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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

CO-EDITORS: **ANDREA GONSALVES** & **JUSTIN SAFAYENI**

STOCKWOODS barristers

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CONTRIBUTORS


Ryann Atkins


Karen Bernofsky


Caitlin Milne


Dragana Rakic

Ensuring confidentiality concerns do not defeat meaningful judicial review: *Minister of Citizenship and Immigration et al. v. Canadian Council of Refugees et al.*, 2021 FCA 72

Facts: The applicants brought applications for judicial review challenging the constitutionality of provisions in federal immigration legislation that prevent certain refugee claimants from seeking refugee protection in Canada when they arrive from a country designated as a "safe country" under the *Immigration and Refugee Protection Regulations*.[1]

The focus of the application was on refugee claimants arriving from the United States, a designated safe country, who have been ruled ineligible for refugee protection in Canada. The applicants challenged the decision of an officer at an entry point who found the individual claimants' claims for refugee protection to be ineligible for referral to the Refugee Protection Division under s. 101(1)(e) of the *Immigration and Refugee Protection Act*,[2] given the status of the United States as a

[1] SOR/2002-227
[2] SC 2001, c 27

designed safe country under s. 159.3 of the Regulations.

The applicants argued that the designation of the United States as a safe country under s. 159.3 of the Regulations was *ultra vires* the authority granted under the Act. They also argued that the ineligibility for refugee protection that resulted from designating United States as a safe country was a violation of ss. 7 and 15 of the *Charter of Rights and Freedoms*.

The Federal Court dismissed the *ultra vires* argument, but allowed the applications on the ground that the impugned provisions of the Act and the Regulations violated s. 7 of the *Charter*. The Minister of Citizenship and Immigration appealed on the s. 7 issue; the applicants cross-appealed on the *ultra vires* issue.

Decision: Appeal allowed; cross-appeal dismissed.

Much of the Federal Court of Appeal's analysis deals with matters of pure constitutional law. This summary will focus only on aspects of the decision that relate to administrative law.

The Court of Appeal dismissed the applicants' claim relating to s. 7 of the *Charter* on the basis that the true alleged constitutional defect was not the provisions of the legislative scheme, but rather flowed "from how administrators and officials are operating the legislative scheme". The Court of Appeal relied on the fact that s. 102(3) of the Act provides for "regular" and "thorough" reviews of a country's designation as a safe country, against specific statutory criteria (para. 89). The Court of Appeal held that the proper recourse for the claimants' was to target s. 102(3) reviews and related administrative conduct, or the lack thereof, and/or to seek an order requiring the Governor in Council to revoke the designation of the United States as a safe country and a declaration that it should have done so earlier.

In support of this alternative recourse, the Court of Appeal spent considerable time addressing the applicants' concerns that a s. 102(3) review would never be a practical or effective process given the Minister's ability to assert privilege over key documents or redact them. The Court of Appeal listed several tools at its disposal to ensure "judicial reviews are available, effective and fair" even when dealing with highly confidential or privileged information, and rejected the proposition that judicial review could not be meaningful or effective just because it engages sensitive or privileged information or documents. Claims of privilege will be carefully scrutinized and adverse inferences may be drawn from a consistent pattern of asserting privilege in the face of demands for certain documents or information. Orders can be crafted that protect confidentiality while permitting sufficient access to confidential material to facilitate effective and meaningful judicial review. An *amicus* may be appointed to receive unredacted or mostly unredacted copies of privileged material and make submissions. *Ex parte* hearings may be necessary and useful in some circumstances. Ultimately, "the measures to which a court can resort are limited only by its creativity and the obligation to afford procedural fairness to the highest extent possible" (at para 120).

No party had seriously addressed s. 102(3) reviews in their written material. Given that the s. 102(3) review process was a central focus of the Court of Appeal's concerns in the case and "the most relevant part of the legislative scheme" in its view, the Court of Appeal recognized that simply proceeding to oral argument raised potential procedural fairness concerns. It addressed these concerns by issuing a direction ahead of the hearing inviting the parties to make additional submissions on the nature, role and significance of s. 102(3) reviews.

The Court of Appeal dismissed the cross-appeal, concluding that the Regulation was not *ultra vires* the Act. The applicants argued that the Regulation was *ultra vires* because the United States no longer met the statutory criteria for a designated safe country, but the Court of Appeal held that the legislation required only that the United States be assessed according to those criteria at the time of the designation.

Commentary: This decision has given constitutional and immigration law scholars much to digest, but it also raises some interesting general administrative law issues.

First, the Court of Appeal's rather lengthy discussion concerning the means by which the s. 102(3) review process could be subjected to meaningful judicial review is worth a careful read for any practitioner dealing with cases that engage sensitive, confidential or privileged information or documents. The Court's message can be boiled down to a very simple one: *we will find a way to make it work* — and the reasons go on at some length exploring various alternatives based on past jurisprudence. While every case will require a tailored approach to some degree, the Court of Appeal's reasons are a forceful reminder that a right to judicial review should not be thwarted by a respondent's refusal to provide an applicant or the court with access to the information required for meaningful review, at least in the absence of express statutory provisions precluding the disclosure of documents or information.

Second, the Court of Appeal's recognition of potential procedural fairness concerns ahead of the hearing, and the way it dealt with them, teach a good lesson for administrative decision makers. On judicial review, procedural fairness concerns normally arise in the context of how one party has treated another at an earlier stage of the proceeding; for example, an applicant may claim they received inadequate disclosure, were not provided with an oral hearing at first instance, or did not receive proper notice of all allegations against them in a disciplinary process. But procedural fairness does not end when a judicial review begins. Nor is a reviewing court free from the requirement to run a procedurally fair hearing process.

In this case, the Court of Appeal recognized that its fundamental concerns had been barely addressed by the parties. It arguably would have been unfair to raise this concern at the hearing of the appeal for the first time, and so the Court released a direction and provided the parties fair warning so that they could prepare for and properly address the issue. Administrative decision makers may avail themselves of the same or similar measures to

ensure that the parties before them are given a fair chance to address any issues of concern — particularly if those issues may be central to the resolution of the dispute, and if the parties have barely addressed them at all in their original submissions.

Federal Court cannot usurp the powers of Administrative Decision-Makers: *Canada (Attorney General) v Kattenburg*, 2021 FCA 86

Facts: In 2019, wines that were produced in the West Bank were being sold in Canada with the label "Product of Israel". The complainant, K, filed a complaint with the Canadian Food Inspection Agency (CFIA) (and later appealed the CFIA's decision to the CFIA's Complaints and Appeals Office (CAO)), asserting that such labels are incorrect because the wines in question are produced in Israeli settlements in the West Bank.

The CFIA and CAO concluded that the wines could be sold as "product of Israel". K sought judicial review in the Federal Court.

The Federal Court found that the decision was unreasonable. The Court's reasons stated: "[a] decision that allows Settlement Wines to be labelled as "Products of Israel" thus does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. It is, rather, unreasonable." The Court quashed the decision and remitted the matter back to the CAO. K appealed to the Federal Court of Appeal.

Decision: Appeal Dismissed.

The issue on appeal was whether the Federal Court identified and properly applied the relevant standard of review in light of the new guidance in *Vavilov*. The Federal Court correctly identified that the standard of review was reasonableness.

Applying that standard, the Court of Appeal noted that there is a duty on administrative decision makers to "provide a reasoned explanation for the decisions they make in discharging their statutory mandate" and "if the reasons read in conjunction with the record do not make it possible to understand the … reasoning on a critical point, the decision fails to meet the standard of reasonableness on that account alone". The CAO did not provide that explanation. The CAO had to interpret and apply the labelling requirements under the *Food and Drug Act*[3] and the *Consumer Packaging and Labelling Act*[4] and decide whether the labels in issue were false or misleading under the relevant sections of those statutes. The record shows that the position of Global Affairs Canada with respect to the *Canada-Israel Free Trade Agreement*[5] played a determinative role in the CAO's decision but the CAO's reasons do not explain why the Agency concluded that the treaty was determinative of the issue that it was required to decide under its labelling legislation.

The process of justification, which binds administrative decision-makers, does not necessarily require exhaustive or lengthy reasons and any reasons are to be reviewed in

[3] RSC 1985, c F-27
[4] RSC 1985, c. C-38
[5] Can TS 1997 No 49 (CIFTA)

light of the record and submissions made by the parties. But whatever form this takes, where, as here, legislative interpretation is in issue, the administrative decision-maker must demonstrate that its interpretation of the relevant provisions is consistent with their text, context and purpose. Here this demonstration is totally lacking. The Court simply has no idea how the CASI construed its legislation in coming to the conclusion that the labels are compliant, including how it addressed the pivotal issues: false and misleading as to what and from whose eyes and from which perspective is the question whether the labels are false or misleading to be assessed?

The Court of Appeal then turned to the remedy granted by the Federal Court. When confronted with the absence of reasoned explanation for a decision, the reviewing court should not itself determine what the proper outcome should have been and provide the justification—that is the role of the decision maker. The appropriate remedy is to send the matter back to the decision maker so it can determine the matter for itself based on a full record. This is not the type of case where this step can be bypassed because the outcome is self-evident. In the course of its reconsideration of the matter, the Agency will want to receive submissions from the affected parties.

While the Court of Appeal, like the Federal Court judge, remitted the matter back to the CAO, it expressly stated that the CAO was not bound by the Federal Court's reasons (including the comment that a decision that allows Settlement Wines to be labelled as "Products of Israel" does not fall within the range of possible, acceptable outcomes. It will be open to the CAO to come to whatever decision it considers appropriate based on a reasonable interpretation and application of the legislation to the facts.

Commentary: When the elected officials in the legislature delegate decision-making authority to administrative decision makers, reviewing courts must respect those institutional choices and resist straying beyond their supervisory role. This was an overarching theme of the majority's reasons in *Vavilov*.

Of course, there may be circumstances where a court can provide useful guidance to an administrative decision makers that will avoid the parties wasting time and judicial resources by ending up back in a judicial review or appeal a second time. The Federal Court of Appeal's decision does not preclude reviewing courts from offering such guidance. Rather, the Court appears to be saying that courts should refrain from expressly limiting the options available to administrative decision makers where the decision makers have failed to provide the underlying reasons for their decisions. On reasonableness review, courts should also generally refrain from offering their own conclusive interpretation of a decision maker's home statutes—their role on judicial review is to assess the reasonableness of the decision makers' interpretations of their home statutes, not to declare what the court thinks the statute means.

To paraphrase US Supreme Court Chief Justice Roberts, this decision reminds the Courts that their role on judicial review is to call balls and

strikes, not to tell administrative decision makers how to pitch or bat.

Judicial review denied where statutory appeal available but unsuccessful: *Yatar v. TD Insurance Meloche Monnex*, 2021 ONSC 2507 (Div Ct)

Facts: Y was injured in an automobile accident in February 2010 and sought benefits under the *Statutory Accident Benefits Schedule*.[6] In a letter sent in January 2011, her insurer, TD, denied her application for three categories of benefits as a result of her failure to submit a completed disability certificate. Y then attended two examinations by TD's chosen assessor, after which TD again denied her claim for two of the benefits for which she had applied. TD initially confirmed that she was eligible for the third form of benefits: income replacement. However, a few months later TD deemed Y ineligible for income replacement benefits too.

Y initiated various forms of dispute resolution that were available at the time under the SABS and the *Insurance Act*[7]. In 2018, and following extensive amendments to the *Insurance Act* and the SABS, Y made an application to the Licence Appeal Tribunal. The LAT held a preliminary hearing to determine whether Y was precluded from proceeding with her application because she missed the statutory two-year limitation. The LAT adjudicator found that the January 2011 letter contained a clear and equivocal denial of benefits. As a result, the limitation period started to run at that time and expired several years before Y initiated the application. The adjudicator dismissed the application. The same adjudicator dismissed Y's request for reconsideration.

Y appealed to the Divisional Court under s. 11(6) of the *Licence Appeal Tribunal Act, 1999*[8] which grants a right of appeal from a decision of the LAT relating to a matter under the *Insurance Act* on a question of law only. Y also sought judicial review in the event the Court determined that LAT's errors were errors of fact or mixed fact and law.

Decision: Appeal and judicial review application dismissed.

Y's notice of appeal did not identify any errors of law. It recited findings of fact made by the adjudicator and then baldly asserted that the adjudicator erred in law, without identifying the legal error or any extricable legal principle. On a statutory appeal limited to questions of law alone, the court considers whether the decision-maker correctly identified and interpreted the governing law or legal standard relevant to the facts found by the decision-maker. In this case, all parties accepted that the applicable legal principles were correctly set out in the LAT's reasons.

There are limited circumstances in which findings of fact, or the administrative decision-maker's assessment of evidence, may give rise to an error of law alone for the purposes of appeal. That is not the case here.

[6] Accidents on or After November 1, 1996, O Reg. 403/96 ("SABS")

[7] RSO 1990, c I.8

[8] SO 1999, c 12, Sched. G

If the adjudicator considered all the mandatory or relevant evidence, but reached the wrong conclusion, or if the adjudicator erred in applying the law (the correct legal standard) to the facts, then the error is one of mixed law and fact. The issue raised in this appeal is whether TD's January 2011 letter constituted a valid denial of benefits under SABS. The argument is that the LAT reached the wrong conclusion considering all the evidence. That is not a question of law: whether there has been a valid denial of benefits under SABS on the facts accepted by the LAT is a question of mixed fact and law.

There is no error of law, and the statutory appeal is dismissed on that basis.

Y argued that if the LAT's errors involve questions of fact or mixed fact and law than the remedy lies with her application for judicial review. TD raised a preliminary objection to the judicial review application on the grounds of prematurity because Y had not exhausted all adequate alternative remedies to judicial review, including the statutory appeal. However, since the court dismissed the appeal, it can decide to hear the judicial review application without a prematurity concern.

The statutory appeal on questions of law does not deprive the court of jurisdiction to consider other aspects of the LAT's decision in judicial review proceedings. Subsection 280(3) of the *Insurance Act* and s. 2(1) of the *Judicial Review Procedure Act*[9] preserve the right of judicial review despite any right of appeal. However, even though judicial review has not been altogether precluded, the court must consider the intention of the Legislature in limiting statutory appeals to questions of law. Judicial review is a discretionary remedy. The court must assess whether the statutory appeal is an adequate alternative remedy that would justify a decision to decline judicial review.

In deciding whether to hear the judicial review application, the court considered several factors. First, it gave weight to the legislative intent to limit the court's review of LAT decisions on statutory accident benefits to questions of law only, and to allow the LAT to function with a minimum of judicial interference on questions of fact and mixed fact and law. Relatedly, the purposes and policies underlying the statutory scheme prioritize access to justice in a quicker and more efficient manner.

Second, the court considered the scope of LAT's statutory reconsideration power, which encompasses errors of fact or law likely to affect the result. The adequacy of the statutory appeal as an alternative remedy includes consideration of both the appeal and the first level reconsideration. The internal standard of review for LAT's reconsideration power is akin to correctness, such that there has already been one level of review of the LAT decision by a decision-maker with broad remedial powers.

Third, the court considered the nature of the allege errors in this case. The errors complained of are question of fact and mixed fact and law involving the assessment of evidence. Whether on a statutory appeal limited to questions of law, or on judicial

[9] RSO 1990, c J.1

review, the court will be similarly deferential to the administrative decision maker in respect of the type of errors alleged here.

Finally, the court considered the systemic difficulties associated with duplicative judicial reviews and appeals. The concurrent pursuit of two remedies has triggered two sets of procedures and the filing of voluminous materials. The duplication of materials is a heavy burden on the parties and the court in terms of time, cost and efficiency.

Taking all these factors into consideration, the court concluded that judicial review of a LAT SABS decision is available only in exceptional circumstances, if at all. There are no exceptional circumstances here.

Commentary: In *Canada (Minister of Citizenship and Immigration) v Vavilov* the Supreme Court distinguished the approach to substantive review of administrative decisions that are subject to statutory appeal mechanisms from those that are not. It considered this to be a principled position that gives effect to the legislature's intent: by creating a statutory appeal mechanism, the legislature has chosen to subject the administrative regime to appellate court oversight. The Supreme Court also recognised that statutory appeal mechanisms are often circumscribed and may be limited in scope. The existence of a circumscribed right of appeal in a statutory scheme does not, on its own, preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply.

Yatar explores the interplay between statutory appeal mechanisms and judicial review applications where the appeal mechanism is limited in scope and an individual seeks to challenge the administrative decision on grounds falling outside the appeal provision.

Several important points emerge from the decision. First— and consistent with the long-standing principle that judicial review remedies are discretionary—there is no absolute right to judicial review where a statutory appeal mechanism exists but the specific basis on which the decision is challenged does not come within the scope of the appeal. Despite the comments in *Vavilov* that judicial review is not precluded where there is a circumscribed right of appeal, the door will not be readily opened to duplicative appeals and applications.

A second point here is that, absent exceptional circumstances, it will be very difficult to challenge through judicial review matters that fall outside the scope of a statutory appeal mechanism. This point is not without some controversy. By enacting a statutory appeal mechanism limited to questions of law, the legislature has chosen to subject the administrative regime to court oversight on an appellate basis. The oversight will be conducted on a correctness basis. However, it does not clearly follow that the legislature intended to make it *more difficult* to review questions of fact or mixed fact and law. The court's decision in *Yatar* does not simply review the alleged errors of fact and mixed fact and law on a deferential basis; it refuses to consider them entirely. This is not readily reconcilable with the search for legislative

intent that *Vavilov* sets as the "polar star" of judicial review. Indeed, one can question how an alternative forum that does not even allow for questions of fact or mixed fact and law to be raised could be considered an "adequate alternative" to judicial review, where they can be raised.

At the same time, the court's concerns about the burden on parties and the court of duplicative proceedings, and the legislative intent of quicker, more efficient access to justice under the SABS regime, are compelling. *Yatar* is a clear signal to litigants and counsel that judicial review applications and appeals in respect of the same administrative decision should not be routine.

Another interesting point is the court's comment that whether on a statutory appeal limited to questions of law, or on judicial review, the court will be similarly deferential to the administrative decision maker on questions of fact or mixed fact and law. There has been debate since *Vavilov* on the extent to which the appellate standard of review for questions of fact and mixed fact and law (palpable and overriding error) differs from the judicial review standard of reasonableness. Both are highly deferential and there will be little, if any, meaningful distinction between them in most cases. However, the right of appeal in *Yatar* is limited to questions of law. For an error of fact or mixed fact and law to amount to a question of law is a different matter. The issue is not about two comparable standards of review—it is that under judicial review there is a highly deferential standard, while on appeal there is essentially *no* right to raise questions of fact or mixed fact and law at all, unless they rise to the level of errors of law.

These points are among the many that remain to be settled as the jurisprudence evolves in the *Vavilov* era. What is clear is that litigants and counsel should be very cautious about bringing judicial review applications where a statutory appeal mechanism exists—even if the precise grounds for challenging the decision do not fall within the appeal provision—and must be prepared to address why the appeal mechanism is not an adequate alternative remedy and why conducting judicial review would not undermine legislative intent.

Proper approach to a joint submission on penalty: *Timothy Edward Bradley v. Ontario College of Teachers*, 2021 ONSC 2303 (Div Ct)

FACTS: B, a teacher with the London District School Board, was the subject of disciplinary proceedings before the Ontario College of Teachers in relation to allegations of harassment by a female teaching candidate assigned to work with him.

At the hearing, B and the prosecutor presented a joint penalty submission that, among other terms, proposed a two-month suspension of B's certificate of qualification and registration that would start to run immediately after the discipline hearing. This meant that the two-month suspension would coincide with the summer break.

The Discipline Committee expressed concern over the fact that the suspension would be served over the summer months and rejected the proposal, directing instead that B start

serving his suspension on September 3, 2019. The Discipline Committee gave two reasons for doing so: (1) the summer suspension would cause the public to lose confidence in the College's disciplinary process; and (2) the penalty objectives of specific deterrence, general deterrence, rehabilitation, and protection of the public interest would not be sufficiently met if Bradley served his suspension over the summer months.

B appealed to the Divisional Court.

DECISION: Appeal allowed on consent. Order made requiring B's suspension to run for two months beginning on July 9, 2020.

The Discipline Committee erred in its application of the principles that apply when a discipline body decides to reject a joint submission on penalty. The governing authority on this issue is the Supreme Court of Canada's decision in *R v Anthony-Cook*.[10] Although *Anthony-Cook* was decided in the criminal law context, it has been applied by disciplinary bodies in Ontario, including by the Discipline Committee of the College of Teachers. In *Anthony-Cook* the Supreme Court adopt a "public interest" test for rejecting a joint submission. Joint submissions on sentence are to be accepted "unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest". The Court emphasized that this is a very stringent test.

The Discipline Committee acknowledged *Anthony Cook* as the governing authority on the question of whether it could reject the joint submission, but it failed to recognize the stringent nature of the public interest test. The test mandates that joint submissions must be accepted unless the proposed penalty is "so 'unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down'." The Discipline Committee failed to articulate any basis for finding that serving the two-month penalty over the summer would meet that threshold.

The Discipline Committee ignored and failed to distinguish other decisions in which two-months suspensions were served over the summer. The joint submission could not be considered "unhinged" if the Committee imposed a similar penalty in similar cases. The Discipline Committee impermissibly focussed on the "fitness" of the penalty; in *Anthony-Cook* the Supreme Court explicitly rejected a fitness test. Further, it was impermissible for the Divisional Court to "tinker" with the proposed penalty by changing the start date for the suspension, after finding that the two-month suspension was an appropriate length. The Committee found that a suspension in the summer was largely "symbolic", without having regard to the submissions made by the parties that the penalty would remain on the appellant's record and would be publicly available. The Discipline Committee erroneously suggested that the parties should

[10] 2016 SCC 43

have shared more information about the circumstances that led to the joint submission. There is no suggestion in *Anthony-Cook* that the parties are required to share that information with the court in order to justify the joint submission. Finally, the Discipline Committee had no regard to the benefits and importance of joint submissions on penalty, and no regard to how its decision could impact those benefits.

Any disciplinary body that rejects a joint submission on penalty must apply the public interest test and must show why the proposed penalty is so "unhinged" from the circumstances of the case that it must be rejected. In this case, the Discipline Committee misunderstood the stringent public interest test, and impermissibly replaced the proposed penalty with its own view of a more fit penalty. This was an error.

COMMENTARY: In this decision, the Divisional Court reinforces the high standard that must be met before a professional discipline body may reject a joint submission on penalty. Many discipline tribunal have for years applied the public interest test affirmed in *Anthony-Cook* and this decision leaves no doubt that it sets out the proper approach to a body's consideration of a joint submission.

As a matter of policy, the practice of obtaining guilty pleas (or, equally, admissions of professional misconduct) in exchange for a joint submission on penalty is itself in the public interest, as it benefits not only to the professional whose conduct is at issue, but also complainants, witnesses, the regulator, and the administration of justice as a whole. In order to achieve those benefits, the member who agrees to plead guilty must have a "high degree of certainty" that the joint submission will be accepted. While the Supreme Court in *Anthony-Cook* noted that judges are not obliged to go along with joint submissions that are unduly lenient or unduly harsh, this does not invite decision makers to revise or reject a proposed penalty simply because they have a different view as to the fitness of the sentence. The required level of disconnect between the penalty and the circumstances is high, and failure to apply that test stringently is a legal error.

The Divisional Court's decision also offers guidance on the considerations that should be reflected in a tribunal's reasons in those rare causes where the stringent test to reject a joint submission is met. For instance, it is best practice for the reasons to grapple with other cases that appear to be similar and resulted in a penalty similar to the one the tribunal has rejected. The tribunal should explain why those cases are distinguishable. The reasons should demonstrate that the tribunal considered all of the parties' submissions before rejecting the joint submission, and why those submissions did not satisfy it that the joint submission would not be contrary to the public interest. Where the tribunal accepts parts of the joint submission but changes others, the reasons should also show that the changes are not the result of impermissible "tinkering" to suit the panel's views of a "fit" penalty, but rather were necessary because the penalty would otherwise be contrary to the public interest.

Limits on court's jurisdiction to grant declaratory relief: *Daneshvar v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 3186 (Div Ct)

FACTS: The applicant, D, brought a judicial review application challenging Ontario's distribution of the COVID-19 vaccines. He alleged that Ontario had failed to ensure that COVID-19 vaccines were distributed equitably in the province, taking into account various equity barriers that disproportionately affect people of colour, people with disabilities, people who do not speak English, and people in less wealthy neighbourhoods. D did not challenge the priority criteria established for eligibility, but rather the concern that vaccines were not being distributed equitably amongst those eligible for the vaccine.

D asked the court to make a number of broad declarations, including that Ontario (and specifically the Ministry and Minister of Health) are responsible for vaccine delivery in the province and therefore are responsible for ensuring that vaccines are distributed equitably in accordance with the *Charter* and the Ontario *Human Rights Code*. D did not seek individual relief with respect to his own circumstances. He had not yet sought to obtain a vaccine.

Ontario took the position that the application had no merit for a number of reasons, including because D had failed to identify the exercise of a statutory power or refusal to exercise a statutory power giving rise to the judicial review application, such that the court did not have jurisdiction over the issues raised.

DECISION: Application dismissed.

The Divisional Court did not have jurisdiction to grant the relief sought because the declarations D sought did not arise from the exercise or refusal to exercise a statutory power.

The Divisional Court is a court of limited statutory jurisdiction. The *Judicial Review Procedure Act* sets out the Divisional Court's jurisdiction over applications for judicial review. Subsection 2(1) of the Act gives the Court its powers to grant relief. Subsection 2(1)2 of Act provides that declaratory relief is limited to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

Before the Divisional Court can grant a declaration on an application for judicial review, two conditions must be satisfied. First, the declaratory relief sought must arise from a statutory power. Second, there must be an actual exercise, refusal to exercise, or proposed exercise of that statutory power. In other words, the Divisional Court does not have jurisdiction to make declarations about abstract questions regarding government action or inaction.

D's application failed to meet both conditions. For the most part, the relief sought did not relate to the exercise of any statutory powers. To the extent it did, there had been no exercise, refusal to exercise, or proposed exercise of said power. The fact that D advanced *Charter* arguments did not change the scope of the court's jurisdiction on judicial review.

The one statutory power identified in D's application was the Minister of Health's power to conduct assessments and issue written directions to public health units under ss. 82 and 83 of the *Health Protection and Promotion Act*.[11] However, s. 83 is premised on the exercise of the Minister's discretionary power under s. 82 to appoint assessors. There was no evidence that the Minister had exercised, proposed to exercise, or refused to exercise those powers. She had not appointed any assessors nor had anyone (including the applicant) requested that she appoint assessors. The rest of the application sought declaratory relief that was not tied to any specific statutory power.

The court declined to determine whether Ontario has legal responsibility for the equitable distribution of vaccines in the province; whether the *Charter* imposes any obligations on Ontario in the context of COVID-19 distribution; and whether D had standing in circumstances where he had not yet been affected by the issues he raised (as he had not yet sought to obtain a vaccine) and did not seek public interest standing.

COMMENTARY: This decision emphasizes the importance of grounding any request for declaratory relief on judicial review in a clearly identifiable statutory power. This is a foundational principle of the law judicial review, which by its nature is a limited and discretionary remedy concerned with the legality of administrative action. Judicial review is not an all-encompassing vehicle to challenge any and all choices made by government actors. If there is no clear statutory power "hook" on which to base the request for relief, it may be necessary to look to other possible forums to achieve the desired aims. It is possible that a proceeding challenging Ontario's involvement in the COVID-19 vaccination rollout that is framed differently and brought in another forum—such as a rule 14 application based on an alleged failure to comply with *Charter* obligations or a human rights application—could yet find success.

This decision also illustrates courts' skepticism of requests for broad declaratory relief arising from abstract questions regarding government action or inaction. Even if a statutory power properly grounded the application in this case, it was evident that the court was not inclined to grant the type of expansive declaratory relief requested. As Justice Favreau put it: "It is not the role of the Divisional Court (or the Superior Court) to make broad declaratory pronouncements in the face of abstract legal questions." Courts will be more inclined to grant declaratory relief where it is specific to the parties and the issue before the court.

Impermissible delegation of decision making authority: *Doe v. the University of Windsor*, 2021 ONSC 2990 (Div Ct)

Facts: D, a student at the University of Windsor, filed a complaint alleging that another student, R, had sexually assaulted her.

Pursuant to the University's *Procedures for Addressing Student Non-Academic Misconduct*, the complaint was directed to a first-level decision-maker (the "AVP"), who appointed an investigator. The investigator obtained

[11] RSO 1990, c H.7

evidence from D. R provided no evidence. In her report, the investigator summarized D's evidence and commented positively on her credibility, but concluded that sexual assault was not established. The AVP, on the basis of the report, dismissed the complaint.

D was granted leave to appeal the AVP's decision to a University Adjudicator. The appeal proceeded *de novo*. R again tendered no evidence, while the AVP conceded that the appeal should be allowed.

The Adjudicator, however, found that it was unsafe to base liability on the investigator's report, as it had concluded that sexual assault was not made out. The Adjudicator adjourned the matter to await the outcome of the ongoing criminal prosecution of R for sexual assault and ordered that if R were to be acquitted, D's complaint would be dismissed, but that if R were to be convicted, he would be sanctioned by the University.

D sought judicial review in the Divisional Court.

Decision: Application granted.

The Court based its decision to dismiss the application on two grounds. First, the Adjudicator had improperly delegated his decision-making authority to the criminal courts. The Court noted that, traditionally, this issue would have been characterized as a jurisdictional question, reviewed for correctness, but following *Vavilov*, should be reviewed on a reasonableness standard. It is well-established that administrative decision makers cannot delegate their decision making authority to another body in the absence of clear and express authorization. Here, the *Procedures* provided the Adjudicator with jurisdiction over appeals and nowhere indicated that that authority could be delegated. The Adjudicator's effective abdication of its decision making function to the criminal process was therefore unreasonable.

Second, even if it were open to the Adjudicator to delegate his decision, it would still have been unreasonable to delegate it to a criminal court, given the higher standard of proof in the criminal process than in the university discipline process.

The Court remitted the matter to a new Adjudicator for redetermination.

Commentary: This decision provides general guidance to administrative decision makers regarding delegation, as well important subject-specific guidance for discipline bodies adjudicating complaints of sexual violence.

First, the decision affirms that administrative decision makers cannot delegate their decision-making authority absent clear and express statutory authorization to do so. Although no longer treated as a jurisdictional issue, whether delegation is clearly and expressly granted by statute may often be clear cut, such that there is only one reasonable conclusion on the issue. Where delegation is not permitted, an adjudicator cannot abdicate their decision-making responsibility by letting their decision simply follow the outcome of a different adjudicative process or by uncritically accepting the

reasoning or conclusions of an investigative report.

Second, although ultimately not the basis on which the application was allowed, the Divisional Court made a number of comments critical of the investigator's and the AVP's reasoning on the issue of whether sexual assault had been established. The Court expressed the view that D's evidence, if believed, clearly supported her complaint, and noted that in concluding otherwise, the investigator and the AVP relied on myths and stereotypes about how sexual assault complainants behave. The Court's comments make clear that these myths and stereotypes, which courts have long worked to eradicate from the criminal law, likewise have no place in the adjudication of sexual violence complaints in administrative contexts.

Also notable for administrators considering sexual assault complaints is that the Court appears to have endorsed the AVP's position in the appeal to the Adjudicator that in the discipline context, like in a civil proceeding for sexual battery, "consent" is an affirmative defence that must be established by the defendant once the plaintiff makes out a *prima facie* case of sexual assault. In other words, the plaintiff does not bear any onus of proving a *lack* of consent. The investigator concluded that there was "insufficient evidence to establish that [D]'s sexual interaction with [R] was not consensual, which prompted the Court to comment that the investigator had no awareness of where the burden of proof on this issue lies.

Since 2016, Ontario's *Ministry of Training, Colleges and University Act* has required all universities receiving public funds to have a sexual violence policy that sets out the process for addressing complaints of sexual violence involving students. While policies at different universities may differ in some respects, the Divisional Court's comments, in large part, were not made with specific reference to the University of Windsor's *Policy on Sexual Misconduct*, and instead can best be understood as guidance applicable to all university decision makers, as well as other disciplinary decision makers, addressing allegations of sexual violence.

CO-EDITORS

Andrea Gonsalves
416.593.3497
andreag@stockwoods.ca

Justin Safayeni
416.593.3494
justins@stockwoods.ca

THE NEWSLETTER

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