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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

CO-EDITORS: **ANDREA GONSALVES , JUSTIN SAFAYENI & DRAGANA RAKIC**

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CONTRIBUTORS

Spencer Bass

No deference to reviewing courts on selection and application of standard of review: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42

Facts: H was addicted to alcohol. She was suspended for coming to work while under the influence of alcohol. After disclosing her addiction and refusing to agree to abstain and seek treatment, H's employer terminated her employment. H's union filed a grievance and H's employment was reinstated on terms effectively requiring that she abstain and seek treatment. H was then terminated for an alleged breach of those terms.

H filed a discrimination complaint with the Manitoba Human Rights Commission, to be heard by an adjudicator appointed under the *Human Rights Code*.[1] The employer contested the adjudicator's jurisdiction, arguing that the matter fell under the exclusive jurisdiction of a labour arbitrator appointed under the collective agreement. The *Human Rights Code* adjudicator concluded that she had jurisdiction because the essential character of the dispute was an alleged human rights violation. On the

[1] C.C.S.M. c. H175.

merits, the adjudicator found the employer had discriminated against H.

The employer brought an application for judicial review. The reviewing court set aside the adjudicator's decision, concluding she lacked jurisdiction over the dispute. H appealed and the Court of Appeal for Manitoba, which allowed H's appeal, remitting the matter back to the reviewing court to determine whether the adjudicator's decision on the merits of the discrimination complaint was reasonable.

The employer appealed, arguing, among other things, that the Supreme Court's approach to the appellate standard of review in administrative law cases should be modified.

Decision: Appeal allowed and reviewing court's order reinstated in part (per Wagner C.J. and Abella, Côté, Brown, Rowe and Kasirer JJ.; Karakatsanis J. dissenting).

The Court declined the appellant's invitation to revisit the approach to appellate review of a reviewing judge's decision set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*.[2] Under the *Agraira* approach, an appellate court examines whether the reviewing judge chose the correct standard of review and whether they applied it properly. The approach affords no deference to the reviewing judge's selection and application of the standard of review, and amounts to a *de novo* review of the administrative decision by the appellate court.

However, a majority of the Court did state that there may be good reason to apply the *Housen v. Nikolaisen* standards of appellate review (rather than the *Agraira* approach) where a reviewing judge acts as a decision maker of first instance. That situation did not arise in the present case.

The Court confirmed that the *Human Rights Code* adjudicator's decision as to whether she had jurisdiction was reviewable on a correctness standard because the decision concerns the jurisdictional lines between two administrative bodies. The employer had argued that the jurisdictional inquiry requires correctly identifying the essential character of the dispute, which is a fact-specific inquiry that ought to attract deference. The Court rejected this approach, concluding that applying a reasonableness standard to this component of the analysis would undermine the objective of ensuring one adjudicative body does not trespass on the jurisdiction of another. Notwithstanding the fact-specific nature of the essential character inquiry, its connection to a determination of jurisdiction requires that correctness review be applied.

A detailed discussion of the substantive issues raised in this case, including the application and interpretation of *Weber v. Ontario Hydro*,[3] lies beyond the scope of this newsletter but will be of particular interest to those who practise in the area of labour arbitration and human rights law. In brief, the Court established and clarified a two-step analysis to resolve jurisdictional contests between labour arbitrators and competing statutory tribunals:

[2] 2013 SCC 36.

[3] [1995] 2 S.C.R. 929.

(i) the relevant legislation must be examined to determine the existence and scope of a labour arbitrator's exclusive jurisdiction; and (ii) if such exclusive jurisdiction exists, then it must be determined whether the dispute in question falls within the scope of that jurisdiction, which will generally extend to all disputes that arise, in their essential character, from the interpretation, application, or alleged violation of the collective agreement. Here, the essential character of H's complaint is that it arises from her employer's exercise of rights under, and from its alleged violation of, the collective agreement — the type of claim that falls solely to a labour arbitrator to adjudicate.

Comment: This case had been closely watched by administrative law practitioners to see whether the Court would take up the appellant's direct attack on the *Agraira* approach to appellate review of a reviewing court's decision. The Court was not prepared to do so, although its reasons for declining to revisit *Agraira* were more cursory than compelling. The Court merely noted that *Agraira* "is a recent decision of the Court and remains good law", failing to respond to the appellant's argument that *Agraira* renders the first level of review a "necessary but feckless step" in the judicial review process and that there is no principled reason that precludes applying the *Housen* standards to an appeal from a judicial review decision.

Perhaps the Court's reluctance to grapple with *Agraira* is due to the reality that whether an *Agraira* or *Housen* approach was applied would have made no difference to the appeal before the Court: under *Housen*, correctness would also have applied to the question whether the adjudicator had jurisdiction. Whatever motivated the Court's approach to this issue, the practical impact of the Court's decision is that *Agraira* has received a renewed imprimatur of judicial approval. It is not going to change anytime soon.

At the same time the majority blessed the *Agraira* approach, it also voiced support for an important exception to that approach by observing that the *Housen* standards may be appropriate where a reviewing judge acts as a decision maker of first instance. These situations are not commonplace, but they do arise. One example is the process under s. 44 of the *Access to Information Act*,[4] which allows a third party with a recognized interest in certain records to apply to the Federal Court for judicial review of the decision of the head of a government institution to disclose those records. The statute provides that an application under s. 44 is "to be heard and determined as a new proceeding".

The Federal Court of Appeal recently considered an appeal from a reviewing judge's decision under s. 44 in *Canada (Health) v. Elanco Canada Limited*.[5] The Court of Appeal carefully reviewed *Agraira* and emphasized that it was decided in the context of a "classic" appeal of a judicial review decision. It would be inappropriate to apply that approach in the context of an appeal from an application brought under s. 44, the Court of Appeal explained, since there is no reason why findings of fact or mixed fact and law made by the lower court judge in that context should be

[4] R.S.C. 1985, c. A-1.
[5] 2021 FCA 191.

treated any differently than those made in any other matter commenced as a new proceeding in the Federal Court. Accordingly, the Court of Appeal applied the *Housen* standards of appellate review — an approach that the Supreme Court in *Horrocks* appears to have endorsed.

Limited appeal rights and judicial review jurisdiction: *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161

Facts: Best Buy Inc. imported metal and wooden floor stands for flat-panel televisions. Canada Border Services Agency classified the stands as "furniture" for tariff purposes. Best Buy appealed the classification to the Canadian International Trade Tribunal ("**Tribunal**"), which made a decision classifying television stands imported by Best Buy as "parts" of televisions. Canada appealed the Tribunal's decision to the Federal Court of Appeal under s. 68 of the *Customs Act*,[6] which permits an appeal on a "question of law".

Decision: Appeal dismissed (per Near J.A., Gleason and LeBlanc JJ.A. concurring).

Canada had commenced its appeal before the Supreme Court of Canada released its decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*.[7] Canada argued that the appeal raised a question of law.[8] However, Canada also argued that the Tribunal's application of the law to the facts was unreasonable. Canada further argued that judicial review on questions of mixed fact and law that do not rise to the level of errors of law is available through an application for judicial review under s. 28(1)(e) of the *Federal Courts Act*.[9]

All three judges of the Federal Court of Appeal agreed that the appeal did not raise a question of law. They split on the issue whether the court had jurisdiction to hear an application for judicial review.

Justice Near noted that although the Federal Court of Appeal had in the past reviewed Tribunal decisions for issues of mixed fact and law, those decisions preceded the Supreme Court's decision in *Vavilov*. Following *Vavilov*, which reiterated that respect for legislative intent is the "polar star" of judicial review, lower courts should no longer effectively ignore the language of statutory appeal mechanisms and treat appeals as, essentially, applications for judicial review.

The *Customs Act* has a privative clause in s. 67(3) that would preclude the court from reviewing Tribunal decisions through any procedure other than a statutory appeal provided for in the Act. The provisions of the Act indicate Parliament's intent to limit judicial review of Tribunal decisions to statutory appeals on questions of law. If Parliament's institutional design choices are to be respected, factual issues and questions of mixed fact and law for which no legal question can be extracted must not be subject to review

[6] R.S.C. 1985, c. 1 (2nd Supp.).
[7] 2019 SCC 65.
[8] Specifically, whether the Tribunal erred by disregarding a Classification Opinion by the World Customs Organization classifying television stands as "furniture".
[9] R.S.C. 1985, c. F-7.

by the court. The court may intervene in a decision of the Tribunal only if it discloses a reviewable error of law. There is no review of Tribunal decisions for errors of fact or mixed fact and law that are not so egregious as to rise to the level of errors of law.

Justice Near was satisfied that his conclusion does not offend the rule of law. In *Crevier v A.G. (Québec)*,[10] the Supreme Court held that a legislature cannot completely oust judicial review through a privative clause. *Crevier* stands for the proposition that there must always be at least some prospect or degree of review; it does not imply that the legislature cannot limit or preclude judicial review for certain types of issues. A statutory scheme that allows for appeal of an administrative decision on a question of law meets the constitutional threshold articulated in *Crevier*.

Section 18.5 of the *Federal Courts Act* makes clear that the traditional judicial review remedies provided for in that Act are unavailable when another statute provides for an appeal from an administrative decision.

Accordingly, the Court has no jurisdiction to conduct judicial review of the Tribunal's decision in respect of the issues of fact and mixed fact and law raised by Canada.

Justice Gleason (with LeBlanc J.A. concurring) concluded that notwithstanding the limited appeal right in s. 68 of the *Customs Act*, the court had jurisdiction to consider applications for judicial review raising questions of fact or mixed fact and law; however, such review would require filing an application for judicial review.

The dicta in *Vavilov* does not support Near J.A.'s reasoning., especially when that decision is understood in the context of how administrative law has developed in Canada. Years ago, the Supreme Court determined that privative clauses could not shield patently unreasonable administrative decisions from review because that would violate the rule of law. Patently unreasonable decisions included both those tainted by patently unreasonable legal determinations and patently unreasonable factual determinations.

In *Vavilov*, a majority a the Supreme Court held that "[t]he existence of a limited right of appeal, such as a right of appeal on questions of law or a right of appeal with leave of the court, does not preclude a court from considering other aspects of a decision in a judicial review proceeding."[11] A complete bar on the availability of judicial review for any type of issue would offend the rule of law. Furthermore, *Vavilov* contemplates that factual issues may give rise to unreasonable decisions.

An approach that permits judicial review for unreasonable factual determinations is consistent with s. 18.5 of the *Federal Courts Act*, which provides that access to judicial review is barred only to the extent a right of appeal otherwise exists in respect of an issue.

Factual errors made by the Tribunal may be reviewed for reasonableness in a judicial review application, while errors of law are

[10] [1981] 2 S.C.R. 220.

[11] At para 45. This point was reiterated at para. 52.

reviewable on the correctness standard through a statutory appeal. Any overlap in proceedings can be addressed through joinder of the appeal and application, or other appropriate directions. The scope of review for factual errors is limited, however, to a narrow range of cases beyond those where there is a complete lack of evidence on a point. Unreasonable factual determinations are those where the decision maker has fundamentally misapprehended or failed to account for the evidence before it.

Commentary: The two sets of reasons in *Best Buy* present conflicting answers to the question whether a court has jurisdiction to conduct judicial review of decisions on grounds that fall outside the scope of a limited appeal right. The question is perhaps one of the most puzzling to have arisen since *Vavilov* in which, as Gleason J.A. notes in *Best Buy*, the majority appears to have expressly contemplated that issues falling outside a limited appeal right could be judicially reviewed.

Both sets of reasons in *Best Buy* draw support from earlier case law. Justice Near rightly notes that respect for legislative intent is at the heart of *Vavilov*'s framework for substantive review. If the legislature created a limited appeal right, does it not signal a legislative intent that those questions be subject to court supervision, but not so questions falling outside the scope of that appeal clause? If the legislature intended for questions of fact or mixed fact and law to be subject to review, presumably it would have included them in the scope of the appeal right. Indeed, it is possible that questions of fact or mixed fact and law could be subject to lower scrutiny through judicial review on the reasonableness standard than if they were encompassed in an appeal right and subject to review on the palpable and overriding error standard — suggesting a direct contradiction to the legislative intent that such questions *not* be subject to review.

Justice Near also draws on prior case law in noting that the rule of law guarantees some scope for judicial review, but not that every issue will always be subject to review. It is on the basis of this reasoning that statutory provisions requiring a court to grant leave to bring judicial review applications do not offend the rule of law. Yet in drawing meaning from the privative clause in the *Customs Act*, Near J.A.'s reasons clash with *Vavilov* (and a long line of cases before it), which refuses to give effect to privative clauses according to their terms.[12] This is, arguably, an incoherence in the *Vavilov* logic more than it is a flaw in Near J.A.'s reasoning.

Justice Gleason's reasons are consistent with a long line of cases before and up to *Vavilov* holding that courts can review factual determinations for reasonableness. At least as far back as *National Corn Growers Assn. v. Canada (Import Tribunal)*,[13] the principle that courts could intervene in an administrator's patently unreasonable interpretation of a statute was expanded to encompass review of factual determinations. Judicial review of factual determinations can be justified on the basis that unreasonable factual findings fall

[12] In *Vavilov*, at para 49, the majority holds that privative clauses serve no independent function in the standard of review analysis.
[13] [1990] 2 S.C.R. 1324.

outside the authority of a statutory decision maker. Justice Gleason's reasons are also more consistent with s. 18.5 of the *Federal Courts Act* and paragraphs 45 and 52 of *Vavilov*.

One consideration not fully accounted for in Gleason J.A.'s reasons is that some factual findings rise to the level of errors of law and can therefore be appealed through an appeal route that is limited to questions of law. That being the case, it is not clear why the rule of law is jeopardized if less egregious factual errors cannot be reviewed through any procedure; after all, the legislature placed those questions in the hands of the administrator to decide, not the courts. While Gleason J.A.'s reasons are arguably more consistent with the jurisprudence as it has developed, it does seem to undermine legislative intent to permit judicial review of factual errors where the legislature deliberately chose to carve them out of an appeal clause that expressly defines the role of the courts in the decision making scheme.

Justice Gleason's reasons also give rise to potential practical concerns. Parties and counsel who want to "cover their bases" are apt to bring parallel appeals and judicial review applications, and then argue all available grounds of appeal or review. This undermines the legislative intent to limit the scope of appeals. Although Gleason J.A. stressed that the range of questions of fact or mixed fact and law that may be reviewed successfully for reasonableness will be narrow — and although there may be few cases where a finding of fact or mixed fact and law is found to be unreasonable while not rising to the level of an error of law — those challenging administrative decisions are unlikely to be deterred from bringing parallel appeals and judicial reviews when challenging arguably factual issues.

Recently, the Ontario Divisional Court took a different approach in *Yatar v. TD Insurance Meloche Monnex*.[14] Justice Kristjanson held that although reviewing courts have jurisdiction to review issues of fact or mixed fact and law falling outside the scope of a limited appeal provision, the jurisdiction is discretionary and should be exercised only in exceptional circumstances. That approach, lying in a middle ground between the approaches of Near J.A. and Gleason J.A. is perhaps the best way for courts to navigate both the theoretical and practical challenges this issue raises. The reasoning in *Yatar* has been followed in several other Divisional Court cases,[15] suggesting that the approach has taken hold in Ontario — while the federal courts will be moving in a different direction after *Best Buy*. The issue is ripe for direction from the Supreme Court.

Vavilov approach to statutory appeals to a court does not apply to internal appeals: *E.Z. Automotive Ltd. v. City of Regina*, 2021 SKCA 109

Facts: EZ owns a property where it operates an autobody repair business. This use of the

[14] 2021 ONSC 2507 (Div. Ct.). See the commentary on that decision in Issue 29 of this Newsletter.
[15] Including most recently in *Peel Standard Condominium Corporation No. 779 v. Rahman*, 2021 ONSC 7113 (Div. Ct.). The applicant in that case has filed a motion for leave to appeal to the Court of Appeal.

property has always been permitted under the applicable zoning bylaw.

EZ also stores junked vehicles on the same property. EZ considered the storage of junked vehicles to fall within the same allowable use as running the repair business, since it uses the junked vehicles as a source of parts for its repair business.

The City considered that the storage of junked vehicles amounted to EZ operating a "salvage yard", which is not permissible under the zoning bylaw. A City development control officer issued an Order to Comply requiring EZ to "cease operation of the salvage yard". EZ appealed that Order to the Development Appeals Board ("**Board**"), pursuant to s. 219 of the *Planning and Development Act, 2007* ("***PDA***").[16] The Board dismissed the appeal on the condition that the City specify the number of junked vehicles that could remain on EZ's property in order for EZ to access parts for its repair business.

Both parties appealed the Board's decision to the Planning Appeals Committee of the Saskatchewan Municipal Board ("**PAC**"), pursuant to an internal statutory appeal provision set out in s. 226 of the *PDA*. The PAC allowed the City's appeal and reinstated the original Order to Comply without conditions.

EZ was granted leave to appeal the PAC's decision to the Court of Appeal for Saskatchewan on certain specific questions, including whether the PAC applied the proper standard of review when assessing the Board's decision.

Decision: Appeal allowed (per Barrington-Foote, Caldwell and Tholl JJ.A.).

The Court's decision focused mainly on what standard of review should apply to appeals from the Board to the PAC.

After conducting a thorough review of the sometimes conflicted recent jurisprudence on this issue, the Court unanimously concluded that *Vavilov*'s key holding on appellate standards of review — that the *Housen v. Nikolaisen* standards should apply "where the legislature has provided for an appeal from an administrative decision to a court"[17] — does not apply to internal appeals within an administrative regime. *Vavilov*'s standard of review discussion concerns the relationship between administrative decision makers and reviewing courts. It is not concerned with internal standards of review.

Furthermore, there is no presumption of reasonableness review when dealing with internal appeals. The reasonableness standard is rooted in the fact that all administrative decisions are subject to *judicial* review by superior courts to maintain the rule of law. That rationale does not apply to internal appellate review by an administrative body, which does not exist unless legislation provides for it.

[16] S.S. 2007, c. P-13.2.

[17] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 37.

Instead, determining the appropriate standard of review on an internal appeal is an exercise in statutory interpretation to discern the respective roles the legislature intended different bodies in the administrative regime to fulfill. This is consistent with *Vavilov*'s emphasis on the need to respect legislative intent, subject only to constitutional limits.

In this case, the legislative scheme establishes that the Board receives evidence, hears witnesses, and creates the record, while the PAC decides on the basis of that record and hears new evidence only in narrow circumstances. The PAC's function is a traditional appellate one: to review for error, not to conduct hearings *de novo*. More broadly, the purpose of the Saskatchewan Municipal Board (of which the PAC forms a part) is to maintain and promote good governance in accordance with the rule of law by a large number and variety of local authorities. The creation of consistent jurisprudence by the PAC is one of the mechanisms that advances that purpose. This calls for an internal standard of review of correctness on questions of law.

The conclusion that the PAC should apply the correctness standard on questions of law is also supported by the fact that the legislature has provided for appellate oversight by the Court of Appeal on questions of law. If the PAC were obliged to apply a reasonableness standard on questions of law, then the questions for the Court of Appeal on any appeal would not be whether the Board or the PAC erred in interpreting the law, but rather whether the PAC adopted and correctly applied the reasonableness standard in considering the Board's decision. As a result, the first and last word on interpretation of legislation and by-laws would rest with the Board, within the limits of reasonableness, and the Court of Appeal would be unable to effectively exercise its appellate oversight function.

With respect to questions of fact or mixed fact and law where there is no extricable question of law, the appropriate standard of review at the PAC's internal appeal stage is reasonableness. A "palpable and overriding error" standard would limit the PAC's role beyond what the legislature intended, given the broad supervisory purpose of the Saskatchewan Municipal Board and the requirement that its members have expertise. These considerations support the conclusion that the PAC should be able to intervene if it determines that there is an unreasonable finding of fact or of mixed fact and law.

In this case, the PAC applied the correct standard of review. But the PAC erred in finding that the Board had erred when it interpreted the zoning bylaw as permitting some junked vehicles to remain on the property. The governing legislation permits land used for the purpose of operating an autobody repair business to also be used for maintaining an inventory of the parts and materials, including junked vehicles, that could reasonably be expected to be used in the course of that business.

Commentary: This decision provides welcome clarity on a fundamental question that has split courts and tribunals alike in the post-*Vavilov* era. In the run-up to offering its final

conclusion, the Court's reasons provide a comprehensive overview of the competing authorities, making particular mention of several tribunal decisions — including one from the Ontario Law Society Tribunal Appeal Division —importing the *Vavilov* statutory appeals framework to internal appeals.

The Court provides compelling justifications as to why *Vavilov*'s approach to the standard of review for statutory appeals from an administrative body to a court should not be applied to internal appeals. Some courts in other jurisdictions have reached the same conclusion, but without the same depth of reasoning, jurisprudential review, or analysis.[18] In yet other jurisdictions, including Ontario, appellate courts have yet to seriously grapple with the question at all. Against this backdrop, the *EZ Auto* decision may well be a significant force in turning the judicial tide against importing *Vavilov*'s appellate judicial review framework into the internal appeal context. Just as importantly, it may influence administrative bodies adjudicating internal appeals to reconsider their standard of review approach, even in advance of having an appellate court in their jurisdiction address the issue.

The Court's decision also provides some interesting guidance on how to discern legislative intent when it comes to standards of review, having regard to the overall statutory scheme, the powers enjoyed by different decision makers, and the purpose those powers are designed to serve. In particular, the Court's conclusion that a statutory right of appeal from an internal appeal body to a court on questions of law militates strongly in favour of correctness review at the internal appeal level could have significant implications. If this perspective were to be adopted more broadly by courts and tribunals in other jurisdictions, then the standard of review analysis for internal appeals on questions of law would be rather easily resolved in many cases."

Issue estoppel can bar civil claims seeking to relitigate decisions of administrative officers: *Waraich v Director of Employment Standards*, 2021 MBCA 82

Facts: W was a businesswoman who ran a commercial cleaning business. An employment standards officer under the Manitoba *Employment Standards Code*[19] initiated an investigation into W's business concerning allegations of unpaid wages. The officer ultimately determined that the claims for unpaid wages of three employees were made out. In reaching this decision, the officer concluded that W, in her personal capacity, was the employer of the employees, rather than a corporation. As a result, the officer ordered W to pay the employees' unpaid wages.

W did not appeal the three orders to the Manitoba Labour Board, as she was entitled to do under the legislation. Accordingly, the Director of Employment Standards (the "**Director**") filed the orders in the Court of Queen's Bench, after which they became

[18] See, for example, *Moffat v. Edmonton (City) Police Service*, 2021 ABCA 183, at paras. 53-55.

[19] C.C.S.M. c. E110.

enforceable judgments of the Court. The Director was then able to garnish over $5,000 from W's bank account to satisfy the judgments.

W then commenced a claim in Small Claims Court for the return of the garnished funds. In support of her claim, she alleged that the officer's decisions were incorrect, as a corporation was actually the employer of the three employees.

The judge of the Small Claims Court who heard the matter held that the claim was not barred on the basis of *res judicata* and that the officer's decisions with respect to two of the employees was unreasonable in light of the evidence adduced at trial. As a result, she quashed two of the orders and ordered the Director to repay W over $2,000.

The Director obtained leave to appeal the decision of the Small Claims Court to the Manitoba Court of Appeal.

Decision: Appeal allowed (per Mainella, Pfuetzner, and leMaistre JJ.A.).

Justice Mainella, writing for a unanimous Court, held that issue estoppel barred W from bringing her civil claim to effectively overturn the decision of the employment standards officer.

The doctrine of issue estoppel applies to civil proceedings following administrative decisions. That includes the decisions of the employment standards officer in this case.

All three recognized preconditions for the operation of issue estoppel were present: (1) the issue of the identity of the employees' employer was decided by the officer; (2) the administrative decision was final as W never pursued her statutory right of appeal to the Manitoba Labour Board; and (3) the parties in the administrative proceeding were the same as in the subsequent civil proceeding.

In this case, there was no principled reason why the Court should exercise its residual discretion not the apply the doctrine of issue estoppel. First, there was no unfairness in the prior administrative proceedings. The underlying decision was not complex, it dealt with an issue within the expertise of the officer, and W had a right to appeal it. Second, the cost-effective and expeditious regime under the employment standards legislation would be undermined by permitting parties to forgo the statutory internal appeal processes in favour of launching new civil actions in the courts. Third, there was not a significant difference between the purposes, process, or stakes involved in the two proceedings.

Ultimately, the Court allowed the appeal and set aside the decision of the trial judge, as W's civil claim was barred by issue estoppel.

Commentary: The conclusion that issue estoppel applies to bar the relitigation of issues in civil proceedings that have already been determined in administrative forums is not novel. Indeed, this proposition was well-established in the Supreme Court's seminal case of *Danyluk v. Ainsworth Technologies*

Inc.[20] Indeed, the circumstances of *Danyluk* are very similar to the facts of *Waraich*. In *Danyluk*, the Supreme Court also determined that issue estoppel could apply to bar civil litigation of issues that were already determined by an employment standards officer.

However, in *Danyluk* the Supreme Court refused to exercise its discretion to apply issue estoppel on the facts of the case. The different outcomes in *Danyluk* and *Waraich* can be explained by the fact that, unlike in *Danyluk*, the claimant in *Waraich* was unable to point to unfairness in the administrative decision to demonstrate that the court ought not rely on it to deny justice.

As *Waraich* makes clear, issue estoppel in the administrative law context does not only apply where there has been a decision of a sophisticated administrative tribunal that resembles a court and that affords participants the same robust procedural rights. Instead, issue estoppel may operate to bar subsequent claims even where the administrative decision results from a more summary, expeditious, or informal process, such as the decision of an employment standards officer.

Accordingly, litigants — and their counsel — would be wise not to dismiss or give little consideration to administrative investigations or the potential for adverse decisions by administrative officers. Where parties do not put their best foot forward in such administrative processes, they will not necessarily be able to rectify a detrimental determination through a subsequent civil action. Instead, parties should take these administrative decisions seriously and fully understand any internal appeal processes that may be available to them.

At the outset, litigants and their counsel must also give careful consideration to which procedural route to choose to resolve their issue: the administrative regime or the courts. If they choose the administrative path and are unsuccessful, they will not be entitled to a "do-over" in the courts.

Another interesting aspect of the Manitoba Court of Appeal's decision is the manner in which it dealt with the third precondition for issue estoppel: that the parties in the proceedings were the same. The Court gave this issue very little consideration, simply concluding that "[t]he parties in the administrative proceeding under the *Code*, the Director and the claimant, were the same as in the subsequent civil proceeding". However, the administrative proceeding involved a dispute between the claimant and her employees, the latter of which had no involvement in the civil action. The employment standards officer, as a delegate of the Director, was the administrative decision maker, not a party to the dispute itself. Nevertheless, the Court relied on the doctrine of issue estoppel to bar the claimant's subsequent civil claim against the Director.

The *Waraich* decision may therefore represent a flexibility towards the last precondition for issue estoppel whereby the presence of the administrative decision maker in both proceedings is sufficient for the doctrine to apply. Thus, parties will not be able to

[20] 2001 SCC 44.

circumvent the doctrine by challenging the administrative decision through civil proceedings against the decision maker itself, rather than against the party they were adverse to in the administrative proceedings.

Finally, the *Waraich* decision raises questions about the continuing role to be played by consideration of the expertise of the administrative decision maker. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[21] the Supreme Court did away with an administrative body's expertise as a factor informing the appropriate standard of review. Nevertheless, the Manitoba Court of Appeal cited the employment standards officer's relative expertise as a reason to apply issue estoppel in this case.[22] This suggests that there may well be a continuing role to play for relative expertise within administrative law more generally, if not in the choice of standard analysis.

Dagenais/Mentuck test applies to a quasi-judicial tribunal: *CBC v. Chief of Police*, 2021 ONSC 6935 (Div. Ct.)

Facts: In 2016, M (later discovered to be a serial killer) was arrested by the Toronto Police Service ("**TPS**") after a man complained that M had violently choked him during a sexual encounter. A TPS investigator, G, interviewed M and, concluding no offence had been committed, released M without charges. In 2019, G was charged with professional misconduct in relation to this incident. The disciplinary hearing took place virtually in 2021, with numerous members of the media present. G was ultimately found not guilty of misconduct.

At the outset of the disciplinary hearing, the prosecutor and counsel for G agreed to introduce the video of G's interview of M as an exhibit. After the video was made an exhibit, counsel jointly sought a publication ban over the video. The Hearing Officer granted the request.

Members of the media requested an opportunity to make submissions about the publication ban, which the Hearing Officer agreed to hear following a break in proceedings. When the hearing resumed, however, counsel for the parties advised that they were no longer agreeing to enter the video as an exhibit and were instead tendering a summary of the video. The Hearing Officer rejected media requests for an opportunity to make submissions on the withdrawal of the video.

In addition, exhibits were not made available to the media at any time during the hearing and for some time thereafter, even though the media requested access to the exhibits at the outset of the hearing. TPS practice when making exhibits available is to charge $1/page for documents, including those available electronically, and $10 for audio/video files — despite a TPS policy that exhibits are to be available for a nominal charge and at no charge if available electronically.

Four media organizations applied for judicial review in the Divisional Court challenging,

[21] 2019 SCC 65.
[22] At para. 21.

primarily, the withdrawal of the video as an exhibit during G's disciplinary hearing. The applicants also sought declarations that the TPS be required to make exhibits available during hearings and at no charge where they are available electronically.

Decision: Application allowed (per Backhouse, Tzimas and Nishikawa JJ.).

The Court began its analysis by finding that the rationales for the open court principle are also applicable in the context of administrative tribunals and that any limit on the openness of quasi-judicial administrative proceedings, including police disciplinary hearings, must be justified through the application of the *Dagenais/Mentuck* test.[23] The Court rejected the respondents' argument that s. 9(1) of the *Statutory Powers Procedure Act* (the "***SPPA***"),[24] which applies to police discipline hearings, ousts the *Dagenais-Mentuck* test in this context.

The Court concluded that the video of G's interview of M had become part of the record at G's disciplinary hearing when it was tendered as and marked as an exhibit; that it was not simultaneously produced or physically received by the tribunal was irrelevant as "in the virtual age, physical custody of an exhibit is not a substantive basis for determining whether an exhibit was tendered". Therefore, it was an error in principle (or alternatively, unreasonable) for the Hearing Officer to grant a publication ban on the video before considering the *Dagenais/Mentuck* test or hearing submissions from the media. Furthermore, the withdrawal of the video as an exhibit in the face of a pending media challenge to the publication ban, and the denial of an opportunity to the media to make submissions on the withdrawal further, infringed tribunal openness and was an error in principle.

In the circumstances of the case, the Court concluded that it was appropriate for it to determine whether the video should be produced, rather than sending the matter back to the Hearing Officer. Applying the *Dagenais/Mentuck* test, the Court found there was no basis for a publication ban on the video and ordered that, after the redaction of the complainant's name from the video, it was to be made available to the public with no limitation on its use.

The Court also noted that the right of the public and the media to access exhibits — an established aspect of openness — includes the right to access them in a timely manner and that insufficiency of resources or the existence of other priorities are not valid justifications for denying access. There was no evidence that the exhibits in G's disciplinary hearing could not have been made available during the hearing, and failing to do so contravened the open hearing principle. The Court ordered the TPS, going forward, to provide exhibits in police misconduct hearings during the hearing, except in exceptional circumstances, and, in accordance with the TPS's own policy, to provide those exhibits at no cost if available

[23] See *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76. As noted by the Court, this test was recently reformulated in *Sherman Estate v. Donovan*, 2021 SCC 25.
[24] R.S.O. 1990, c. S.22.

electronically or for a nominal charge otherwise.

Commentary: The Divisional Court's decision is notable because it holds that any limits on the openness of "quasi-judicial" tribunal proceedings governed by the *SPPA* must be justified on the *Dagenais/Mentuck* test — the same framework on which limits on court openness must be justified — rather than with reference to the test for when a hearing may exclude the public that is set out in s. 9(1) of the *SPPA*.

In support of its conclusion in this respect, the Divisional Court cited the Court of Appeal's 2019 decision in *Canadian Broadcasting Corporation v. Ferrier*.[25] In *Ferrier*, the Court of Appeal considered the applicability of the *Dagenais/Mentuck* framework to a hearing held by a police board delegate to decide whether to grant an extension of time to commence a police disciplinary proceeding under the *Police Services Act*.[26] The Court of Appeal concluded that such a proceeding (to which the *SPPA* does not apply) is administrative in nature, not judicial or quasi-judicial, and the *Dagenais/Mentuck* framework therefore does not apply to it. Instead, the question whether the hearing should be open to the public is to be determined by the application of s. 35 of the *Police Services Act*, which provides that such hearings are to be presumptively open to the public and sets out, in s. 35(5), the circumstances in which this presumption may be overridden.

The Divisional Court in the present case relied on the distinction made in *Ferrier* between administrative proceedings (including police board extension of time hearings) and quasi-judicial proceedings (including police disciplinary hearings) to find the latter are subject to the *Dagenais/Mentuck* test. Thus, the *Dagenais/Mentuck* test superseded the test for openness in s. 9(1) of the *SPPA* (which provision is almost identical to s. 35(5) of the *Police Services Act* at issue in *Ferrier*).

This approach appears to contradict that taken by at least one administrative tribunal relying on *Ferrier*: in *Ontario College of Teachers v. ZZD*,[27] the Discipline Committee of the Ontario College of Teachers concluded that a decision whether to prohibit public disclosure of the name of the person subject to the disciplinary hearing (a quasi-judicial proceeding) was governed by provisions of the *Ontario College of Teachers Act, 1996*, rather than the *Dagenais/Mentuck* framework. Statutory tribunals conducting quasi-judicial proceedings, such as professional discipline hearings, should be aware of *CBC v. Chief of Police* and consider carefully whether any limits they impose on the open hearing principle are justified under the *Dagenais/Mentuck* test.

The Divisional Court's decision in this case also provides important guidance to tribunals with respect to hearing exhibits. Hearing exhibits should be made available, where possible, *during* the hearing at issue and, the Court's

[25] 2019 ONCA 1025, leave to appeal refused, 2020 CanLII 74021 (SCC). See the commentary on that decision in Issue 21 of this Newsletter.
[26] R.S.O. 1990, c. P.15.
[27] 2021 ONOCT 19.

decision suggests, any fees for accessing exhibits should be reasonable, which in the case of electronic exhibits, may mean non-existent.

Permissible scope of statutory delegation: *Gateway Bible Baptist Church v. Manitoba*, 2021 MBQB 218

Facts: The applicants, in multiple legal proceedings, challenged the constitutionality of various emergency public health orders ("**PHOs**") made under Manitoba's *Public Health Act*[28] for the purpose of addressing the ongoing public health threat posed by the COVID-19 pandemic. In the present proceeding, they did so by seeking a declaration that ss. 13 and 67 of the Act are unconstitutional.

Section 67 of the Act permits the Chief Public Health Officer ("**CPHO**") to take certain special measures in prescribed circumstances, including certain circumstances involving serious and immediate threats to public health because of an epidemic. Section 13 provides that the CPHO may, in certain circumstances, delegate certain of their powers or duties under the Act. Since the start of the pandemic, the CPHO had subdelegated, from time to time, to the Acting Deputy CPHO in accordance with s. 13 of the Act, on a temporary basis, his authority to make PHOs. The impugned PHOs were issued by the CPHO pursuant to s. 67 or the Acting Deputy CPHO, acting under delegated authority pursuant to s. 13 of the Act.

The applicants sought a declaration that ss. 13 and 67 of the Act violate an unwritten constitutional principle that only the Legislative Assembly can make laws of general application and that such lawmaking powers cannot be delegated to the CPHO or to individual ministers and that insofar as the relevant provisions of the Act enable such delegation, they are unconstitutional.

Decision: Application dismissed (per Joyal C.J.Q.B.).

Chief Justice Joyal first reviewed the legislative history of the Act, noting that it represents a deliberate choice to centre Manitoba's public health system under a single official, the CPHO. The Act sets out the powers afforded to public health officials to address communicable diseases and also constrains those powers to ensure an appropriate balance between individual rights and protection of public health.

With respect to the applicants' constitutional arguments, Joyal C.J.Q.B. found that the broad delegation of powers under s. 67 is consistent with the jurisprudence validating such delegation. It is also consistent with the Supreme Court's jurisprudence affirming that such delegation is a necessary reality of Canada's modern regulatory state. Delegated laws have been described as the lifeblood of the modern administrative state. Far from delegated lawmaking being incompatible with Canada's constitutional architecture or endangering the rule of law, the Supreme Court's jurisprudence contemplates and assumes a certain degree of delegated lawmaking.

[28] C.C.S.M. c. P210.

The legislative history of the Act suggests that the rationales motivating the delegation of emergency powers to the CPHO are similar to those typically invoked when delegating powers to administrative decision makers: there was an obvious need for medical expertise and prompt, flexible responses during a public health emergency.

Moreover, the legislature provided through the Act very clear criteria for when the CPHO may invoke special measures and has set out what measures may be taken. There is sufficient content in the legislation to subject the PHOs to judicial review, thereby preserving the rule of law. To the extent the applicants have concerns that the CPHO might act arbitrarily or in excess of their authority under the Act, those concerns can be addressed through judicial review. In addition, the legislature, which has established the limits of the delegated authority, retains the ability to alter those limits and/or override particular orders at any given time. The Minister can refuse to approve an order or can replace the CPHO.

Commentary: In a growing number of COVID-19 pandemic court cases, *Gateway Bible Baptist Church* stands out for its clear and straightforward affirmation of the role of the modern administrative state, especially in managing an ongoing public health crisis. Chief Justice Joyal's reasons recognize that delegated laws are fundamental in our regulatory system. They permit flexible, prompt, expert decision making in a variety of contexts, including the management of a public health emergency. This decision also demonstrates that courts will respect the institutional role of those exercising delegated lawmaking powers and the authority of the legislature to delegate those powers, as well as showing deference to the substantive decisions of such public health officials.

This decision also underscores that, from a rule of law perspective, the check on administrative power provided by the courts' judicial review jurisdiction is adequate and paramount. As long as judicial review is available, if a decision is unreasonable or beyond a decision maker's delegated authority, courts are very unlikely to interfere with the legislative choice to give the decision maker that authority in the first place.

QUOTES FROM THE CASES

Party A v. British Columbia (Securities Commission), 2021 BCCA 358

On a statutory appeal from the BC Securities Commission:

[114] Even though the standard of review has been clarified in *Vavilov*, this does not mean we should ignore the expertise the Commission brings to the complex regulatory framework in which it operates. The Commission members bring considerable expertise and experience to their appreciation of the evidence of complex market transactions. Nevertheless, it is to be kept in mind that, as a regulator, the Commission does not have unfettered discretion. Rather, its discretion is to be exercised in keeping with the purpose for which it was given by the legislature, in light of factors related to achieving that purpose[.]

Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation British Columbia, 2021 BCCA 368

In response to the appellant's argument of procedural unfairness:

[25] When the Court reconvened at 2:00 p.m., Dr. Buranov was not on the line. The judge adjourned to allow for time for Dr. Buranov to get back on the line, and reconvened at 2:16 p.m. When Dr. Buranov was still not present, the judge proceeded to give judgment without hearing the end of the reply submissions. After judgment was given, Dr. Buranov re-connected to the proceeding. The judge told him what happened and gave him the opportunity to make his full reply submissions, and advised him he was open to considering whether those submissions would change his judgment.

[26] Dr. Buranov agreed to proceed on this basis, and then completed his reply submissions. The judge declined to change the outcome, and summarized his decision for Dr. Buranov.

[27] Having read the transcript of what occurred, I am satisfied that the appellant's argument that he was prejudiced by what occurred is without merit. He had been given a fair opportunity to make reply submissions before the break at 12:42 p.m. Respectfully, while Dr. Buranov may be a very talented scientist and visionary, as someone not trained in law, he was unskilled in focusing his reply submissions. The reply submissions made after the judge read out his decision were not relevant or helpful, and were repetitive of remarks he had already made. I am of the view he had a full opportunity to advance his case in the morning of the hearing.

Dua v. College of Veterinarians of Ontario, 2021 ONSC 6917 (Div. Ct.)

On the role of independent legal counsel in assisting with drafting reasons:

[43] Dr. Dua also raised an issue about the role of the Discipline Committee's counsel and argued that this role prejudiced his right to a fair hearing. The Committee reasonably found that there was no merit to this suggestion and that its counsel's role was appropriately limited to assisting them in understanding the law and the evidence that were relevant to the decisions it had to make and was never directed at telling them what decisions it should make. Before us, Dr. Dua also asserted that the Committee's counsel assisted the Committee in drafting its reasons. There is nothing inappropriate about a counsel who has been hired to assist an administrative tribunal with its task also assisting in the drafting of reasons as long as that role is limited to helping express the views of the Committee appropriately and does not encompass usurping the role of the Committee, which is to make a decision and to provide its reasons for doing so. In this case there is no basis for finding that the Committee's counsel exceeded his proper role.

Sobczyk v. Ontario, 2021 ONSC 7030 (Div. Ct.)

On single judges of the Superior Court of Justice hearing judicial review applications properly before a panel of the Divisional Court:

[4] With the advent of the court's use of CaseLines and ZOOM, and coordinated Divisional Court case management throughout Ontario, recourse should not be had to order a hearing before a single judge pursuant to JRPA, s.6(2) except in truly exigent circumstances. Simply put, the court can now arrange expedited panel hearings for matters arising anywhere in Ontario, and so the second branch of the statutory test cannot be met in most cases. There is administrative oversight available both regionally and centrally to address urgent matters, and it should only be after recourse to this oversight has been sought that a hearing before a single judge should be ordered pursuant to s.6(2) of the JRPA unless the exigencies of the situation do not allow that to take place.

[5] ... In addition, s.21(2)(c) of the Courts of Justice Act accords discretion the court's Executive (usually and currently vested in the Associate Chief Justice) to designate a particular matter to be heard by a single judge of the Divisional Court rather than a panel. It is an extraordinary decision to conclude that a matter ordinarily requiring decision from a panel of three judges of the Divisional Court will be heard by a single judge, and it is preferred that this extraordinary exercise of discretion be exercised consistently with an overall appreciation of the court's ability to accommodate an urgent panel hearing.

CO-EDITORS

Andrea Gonsalves
416.593.3497
andreag@stockwoods.ca

Justin Safayeni
416.593.3494
justins@stockwoods.ca

Dragana Rakic
416.593.3496
draganar@stockwoods.ca

THE NEWSLETTER

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