision: *Setia v. Appleby College*, 2013 ONCA 753, 118 O.R. (3d) 481, at paras. 29-32. Rather, the fundamental issue is whether the decision to terminate accreditation is (a) an exercise of state authority, and (b) of sufficiently public character that public law remedies are available: *Wise Elephant Family Health Team v. Ontario (Ministry of Health)*, 2021 ONSC 3350 (Div. Ct.), at para. 72.

[63] Judicial review is only available when "there is an exercise of state authority and where that exercise is of a sufficiently public character": *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, at para. 14.

Exercise of Statutory Authority

[64] I find that Accreditation Canada exercised statutory authority as a delegate.

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[65] CMRITO has the exclusive power to accredit medical radiation and imaging technology programs, pursuant to s. 4(1)1(i) of *O. Reg. 31/24*, titled "*Registration*" made under the *Medical Radiation and Imaging Technology Act*. Under s. 4(1)1(i), CMRITO is authorized to approve medical radiation and imaging technology programs, or to delegate the approval power to another body. For the sake of convenience, I set out the provision again:

> 4. (1) The following are additional registration requirements for a specialty certificate of registration:
>
> 1. The applicant must have successfully completed a medical radiation and imaging technology program in the specialty where the program is,
>
> i. offered at a Canadian institution and was approved by Council *or a body or bodies approved by Council for that purpose* at the time the applicant successfully completed the program …. [Emphasis added.]

[66] CMRITO Policy 13.2 on Accreditation, as approved by its Council, references s. 4(1) and concludes:

> Council has determined that, for a program to be an approved program for the purpose of subparagraph i, the program must be accredited by Accreditation Canada (the Approved Accreditation Body) …. Accreditation is the public recognition that an educational program has met defined standards.

[67] Further, CMRITO Policy 13.3 on Approved Programs states:

> Council has designated Accreditation Canada (the Approved Accreditation Body) as the body for the purposes of subsection 4(1)(i).

[68] I find that in the Decision, Accreditation Canada has exercised its regulatory authority as the designated delegate of CMRITO. *Luzak v. Real Estate Council of Ontario* (2003), 67 O.R. (3d) 530 (Div. Ct.), at paras. 19-33, confirms that a delegation of power can constitute a statutory exercise of authority even where the delegation of power occurs through by-laws.

[69] The evidence on the application supports this conclusion. Mr. Roman Savka, the Director of Health Education Accreditation for Accreditation Canada, agreed that since 2018, further to Policies 13.2 and 13.3, the approved program policies, Accreditation Canada has been CMRITO's approved accreditation body. Carolyne Morris, the Deputy Registrar and Registration Director of CMRITO, outlined the history of the regulator when it comes to the accreditation process. CMRITO lacks the resources or expertise to accredit approved educational programs and its Council has, since February 1, 2018, approved Accreditation Canada as its accreditation body. The two bodies have signed agreements to that effect. CMRITO also has a right to appoint surveyors to Accreditation Canada's surveyor team whose roles include advising the team of provincial laws and the education system for the profession. It had appointed two surveyors in BizTech's case.

[70] Despite this, relying on *Fawcett v. Canadian Chiropractic Examining Board*, 2010 ONSC 4903 (Div. Ct.), CMRITO maintains that an exercise of statutory authority has not been shown. In my opinion, *Fawcett* can readily be distinguished. In *Fawcett*, the respondent was a not-for-profit without-share-capital corporation that administered examinations for provincial licensing bodies that

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regulated the practice of chiropractic medicine across Canada. Judicial review was not available because, although the regulator relied on these examinations, the respondent did not exercise any delegated statutory authority. The same cannot be said of Accreditation Canada when it made the Decision under s. 4(1)1(i) of *O. Reg. 31/24*.

[71] Finally, there is no merit to the Respondents' attempt to distinguish "accreditation" as done by Accreditation Canada and "approval" within the meaning of s. 4(1)1(i) of the regulation. On the record before the Court, there is no meaningful distinction. They are one and the same.

Public Character

[72] I find that this exercise of statutory authority was sufficiently public in character to be amenable to judicial review.

[73] In *Wall*, at para. 14, the Supreme Court of Canada explained the limited reach of public law:

> 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. Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

[74] In *Setia*, at paras. 33-34, the Court of Appeal for Ontario emphasized that a determination of whether any particular decision is subject to public law and its remedies requires a consideration of the relevant circumstances in the particular case and adopted a helpful summary of factors from *Air Canada v. Toronto Port Authority*, 2011 FCA 347, 426 N.R. 131, at para. 60. The court in *Air Canada*, at para. 60, also held that "[w]hether or not any one factor or a combination of particular factors tips the balance and makes a matter 'public' depends on the facts of the case and the overall impression registered upon the Court." The factors are as follows:

(i) the character of the matter for which review is sought;

(ii) the nature of the decision-maker and its responsibilities;

(iii) the extent to which a decision is founded in and shaped by law as opposed to private discretion;

(iv) the body's relationship to other statutory schemes or other parts of government;

(v) the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity;

(vi) the suitability of public law remedies;

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(vii) the existence of a compulsory power; and,

(viii) an "exceptional" category of cases where the conduct has attained a serious public dimension.

[75] Regarding the character of the matter for which review is sought, the Respondents submit that it is essentially a private contractual dispute which only has consequences to a career college and its students. I do not question that there is a significant contractual element to the dispute. More will be said about this when it comes to the motion for a stay of proceedings in favour of arbitration. But that is only one perspective of the matters under review. The other perspective is BizTech's. There is substance to their argument that Accreditation Canada has exercised a statutory power of decision in that the Decision determined "the eligibility of any person or party to receive or continue the benefit of a license"; "licence" being defined as including "any permit, certificate, approval, registration or similar form of permission required by law": s. 1 of the *JRPA*. Said differently, the character of the matter for which review is sought has this dual character, one being of a very public nature.

[76] In *J.N. v. Durham Regional Police Service*, 2012 ONCA 428, 284 C.C.C. (3d) 500, at para. 18, a body that was neither created by statute or regulation—an informal decision-making body created by the Durham Regional Police Service—was found to be a statutory body in that the decision it made about the retention of information held by the police, was one that affected "legal rights and privileges … and in that sense involves the exercise of a 'statutory power of decision'". This ad-hoc body was found to be judicially reviewable even though its connection to the statutory body, the Durham Regional Police Service, was far less direct than Accreditation Canada to the CMRITO, the statutory body, where the regulation contemplates the delegation of statutory authority.

[77] While BizTech submits that the Decision has broader public impact than contended by the Respondents, in administrative law, a decision is a public one "where it involves questions about the rule of law and the limits of an administrative decision maker's exercise of power": *Wall*, at para. 20. Ensuring that a statutory delegate's power to approve programs necessary for professional registration stays within its proper limits has a significant public dimension.

[78] The nature of Accreditation Canada is that of a private entity and not a governmental one. It is an independent, non-governmental, not-for-profit corporation incorporated under the *Canada Not-for-Profit Act*. Accreditation Canada delivers a wide range of assessment programs for health and social service organizations and provides accreditation services to over 200 healthcare educational programs. Therefore, in all these ways, its nature and responsibilities do not lend themselves to a public characterization.

[79] On the other hand, it is the exercise of its power as a delegate pursuant to s. 4(1)1(i), its relationship to the CMRITO, and the CMRITO's role as a regulator of a health profession, that distinguishes Accreditation Canada's Decision in this context from other scenarios where it may offer its services to clients in a private capacity, sometimes just to assist the clients for the purpose of self-improvement. In other words, the accreditation of BizTech is not only shaped by contractual standards and obligations and private discretion but also the public interest in ensuring that trained and qualified health professionals are registered to practice. The discretion it exercised in making the Decision must take this into account.

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[80] Essentially, Accreditation Canada is acting in the place of the CMRITO under s. 4(1)1(i) in determining whether to approve BizTech's DMS Program. As a health profession regulator, there are statutory requirements requiring the CMRITO's exercise of authority to take account of the public interest, including s. 3 of the *RHPA* which mandates the Minister to ensure the health professions are regulated and coordinated in the public interest, and s. 2.1 and s. 3(1) and (2) of the *Code,* which sets out the duty of the CMRITO to serve and protect the public interest in carrying out its objects including in developing, establishing, and maintaining standards for certificates of registration and for programs and standards of practice to assure the quality of the practice of the profession.

[81] If a body exercises powers that do not accrue to private organizations, and that are only vested on the body by statute for the benefit of the public, then it is subject to judicial review. In some instances, a body may have both public and private powers. The body is generally only subject to judicial review when and to the extent that its public powers are in question. When it exercises its private powers, only private remedies are generally available: *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 286 D.L.R. (4th) 129, at paras. 20, 22.

[82] Regarding the factor of compulsion, while BizTech is not compelled to apply to have a DMS program, it remains a practical reality that Accreditation Canada is the only organization through which it could obtain the necessary approval from the CMRITO.

[83] Finally, although the Respondents contend that only arbitration will provide BizTech with the remedy that it seeks (i.e., accreditation or accreditation with conditions), I find that public law remedies remain suitable.

[84] As BizTech pointed out, the issue of whether judicial review is available in these circumstances has close parallels to the *Trinity Western University* line of cases. In those authorities, it was never disputed that the decision to approve university programs by a regulator as prerequisite education for the registration of professionals was properly subject to judicial review. In *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, the British Columbia College of Teachers refused to approve Trinity Western University's application for permission to assume full responsibility for their teacher education program because of Trinity Western University's apparent discriminatory practices against the LGBTQ+ community. In *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250, 126 O.R. (3d) 1 (Div. Ct.), at para. 60, aff'd 2016 ONCA 518, 398 D.L.R. (4th) 489, aff'd 2018 SCC 33, [2018] 2 S.C.R. 453, the benchers of the Law Society of Upper Canada denied accreditation to Trinity Western University's proposed law school due to its code of conduct prohibiting "sexual intimacy that violates the sacredness of marriage between a man and a woman": at paras. 14, 106. No one raised the issue of whether the decision by the Law Society of Upper Canada was sufficiently public in character. Trinity Western was also involved in judicial reviews, in two other provinces, regarding legal education approval, and the issue of whether the decisions were subject to judicial review was never raised: see *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293 and *Trinity Western University v. Nova Scotia Barrister's Society*, 2016 NSCA 59.

[85] Justiciability was not raised as an obstacle to judicial review in any of these cases. Similar to the present matter, the regulators were tasked with approving an education program that determined whether students could be admitted to their profession. This was not considered ancillary to the regulator's mandate as the Respondents contend in this case. Rather, it was integral to its public

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interest objectives. The only difference in the present case is that this responsibility was delegated to an external body, Accreditation Canada.

[86] Looking at the material factors collectively on the specific facts of this case, I find that the balance has been tipped and the Decision is sufficiently public in character to be judicially reviewable.

F. THE MOTION TO STAY IN FAVOUR OF ARBITRATION

[87] Accreditation Canada has brought a motion to stay BizTech's judicial review application in favour of arbitration, pursuant to the parties' contract and s. 7 of the *Arbitration Act*. Subsection 7(1) of the *Arbitration Act* provides:

> **Stay**
>
> 7 (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

[88] The Accreditation Contract includes an arbitration clause at section 21.01 (the "Arbitration Agreement"):

> **DISPUTE RESOLUTION**
>
> 21.01 Subject to the provisions of subsection 21.02, any dispute, claim, controversy or disagreement relating to or arising out of the Contract (a "Dispute") that is not amicably resolved within thirty (30) days from the date of a written request by one Party to the other to attempt to resolve it, shall, unless the Parties mutually agree to prolong the time for amicable resolution, be finally resolved by arbitration before a single arbitrator in accordance with the Arbitration Act (Ontario) or, where Client is domiciled outside Canada, the International Commercial Arbitration Act (Ontario).
>
> 21.02 Any Party (the "Claimant") may commence arbitration of a Dispute by delivering to the other Party (the "Respondent") a written notice (a "Notice of Arbitration"), which shall describe the substance of the Dispute and name three independent and impartial individuals whom the Claimant is prepared to appoint as arbitrator. Within ten (10) days of the receipt of the Notice of Arbitration, the Respondent shall agree to the appointment of one of the three individuals named by the Claimant, failing which either Party may petition the court to have an arbitrator named.
>
> 21.03 The seat of arbitration shall be in Toronto, Ontario. The language of the proceedings shall be English. The decision of the arbitrator, which may include an award of costs in the matter, shall be final and binding upon the Parties and no appeal shall lie therefrom. Judgement upon the award rendered by the arbitrator may be entered in any court having jurisdiction.

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> 21.04 The procedures set forth in Section 21 shall be the sole and exclusive procedures for the resolution of disputes between the Parties, provided that Disputes pertaining to a breach of Confidential Information or to Contractor's intellectual property rights shall be submitted to a court of competent jurisdiction and are not subject to the arbitration agreement provided for in subsection 21.01; and further provided that a Party may in every case seek injunctive or other interim relief from a court of law.

[89] Some preliminary explanation of how I approach this motion is required.

[90] All parties agree that the leading authority to be considered is *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41, 475 D.L.R. (4th) 1 ("*Peace River*"). Both BizTech and Accreditation Canada rely on this case. In *Peace River*, the Supreme Court of Canada considered a motion under the British Columbia *Arbitration Act* to stay an insolvency proceeding in favour of arbitration provided for in the material contract. After a comprehensive exposition of the issue, Côté J. ultimately concluded on the facts of that case, a stay of proceedings in favour of arbitration was not warranted.

[91] After analyzing the policy rationales underlying arbitration and insolvency law, Côté J. concluded that in many cases, given the shared interests between the two areas in expediency, procedural flexibility, and specialized expertise, the parties should be held to their agreement and the presumption in favour of arbitration would lead the court to stay the legal proceedings. However, in certain situations, the court proceeding may take precedence if it was necessary because arbitration would compromise the orderly and efficient conduct of a court-ordered receivership. She stressed the analysis must focus on the facts of the specific case, the particular statutory regimes, and the arbitration agreements in play. In conducting this assessment, the court should have regard to the principles of party autonomy and freedom of contract as well as the policy imperatives underpinning the law under consideration, in that case, bankruptcy and insolvency law: *Peace River*, at paras. 72-75.

[92] Côté J. set out a test to guide the analysis. In her view, the test was implicit in all the various provincial arbitration legislation.

The *Peace River* Test

[93] In *Peace River* at paras. 76-79, a two-step process was established to determine whether court proceedings should be stayed in favour of arbitration:

1. the technical requirements for a mandatory stay of proceedings are met; and

2. none of the statutory exceptions under the *Arbitration Act* apply.

[94] Before analyzing this two-step test on the facts here, the competence-competence principle must be addressed. Competence-competence is a principle that gives precedence to the arbitration process subject to the exceptions where the challenge to jurisdiction involves pure questions of law, or questions of mixed fact and law requiring only superficial consideration of the evidentiary record. If the two exceptions do not apply, the arbitrator should be allowed to exercise their power to rule first on their own jurisdiction: *Peace River*, at paras. 41 to 42; *Uber Technologies Inc. v. Heller*, 2020 SCC 16, 447 D.L.R. (4th) 179, at para. 32. If the exceptions apply, the court may resolve a challenge to the arbitrator's jurisdiction.

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[95] None of the parties contend in this case that the competence-competence principle will be offended if the court determines the issue of the arbitrator's jurisdiction. The questions in this judicial review are of mixed fact and law requiring at best a superficial consideration of the evidentiary record.[1] Acknowledging that the competence-competence principle is not lightly displaced, I find that an exception has been established: *Lochan v. Binance Holdings Limited*, 2024 ONCA 784, at para. 22. Therefore, I will resolve the question of arbitral jurisdiction.

[96] To begin the analysis, the two-step process set out in *Peace River* is mirrored in s. 7(1) and s. 7(2) of the *Arbitration Act*—section 7(1) being the technical requirements and s. 7(2) being the statutory exceptions.

The Technical Requirements

[97] Accreditation Canada must establish an "arguable case" that the following technical requirements to engage a mandatory stay have been met:

1. an arbitration agreement exists;
2. court proceedings have been commenced by a "party" to the arbitration agreement;
3. the court proceedings are in respect of a matter that the parties agree to submit to arbitration; and
4. the party applying for a stay in favour of arbitration does so before taking any "step" in the court proceedings.

Peace River, at paras. 83-85.

[98] No dispute arises that Accreditation Canada has shown the technical requirements, except for the third one. BizTech argues that the issues raised in the judicial review do not fall within the contract that the parties agreed to submit to arbitration. In assessing this submission, both the subject-matter of the dispute and the scope of the arbitration agreement must be considered: *Haas v. Gunasekaram*, 2016 ONCA 744, 62 B.L.R. (5th) 1, at paras. 17-27. For the latter analysis, the normal rules of contract interpretation apply. The interpretation of the contract focuses on the objective intention of the parties. The contract is read as a whole, giving the words their ordinary and grammatical meaning consistent with the known surrounding circumstances and the factual matrix at the time of contract formation: *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, 492 D.L.R. (4th) 389, at paras. 61-65.

[99] The subject matter of the dispute as raised on judicial review is that Accreditation Canada made unreasonable errors in its Decision and failed to afford BizTech the requisite procedural fairness in deciding not to accredit the program. It is submitted that those errors are contrary to the Decision Guidelines, the Program Manual, the Implementation Guide, and its delegated authority from CMRITO, but not to the 2024-2029 Accreditation Contract. Therefore, BizTech argues that the

[1] I appreciate that BizTech has raised unconscionability as a ground to invalidate the arbitration agreement and that in some cases, this would require more than a superficial examination of evidence and is best left to the arbitrator to decide: *Irwin v. Protiviti*, 2022 ONCA 533, at para. 12. However, given the position of the parties, the nature of the issue, and the record before the court, this is not so in the case at bar. In *Uber*, the Supreme Court of Canada was able to determine the issue of unconscionability.

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arbitrator does not have the jurisdiction under the contract to consider procedural fairness or the reasonableness of the Decision as raised in this court proceeding.

[100] I disagree for the following reasons.

[101] First, the language of the Arbitration Agreement is broad in stating that "[a]ny dispute, claim, controversy or disagreement relating to or arising out of the Contract" can be dealt with by the arbitrator. Noteworthy is the fact even if the nexus to the contract is attenuated, so long as it is *related* to the contract, it falls within arbitral jurisdiction: *Haas*, at paras. 28-29, 30-31.

[102] Second, the contract is comprehensive and is comprised of several documents including the Proposal, General Terms and Conditions, and Specific Terms and Conditions. Collectively, these constitute the contract. They must holistically be assessed in determining whether the issues raised in the judicial review would fall within the Arbitration Agreement. A broad contractual scope exists to consider BizTech's complaints.

[103] Third, somewhat unusually, the Proposal, titled the "EQual Accreditation Program", provides a detailed outline of the accreditation process offered. This is included in the contract. Amongst other things, the Proposal includes:

- Accreditation Canada's agreement to provide accreditation services to BizTech using the Health Education Program Standard, a global standard, to guide BizTech in designing and delivering their DMS Program. This standard is to be used in the accreditation of the DMS Program and provides Accreditation Canada with "measureable standards" to assess the Program.

- In addition, EQual's competency profile guidelines, assessment process, and standards are to be used in the accreditation process.

- The steps used in the accreditation cycle are outlined, including the accreditation survey phase, and the duties and tasks of the surveyor's team are set out as being to "assess the program's compliance with the standards." This "comprehensive" assessment gives the basis for the ADC's decision on the Program's accreditation status.

- The ADC subjects the survey report to a "thorough review" and "upon due consideration", the ADC renders a decisive judgment on the program's status.

- The potential outcomes are set out: accredited, accredited with condition and not accredited. An internal appeal option is provided. As well, the program can reapply for accreditation after 12 months.

[104] In my opinion, an examination of the Proposal reveals that the fairness of the process and the merits of the decision arguably fall within the jurisdiction of the arbitrator.

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[105] Fourth, specific clauses in the General Terms and Conditions and the Specific Terms and Conditions further support this conclusion:

> 4.01 Contractor agrees to perform or cause to be performed the Service(s) within the timelines set forth and as described in the Proposal, exercising reasonable skill, care and diligence in accordance with recognized professional and industry standards.
>
> 4.02 Contractor shall provide the Service(s) through competent and, where required, qualified Personnel. In no case shall Personnel be deemed agents or employees of Client, and any representations to the contrary are hereby disclaimed.

[106] Fifth, procedural fairness can be considered as a way of enforcing the terms of a contract: *Wall*, at para. 26.

[107] Finally, the factual matrix does not reveal any circumstance that supports BizTech's position that these matters do not fall within the Arbitration Agreement.

[108] In conclusion, I find that Accreditation Canada has met its burden on all the technical requirements.

The Statutory Exceptions

[109] Even if the technical requirements for a stay are met, the party seeking to avoid arbitration can show on a balance of probabilities that one or more of the statutory exceptions apply: *Peace River*, at para. 88; *Husky Food Importers & Distributors Ltd. v. JH Whittaker & Sons Ltd.*, 2023 ONCA 260, at para. 29.

[110] Section 7(2) of the *Arbitration Act* provides a list of statutory exceptions:

> Exceptions
>
> (2) However, the court may refuse to stay the proceeding in any of the following cases:
>
> 1. A party entered into the arbitration agreement while under a legal incapacity.
>
> 2. The arbitration agreement is invalid.
>
> 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
>
> 4. The motion was brought with undue delay.
>
> 5. The matter is a proper one for default or summary judgment.

[111] Unlike the provision providing statutory exceptions in British Columbia that was under consideration in *Peace River*, it appears that s. 7(2) is permissive and not mandatory, although the degree of the discretion remains an open question given the nature of some of the exceptions: *Pokornik v. SkipTheDishes Restaurant Services Inc.*, 2024 MBCA 3, at para. 27; *Uber*, 2019 ONCA 1, at para. 26; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 73. Regardless of the discretion permitted, the exercise of it is not a live issue in this case.

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[112] Further, I note that the exceptions in the British Columbia *Arbitration Act* are not the same as in Ontario. In *Peace River*, the statutory exception permitted for the dismissal of the stay motion where the arbitration agreement was "void, inoperative, or incapable of being performed." An exception worded in that fashion is absent in s. 7. That being said, the analysis on this issue in *Peace River* remains helpful. Given the purpose and rationale of the *Arbitration Act* and the presumption in favour of arbitration, the exceptions found in s. 7 should be narrowly construed: *Peace River*, at paras. 123, 133.

[113] BizTech's position is that it has proven that the second and third exceptions apply. It first argues that the Arbitration Agreement is unconscionable. In addition, BizTech submits given that the Decision involves an exercise of a statutory power of decision under s. 1 of the *JRPA*, which is properly reviewable by this Court on judicial review, the Arbitration Agreement is contrary to public policy, invalid and/or is not capable of being the subject of arbitration under Ontario law.

[114] Accreditation Canada responds that BizTech has not proven either. It submits that the Arbitration Agreement is not unconscionable. Further, it submits that even if the Decision is judicially reviewable, judicial review is discretionary and does not displace the provisions of the *Arbitration Act*.

Invalidity due to unconscionability

[115] Although paragraph 2 of s. 7(2) uses the term "invalid", at least in terms of the challenge based on unconscionability, it would have similar meaning to "void": *Peace River*, at para. 136. Cases dealing with s. 7(2)2 have done so in the context of whether the arbitration clause is invalid from a traditional contractual perspective. Those perspectives include whether the clause is void *ab initio*, arose due to fraud, whether there was a lack of capacity or whether the contract was unconscionable, etc. The exceptions are all situations "where it would be either unfair or impractical to refer the matter to arbitration": *Wellman*, at para. 65; *Pokornik*, at para. 51.

[116] *Uber* held that the elements of a claim of unconscionability are: (1) an inequality of bargaining power; and (2) an improvident or unfair bargain.

[117] I am not satisfied that BizTech has proven either on a balance of probabilities.

[118] An inequality of bargaining power exists where one party cannot adequately protect their interest in the bargaining process because the relevant disadvantages impaired the party's ability to freely enter or negotiate a contract, compromised the party's ability to understand or appreciate the meaning and significance of contractual terms, or both: *Uber*, at paras. 65-68.

[119] I appreciate that there is a "take-it-or-leave-it" quality to the contract and the contractual process. As well, BizTech needed the accreditation of Accreditation Canada, the exclusive authority in Ontario, to offer the DMS Program to the public. Such circumstances can potentially lead to an inequality of bargaining power: *Uber*, at paras. 88-91. BizTech emphasizes at several points in their submissions that the Accreditation Contract is a contract of adhesion.

[120] I do not agree with this description. I find as a fact that BizTech had an opportunity to negotiate the terms if it chose to do so.

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[121] I place little weight in Mr. Dharna's assertion that he viewed this contract as a "contract of adhesion". This is just a bald assertion and a subjective legal conclusion without setting out the underlying factual foundation to support that view.

[122] The contract named "Proposal for Service" was sent to BizTech on December 7, 2023, with a covering email inviting BizTech to contact Accreditation Canada if they had any questions or clarifications. BizTech did not and signed the contract on March 15, 2024. BizTech had ample time and opportunity to seek advice and negotiate the contract in general, and the Arbitration Agreement in particular, should it have chosen to.

[123] Mr. Savka provided evidence that for other similar "Proposal for Service" contracts for other clients, Accreditation Canada has amended and changed clauses of the contract for those clients including provisions relating to the payment terms, the complaints process, indemnification and limitations on liability. BizTech argues that this evidence should be given little weight due to the lack of detail provided about the other cases. I agree that more detail would have been useful, but this evidence supports my finding that Accreditation Canada was open to negotiate and alter portions of the Accreditation Contract. In other words, it was not a true "take-it-or-leave-it" standard form contract.

[124] Moreover, even in contracts of adhesion, the Supreme Court of Canada said the following in *Wellman*, at para. 46:

> The central theme emerging from *Seidel*, consistent with its predecessors *Dell* and *Rogers*, is that arbitration clauses, even those contained in adhesion contracts (at para. 2), will generally be enforced "absent legislative language to the contrary" (para. 42 (emphasis deleted)). Accordingly, this Court's task is to apply the relevant principles of statutory interpretation and determine whether s. 7(5) of the *Arbitration Act*, which has no equivalent in the B.C. legislation at issue in *Seidel*, contains language overriding the principle that arbitration clauses will generally be enforced.

[125] BizTech is a sophisticated private for-profit corporation with staff and resources to obtain outside assistance. It also had previous experience in having its programs accredited. While its desire to have its DMS Program approved would require Accreditation Canada's services, I am not satisfied that any inequality of bargaining power resulted in it being unable to adequately protect its interest in the bargaining process such that any relevant disadvantage impaired its ability to freely enter or negotiate the contract. Its desire to pursue the DMS Program could not have resulted in the type of vulnerability that the doctrine of unconscionability is intended to capture. Furthermore, there is no evidence that BizTech's ability to understand or appreciate the meaning and significance of the contractual terms was ever compromised. BizTech freely agreed to the Arbitration Agreement: *Adams v. Canada (Attorney General)*, 2011 ONSC 325 (Div. Ct.), at para. 29.[2]

[126] A bargain is improvident if it unduly advantages the stronger party or disadvantages the more vulnerable, measured at the time the contract is formed. Improvidence is assessed contextually and will depend on the facts of the specific case: *Uber*, at paras. 74-75.

[2] A motion to set aside the decision was dismissed 2011 ONSC 7592 (Div. Ct.).

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[127] Having carefully reviewed the Arbitration Agreement in the context of the whole contract, I conclude that Accreditation Canada has not obtained an undue advantage. Equally, BizTech has not been unduly disadvantaged by the terms of the contract. Its terms are fair and reasonable; indeed, the Arbitration Agreement would offer BizTech many advantages from its perspective. The Arbitration Agreement in the immediate case is not an improvident or unfair bargain at the time the contract was entered into. Here arbitration is an accessible, feasible, and a fair dispute resolution system: *Wasylyk v. Lyft*, 2024 ONSC 664, at para. 78.

Subject-matter of the dispute not capable of being the subject of arbitration under Ontario law

[128] BizTech argues that the judicial review of statutory decision-makers cannot be supplanted by a privately negotiated arbitration agreement. Acceptance of such an argument would descend administrative law into chaos—statutory decision-makers could simply delegate away decisions to private parties to avoid judicial oversight. Judicial review would become arbitral review. BizTech submits that it would be legally absurd if the court's constitutionally recognized ability to judicially review decisions was ousted by arbitration provisions. It would sterilize the purpose of judicial review if parties and government actors could contract away the court's right to judicially review public decisions and the public's interest in ensuring statutory decision-makers are held accountable.

[129] Before commencing the analysis, it is important to accurately characterize the legal context involved. In one way, BizTech's argument overly simplifies that context. This is not just a scenario involving two parties who through the operation of private law are attempting to contract out of judicial review. Rather, the *Arbitration Act* infuses that contract with legislative purposes and objectives and provides the true broader legal context.

[130] While BizTech argues that the Arbitration Agreement is invalid both due to public policy and it being a subject matter that is not capable of being arbitrated, I will analyze this under exception 3 of s. 7(2) as this is the essence of the argument.

[131] The application of this exception can be straightforward. In some instances, there may be express legislative override of the parties' right to arbitration: *Peace River*, at para. 145. As an example, in *Wellman*, at para. 54, the plaintiff brought a proposed class action on behalf of consumers and non-consumers (i.e., business customers) with TELUS mobile phone service contracts. The Supreme Court of Canada held that the consumers' arbitration agreements were invalidated by the *Consumer Protection Act, 2002,* S.O. 2002, c. 30, Sch. A. However, noteworthy is the fact that the Court found that a stay was mandatory for the non-consumer class members pursuant to s. 7 of the *Arbitration Act*. For other examples where there is a legislative override see *Seidel v. Telus Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at paras. 5-7; *Briones v. National Money Mart Co. et al*, 2014 MBCA 57, 306 Man. R. (2d) 129, at para. 36.

[132] In this case, there is no statute that provides similar express language as found in the *Consumer Protection Act*. Therefore, the application of this exception on the facts of this case is more complex and nuanced.

[133] When it comes to the stay of this judicial review proceeding, the starting point of the analysis is that judicial review by the courts is protected by s. 96 of the *Constitution Act, 1867*. It is a cornerstone of our justice system. And legislative lawmakers cannot remove the court's ability to

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conduct judicial review: *Ontario Place Protectors v. Ontario*, 2025 ONCA 183, at para 33; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 563, at para. 24. Thus, the fact the *JRPA* does not include mandatory language excluding arbitration is legally irrelevant given the constitutional status of judicial review, its relationship to the rule of law and the status of superior courts. As Lorne Sossin J.A. explains in *Practice and Procedure Before Administrative Tribunals* (Toronto: Ontario: Thomson Reuters), § 38:2. Nature, Source and Purpose of Judicial Review:

> Judicial review refers to the constitutional power, right and responsibility of the superior courts to ensure that state authority is exercised in accordance with the law. It is a vital aspect of the rule of law. As such the ability of courts to judicially review state action is not dependant on a legislature creating such a right. Unlike a right of appeal, which exists only to the extent that a legislature creates it, judicial review exists independent of legislative desire or creation as an inherent power of the superior courts flowing from sections 96 to 101 of the *Constitution Act, 1867*.
>
> By virtue of the concept of the rule of law, all exercises of public authority must find their source in law. Furthermore, all decision-making powers have legal limits, derived from the enabling legislation, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep these limits. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[134] The *JRPA* is thus distinct from other statutes in this regard.

[135] However, this recognition does not answer the question before me. As urged in *Peace River*, the answer depends very much on the legal context, the terms of the arbitration agreement, and the specific facts of the case.

[136] The constitutional right to seek judicial review does not mean "a right to require the court to undertake judicial review" regardless of the nature of the question before it: *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 30; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at p. 93.

[137] Discretion is inherent in undertaking the task of judicial review. At minimum, the court must determine whether judicial review is appropriate. In deciding that, if the court determines that one of the discretionary bases for refusing a remedy is present, they may decline to consider the merits of the judicial review application. The court also has the discretion to refuse to grant a remedy, even if they find that the decision under review is unreasonable: *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, 489 D.L.R. (4th) 191, at para. 54; ss. 2(2), (5) of the *JRPA*.

[138] BizTech relies on s. 6(1) of the *JRPA* which states that an application for judicial review "shall" be made to the Divisional Court. BizTech relies on this section to argue that there is no discretion as to which forum holds jurisdiction over judicial review, even though the choice of remedy on an application for judicial review is discretionary under s. 2 of the *JRPA*.

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[139] This argument is not persuasive. Section 6(1) of the *JRPA* only makes mandatory the Divisional Court as the proper forum to hear judicial review applications in Ontario. It does not make judicial review *per se* mandatory.

[140] Further, BizTech's argument that the court, not an arbitrator, must be the body to conduct a judicial review is a mischaracterization of the role of the arbitrator. The arbitrator is not conducting a judicial review that is meant to be conducted by a s. 96 court; rather, it is arbitrating the contract or the dispute.

[141] All of this is to say what is fundamentally protected is access to judicial review, not an unqualified right to judicial review.

[142] There is nothing in the *Arbitration Act* that precludes a stay of proceedings from applying to a judicial review proceeding. Section 7(1) applies to a "proceeding", a broad term which is left undefined.

[143] The Supreme Court of Canada in *Wellman* sets out the purposes and history of the Ontario *Arbitration Act* both generally and more particularly of s. 7. Fundamentally, this legislative scheme rests on a policy of party autonomy and through provisions like s. 7, the legislative and judicial preference that the parties to a valid arbitration agreement should abide by their agreement is given effect: *Wellman*, at paras. 51-53; *Peace River*, at para. 10.

[144] Giving effect in the right case to an arbitration agreement even if a public body exercising statutory authority is involved is consistent not only with the primacy given to arbitration under the *Arbitration Act* but also with the exercise of judicial discretion where there is an appropriate alternative remedy to judicial review. Put another way, it is appropriate to consider the *Arbitration Act* and a valid arbitration agreement in the exercise of the discretion in deciding whether judicial review is appropriate. Such an approach reflects what *Yatar*, at para. 64, described to be the "balancing exercise" that is judicial review in the following quote citing *Strickland v. Canada (Attorney General)*, 2015 SCC 37:

> This Court in *Strickland*, at para. 43, also emphasizes the appropriateness of judicial review in the circumstances, referring to a "balancing exercise":
>
> > The categories of relevant factors are not closed, as it is for courts to identify and balance the relevant factors in the context of a particular case: *Matsqui*, at paras. 36-37, citing [*Minister of Energy, Mines and Resources*], at p. 96. Assessing whether there is an adequate alternative remedy, therefore, is not a matter of following a checklist focused on the similarities and differences between the potentially available remedies. The inquiry is broader than that. The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an

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> inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant ..." [*Minister of Energy, Mines and Resources*], at p. 96). [Emphasis added in *Yatar*.]

[145] In determining whether to exercise that discretion, the constitutional nature of that power, as urged by BizTech, is respected. As stated in *Yatar* at para. 61:

> In *Vavilov*, this Court held that "because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely" (para. 24). Professor Paul Daly argues that "[w]here the judicial review jurisdiction of the courts has been successfully ousted by statute ... the legislature has provided a particular channel for oversight of the legality, rationality and procedural fairness of administrative action" (*Understanding Administrative Law in the Common Law World* (2021), at p. 188 (emphasis in original)). In other words, there was an appropriate alternative forum or remedy.

[146] The *Arbitration Act* may not always provide a suitable alternative channel for the oversight of the legality, rationality, and procedural fairness of administrative action. Much will depend upon the terms of the contract, the arbitration agreement in issue, the nature of the interests involved, and the factual circumstances of the case. In some situations, judicial review should be entertained over arbitration. To put it in the words of s. 7(2), the subject matter in those circumstances is not capable of being subject to arbitration. Support for this can be found in Alexander M. Gay, Alexandre Kaufman A.J., and James Plotkin, *Arbitration Legislation of Ontario: A Commentary*, 4th ed, (Toronto: Thomson Reuters, 2023), at pp. 218-219, where the writers state that a dispute may not be capable of being the subject of arbitration under Ontario law due to the public interest at stake or the fact that "the very nature of the subject-matter cannot be entertained by an arbitral tribunal, such as a criminal proceeding or a right that has been conferred by statute and which is inalienable."

[147] However, if on the specific facts, as *Peace River* insists the focus be on, the *Arbitration Act* and the arbitration agreement in issue viewed carefully in context provides an appropriate alternative forum or remedy, then arbitration should proceed as the subject matter is capable of being arbitrated under Ontario law; essentially on the grounds that it does not infringe the rule of law, the principle that underpins judicial review: *Wilson v. Atomic Energy of Canada Ltd*., 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 28, citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 27-28.

[148] In this case, looking at some of the typical factors in the exercise of discretion set out in *Strickland*, at para. 42, many support the finding that arbitration is an alternative remedy adequate to justify a discretionary refusal to hear a judicial review application. These include the fact the alternative remedy is convenient and flexible. A single Toronto arbitrator can be chosen. The rules and procedures will be determined at the arbitration. It is designed to be conducted expeditiously; unless consented to by the parties, the arbitrator will decide within 30 days. The remedial capacity of the arbitrator is broad and it includes the awarding of costs. The grievances of BizTech can be determined by the arbitrator. Perhaps most importantly, BizTech can nominate three independent and impartial potential arbitrators of which Accreditation Canada may select one to be the arbitrator. This is an invaluable mechanism to select an arbitrator with the appropriate experience and/or expertise in

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such areas as educational institutions, assessment of regulatory programs, and health sciences; expertise that a court may well not have. The nature of the errors alleged can be adjudicated as appropriately by an arbitrator as by a court. Indeed, a reasonableness review on judicial review would likely be less exacting than one conducted under arbitration. While the judicial review is presently before the court, the court system must be mindful about the judicious use of limited judicial resources in cases such as this where scrutiny of thousands of pages of documents submitted by BizTech to Accreditation Canada on the Decision is required—the interpretation of which is unguided or unfiltered by any expert or expertise.

[149] While BizTech argues that the arbitration process will not be as transparent as judicial review or include the CMRITO as a party, for an alternative forum or remedy to be adequate, neither the process nor the remedy need be identical to those available on judicial review. In *Strickland*, at para. 42, the Court adopts the following framing of the question: "in each context the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant's grievance?"

[150] In my opinion, the alternative remedy of arbitration is adequate to address BizTech's grievances.

[151] In coming to this conclusion, I am appreciative of the fact that the parties have not brought to the attention of the Court any authority relating to a stay of a judicial review proceeding under s. 7(1) of the *Arbitration Act* or other arbitration legislation.[3] I do note the decision of *Knox v. Conservative Party of Canada*, 2007 ABQB 180, [2007] A.J. No. 303 (Alta. Q.B.), at paras. 67-72, where a judicial review application brought against a political party's decision to acclaim a candidate was dismissed as the court concluded that a referral to an arbitration panel, as permitted by the party's constitution and rules, afforded a suitable alternative remedy for judicial review. On appeal, 2007 ABCA 295, 286 D.L.R. (4th) 129, at paras. 27-28, the Alberta Court of Appeal varied the decision finding that these decisions of the political party were not sufficiently public in character to be judicially reviewable and since the judge below had found the referral to arbitration to be proper, the arbitration legislation applied.

[152] Also, I have not overlooked BizTech's submission that there are exceptional circumstances present such that, despite there potentially being an alternative remedy, an application for judicial review should nonetheless proceed: *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541, 111 O.R. (3d) 561, at para. 70. The exceptional circumstances are said to be the Superintendent's Decision to revoke BizTech's status as a career college to offer the DMS program thereby triggering an automatic refund of student fees leading to alleged devastating consequences for BizTech. Similar concerns were raised in BizTech's motion to stay the Superintendent's Decision pending the decision by this Court. For largely the reasons set out in our decision dismissing the

[3] A similar argument did come up in *Ontario (Minister of Northern Development, Mines, Natural Resources and Forestry) v. HugoMB Contracting Inc*., 2023 ONSC 3513. In that case, Justice Centa had to determine the scope of an arbitration agreement and whether the Ministry's decision to disqualify it from bidding on additional government contracts was arbitrable under the agreement. As a part of the Ministry's challenge to the arbitrator's assertion of jurisdiction, it argued that its disqualification decision was "not capable of being subject of arbitration under Ontario law" pursuant to s. 7(2) of the *Arbitration Act* as it was made pursuant to its authority under the *Ministry of Natural Resources Act*. The Ministry argued, in much the same way BizTech does, that this was therefore a statutory power of decision which could only be subject to judicial review. Justice Centa did not weigh in on this issue as he found in favour of the Ministry on other grounds. At footnote 19 of the decision, he writes that "Given my findings above, it is not necessary for me to address this argument and nothing in these reasons should be taken as me expressing a view on the merits of that argument."

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motion, I am not persuaded that these constitute exceptional circumstances: *BizTech Institute Inc. v. Accreditation Canada*, 2025 ONSC 2455 (Div. Ct.).

[153] Finally, I observe that some of the factors used in the exercise of the judicial discretion in this context would parallel to a degree the analysis in *Peace River* regarding whether an arbitration agreement is "incapable of being performed" or would be rendered "inoperative" by the courts. Some factors set out in *Peace River* at para. 155, as modified to the context of judicial review, that may be relevant in determining whether an arbitration agreement is inoperative under s. 7(2) include: (a) the effect of arbitration on the integrity of the judicial review proceedings; (b) the relative prejudice to the parties to the arbitration agreement; (c) the urgency of resolving the dispute; (d) the effect of a stay of proceedings arising from the judicial review proceedings; and (e) any other factors the court considers material in the circumstances. Each factor may carry more or less weight depending on the circumstances of the case.

[154] In conclusion, I am not satisfied that BizTech has met its onus in establishing a statutory exception. This not being a "clear case" where the statutory exception applies, a stay of proceedings is warranted: *Peace River*, at para. 89; *Dalimpex Ltd. v. Janicki*, (2003) 64 O.R. (3d) 737 (C.A.), at para. 22; *Goberdhan v. Knights of Columbus*, 2023 ONCA 327, at para. 15.

G. THE EXERCISE OF THE DISCRETION TO DECLINE JUDICIAL REVIEW

[155] In the alternative, as the Respondents have submitted, if the motion were to be dismissed and a stay of proceedings under the *Arbitration Act* not ordered, I would have exercised the court's discretion not to conduct the judicial review largely for the reasons outlined above: *Volochay*, at paras. 68-71. Based on the above reasoning, had I found the judicial review not stayed under s. 7(1) of the *Arbitration Act*, I would have declined to conduct the judicial review given the alternative and suitable remedy of arbitration.

H. THE JUDICIAL REVIEW OF THE REVOCATION DECISION OF THE SUPERINTENDENT

[156] As agreed to between BizTech and the Superintendent, BizTech's judicial review of the Superintendent's Decision depends upon the success of the judicial review of Accreditation Canada's Decision.

[157] Given that I would stay BizTech's application for judicial review of the Decision, I would dismiss the application for judicial review of the Superintendent's Decision, without prejudice to BizTech re-instituting a judicial review depending on the outcome of any further events such as arbitration.

I. DISPOSITION

[158] For the reasons given, I would grant the motion and stay the judicial review of the Decision and dismiss the judicial review of the Superintendent's Decision.

[159] I wish to say that depending on the outcome of any future procedures undertaken by the parties, amongst other available avenues for relief, it remains open for BizTech to seek the lifting of the stay of proceedings by this Court. Stays granted under s. 7(1) of the *Arbitration Act* can be lifted and the issues dealt with in court if the arbitrator did not deal with them: *Ticketops Corp. v. Costco*

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Wholesale Corp., 2023 ONSC 1191, at para. 21; *MTCC No. 1171 v. Rebeiro*, 2022 ONSC 503, at para. 48; *Star Woodworking Ltd. v. Improve Inc.*, 2021 ONSC 4940, at para. 62; *El-Halabi v. Reslan*, 2024 ONSC 5341, at para. 53.

[160] Indeed, the Supreme Court has emphasized that a core feature of a stay as opposed to a dismissal is that a stay can be lifted. It does not represent the end of a claim. In *Uber*, at para. 252, the Court stated: "A court stays a proceeding that has been commenced in contravention of an arbitration agreement – it does not dismiss the action: *Arbitration Act*, s. 7. This has important practical ramifications because a stay can be lifted. … It is therefore wrong to conceptualize a successful motion for a stay as the end of the line for the plaintiff's pursuit of their claim."

[161] A final remaining matter is BizTech's motion to stay the Decision pending arbitration. This can be dealt with briefly. As noted above, previously, the motion to stay the Superintendent's Decision was denied. Assuming any jurisdiction remains on the part of the Court to stay the Decision pending arbitration, nothing in these reasons changes our view that resulted in the previous dismissal of the stay motion against the Superintendent's Decision. No stay of the Decision pending any arbitration is granted.

[162] As agreed to by the parties, BizTech will pay CMRITO $10,000 all-inclusive in costs. BizTech will pay Accreditation Canada $30,000 all-inclusive in costs. No costs are sought by or are awarded against the Superintendent.

_____
Nakatsuru J.

I agree: _____
S. Bale J.

I agree: _____
S. Shore J.

Released: May 22, 2025

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CITATION: BizTech v. Accreditation Canada, 2025 ONSC 2689
DIVISIONAL COURT FILE NO.: DC-25-00000091-00JR
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ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

S. Bale, S. Nakatsuru, S. Shore JJ.

BETWEEN:

BIZTECH INSTITUTE INC.

Applicant

ACCREDITATION CANADA, COLLEGE OF MEDICAL RADIATION AND IMAGING TECHNOLOGISTS OF ONTARIO, and SUPERINTENDENT OF CAREER COLLEGES

Respondents

REASONS FOR JUDGMENT

Released: May 22, 2025