ISSUE No. 32 • MARCH 2022

ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

STOCKWOODS barristers

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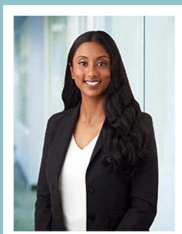
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Questions of central importance to the legal system: *Ville de Sherbrooke c Laboratoires Charles River Services précliniques Montréal*, 2022 QCCA 263

Facts: The five respondent corporations instituted proceedings before the Tribunal Administratif du Québec, Real Estate Division to challenge the value of their property as reflected in their respective cities' property assessment rolls. The appellant cities moved to dismiss the proceedings because the respondent corporations' originating processes had been prepared, drafted, and/or signed by an officer, rather than a lawyer.

In asserting that the originating processes were improper, the cities relied on s. 128 of Quebec's *Loi sur le Barreau*,[1] which sets out acts that only lawyers may perform. Subsection 129(c) contains an exception to s. 128, whereby the acts reserved for lawyers are not limited or restricted by "the right of public or private bodies to be represented by their officers, except for the purpose of pleading, before any body exercising a quasi-judicial function." The cities argued that s. 129(c) was not applicable here.

[1] RLRQ, c B-1.

The Tribunal disagreed and allowed the respondents' actions to move forward. The cities sought judicial review. They were unsuccessful at both the Court of Quebec and in an initial appeal to the Superior Court. They further appealed to the Quebec Court of Appeal.

Decision: Appeals dismissed (Schrager, Hamilton, and Baudouin JJCA).

Although the lower courts rendered their judgments under the pre-*Vavilov* framework, their review of the Tribunal's decision on a standard of correctness was appropriate.

In this case, the presumption of reasonableness is rebutted for rule of law purposes because the question is one of central importance to the legal system as a whole. The court contrasted this case with *Barreau du Québec v Québec (Attorney General)*[2] in which the Supreme Court of Canada found the question raised was not of "central importance to the legal system." The issue in *Barreau du Québec* — namely, the scope of an exception in the *Loi sur le Barreau* allowing non-lawyers to represent a Minister in certain proceedings — was narrow and had limited impact. Here, however, the issue concerned the representation of any public or private body before any body exercising quasi-judicial functions.

The court determined that the question at hand ultimately goes to the foundation of the legal profession and of legal counsel because the interpretation of ss. 128 and 129 would impact the administration of justice. The rule of law requires a degree of certainty higher than what is available under reasonableness review. Accordingly, the correctness standard applies.

The *Loi sur le Barreau*, which confers an exclusive right to practise in the legal profession, should be interpreted consistently with the spirit, purpose, and intent of the statute, namely the protection of the public. Sections 128 and 129 should not be read so as to unduly expand or confine the acts specifically reserved for lawyers.

Turning to the text of s. 129, the court accepted that corporations qualify as "private bodies" and the Tribunal has a "quasi-judicial function" within the meaning of s. 129. The court interpreted the phrase, "to be represented by their officers, except for the purpose of pleading," to include all stages of representation — from preparation, to drafting, to the closing of the case. An officer could thus represent a corporation without being considered to be acting on behalf of another party. The only restriction is that an officer may not plead, i.e., make an oral argument at the close of a proceeding with a view to convincing the trier of fact of the case's merits. This act is restricted to legal professionals. In the result, the officer of a respondent corporation could lawfully prepare, draft, and/or sign an originating process.

Comment: *Ville de Sherbrooke* is a rare example of a case where a court has invoked the "question of central importance" exception to rebut the presumption of reasonableness review.

[2] 2017 SCC 56.

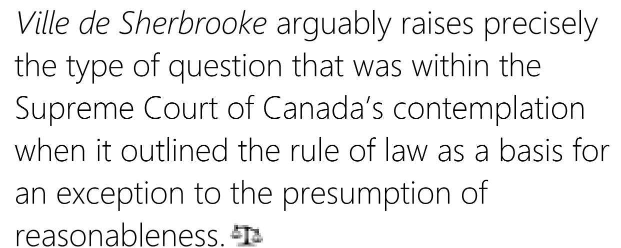
In *Canada (Minister of Citizenship and Immigration) v Vavilov*,[3] the Supreme Court of Canada stressed that it is not enough for a question to be of "wider public concern" or to "touch on an important issue" for it to fall within the exception attracting the correctness standard of review. The exception should be used only to address questions of "fundamental importance and broad applicability" that have the potential to produce "significant consequences for the legal system as a whole or for other institutions of government." This threshold limits the correctness standard of review to those questions that necessitate a "uniform and consistent answer."[4]

The Court of Appeal's decision to invoke the correctness standard is noteworthy because the Supreme Court of Canada had declared, in the case of *Barreau du Québec*, that a similar question did not rise to a question of "central importance to the legal system as a whole." The court sought to distinguish *Barreau du Québec* by reasoning that *Ville de Sherbrooke* would have ramifications beyond the dispute between the parties — the interpretation of s. 129(c) informs the parameters of rights that all public and private parties have before the province's quasi-judicial bodies. An incorrect interpretation could gut the value of s. 128, s. 129(c), or both, and leave the public unprotected.

Drawing on the Supreme Court's reasoning from *Barreau du Québec*, the court's analysis in *Ville de Sherbrooke* appears to be sound.

Sections 128 and 129 dictate the overall scope of the monopoly that Quebec lawyers have over the provision of legal services in the province. The exception established by s. 129(c) with respect to acts capable of being performed by individuals other than lawyers is not narrow. As the court found, s. 129(c) permits entities, like corporations, to be represented by officers for essentially every part of a legal proceeding except the closing submissions. This pronouncement has the potential to fundamentally affect the way in which Quebec's legal system, as a whole, operates.

Ville de Sherbrooke arguably raises precisely the type of question that was within the Supreme Court of Canada's contemplation when it outlined the rule of law as a basis for an exception to the presumption of reasonableness.



Reasonableness review of discretionary decisions: *Safe Food Matters Inc v Canada (Attorney General)*, 2022 FCA 19[5]

Facts: The registration and use of pest control products in Canada are governed by the *Pest Control Products Act*[6] and its regulations. The Pest Management Regulatory Agency, a branch of Health Canada, is responsible for the regulation of pesticides under the Act. Glyphosate is a pest control product that has been registered for use in Canada since 1976. In 2017, after completing a public consultation

[3] 2019 SCC 65.
[4] *Vavilov*, at paras 59, 61.

[5] Stockwoods LLP was counsel of record for the appellant in this case.
[6] SC 2002, c 28.

process, the Agency issued a re-evaluation decision permitting the continued registration of glyphosate products for use in Canada.

Safe Food Matters ("SFM") is a non-profit organisation dedicated to promoting public health and protecting the environment by educating Canadians about the safety of food production technologies. SFM filed a notice of objection ("NOO") to the Agency's glyphosate re-evaluation decision pursuant to s. 35(1) of the Act. The NOO raised nine objections that SFM argued raised "scientifically founded doubt" about the validity of the Agency's evaluations concerning glyphosate products. SFM asked the Agency to establish a review panel of independent experts to consider the subject matter of the objections raised in the NOO, with a view to confirming, reversing or varying the re-evaluation decision.

Section 3 of the *Review Panel Regulations*[7] under the Act requires the Agency to take two factors into account in deciding whether to establish a review panel: (a) whether the information in the NOO raises "scientifically founded doubt" as to the validity of the evaluations, on which the registration decision is based, of the health and environmental risks and the value of the pest control product; and (b) whether the advice of expert scientists would assist in addressing the subject matter of the objection.

The Agency dismissed the objections raised in the NOO and decided not to establish a review panel. SFM challenged that decision on judicial review. The Federal Court dismissed the application. SFM appealed.

Decision: Appeal allowed (Stratas, Rivoalen and MacTavish JJA). Decision quashed and matter remitted to the Agency for a new decision.

The parties agreed that the standard of review is reasonableness. On appeal, the court must step into the shoes of the Federal Court and determine whether the Agency's decision is reasonable.

SFM's NOO raised nine objections. The main basis for the first four objections is that when glyphosate is applied for pre-harvest desiccation purposes in certain crops, the residue levels of glyphosate may exceed the permitted maximum levels and may therefore be of concern to human health. These four objections were key to raising "scientifically founded doubt". The remaining five objections presented other arguments.

In support of the objections, the NOO provided several references to scientific studies, literature, and government publications, as well as Health Canada policy documents. The NOO noted that the re-evaluation decision did not consider certain evidence SFM had provided. The NOO argued that Canadians are likely consuming crops that contain unacceptable levels of glyphosate residue and as a result, a review panel should be established to assess glyphosate in the context of its objections.

In response to the NOO, the Agency wrote a two-page letter consisting of seven

[7] SOR/2008-22.

paragraphs. The first few paragraphs consisted of background information and references to the relevant legislation. The fifth paragraph set out the Agency's decision in response to the NOO, as follows: "The information which you submitted in support of your objection does not meet either of those factors and, accordingly, does not provide a basis for the establishing of a review panel" and "[a]s a consequence, a review panel will not be established to reconsider the regulatory decision in response to your request." The sixth paragraph introduced an attachment to the letter containing six pages of scientific explanation from the Agency to certain objections raised in the NOO.

The Agency must interpret its legislation reasonably and in a manner that can be understood. Expert scientists employed by the government may well be tasked with reviewing the science raised in the NOO, but the Agency is tasked with interpreting the Act and Regulations in the context of the scientifically based objections in the NOO and the record. The Agency's responsibility is to consider the scientific basis for the objection and the corresponding scientific advice it receives from government scientists. With this information in hand, and in coming to its decision on whether it should exercise its discretion to establish a review panel, the Agency must look to the relevant provisions of the Act and it must take into account the two factors in s. 3 of the Regulations.

The Agency's discretion is not untrammeled. The exercise of discretion must comply with the rationale and purview of the Act. The Act's primary purpose is the protection of individuals and the environment, which it achieves by: i) requiring a scientifically based approach to the evaluation of risks posed by the use of pest control products; ii) requiring periodic re-evaluations of registered pest control products, such as is the case here; and iii) inviting public participation in the regulatory scheme.

The Agency's discretion is further constrained by making it subject to the two factors set out in s. 3 of the Regulations, which limits the Agency's discretion by dictating factors that it must consider in arriving at its decision as to whether it is necessary to establish a review panel. While the Agency can consider other factors, it must consider at least those two factors.

The Agency decision falls short of these fundamental requirements. The Agency failed to consider the preamble of the Act and the definitions of "health risk" and "acceptable risks" in the Act. The decision is silent on the primary objective of the legislation, being the prevention of unacceptable risks to individuals and to the environment from the use of pest control products. It provides no explanation as to the meaning of "scientifically founded doubt" and does not tackle the question of whether the advice of expert scientists would assist in addressing the subject matter of the objection.

The Agency provided only a conclusory statement that the NOO did not meet either factor in s. 3 of the Regulations. The court simply could not discern from the decision why the Agency concluded that the objections raised in the NOO did not meet either factor.

This is particularly important because the Act requires the Agency to provide written reasons as a way to make public participation meaningful. The failure to provide any explanation of these factors is sufficient to render the decision unreasonable.

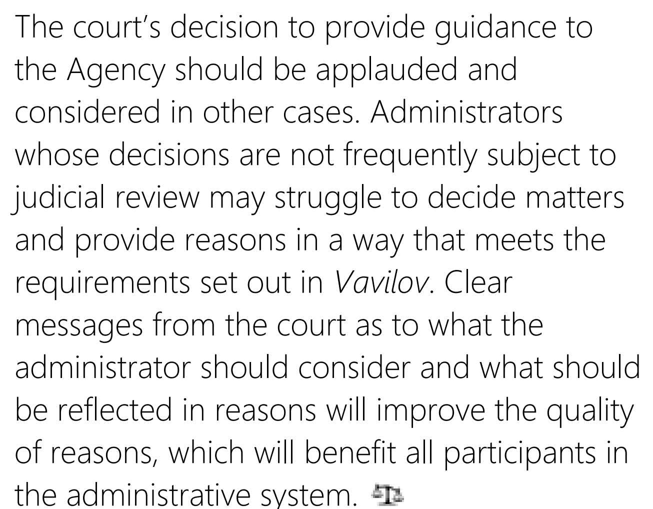
The court further concluded that the record does not assist in discerning the basis for the Agency's decision.

As this case was the first time the court reviewed a decision of the Agency, the court provided guidance to the Agency when it goes about its redetermination by listing a number of factors that the Agency should consider in determining the matter and interpreting the legislation. The Agency should also communicate how it had regard to those factors.

Commentary: This decision provides a clear example of the obligation on administrators to provide reasoned explanations for their decisions to withstand court scrutiny on the reasonableness standard post-*Vavilov*. Even where the decision maker is vested with a discretionary power, the reasons (taken together with the record) must allow the reviewing court and the affected party to discern the basis for the decision. The administrator must consider — and show how they considered — the relevant factors that constrained the exercise of discretion, including the text, context and purpose of the legislation.

The context of the Act heightened the importance of the Agency providing a reasoned explanation for its decision. The purpose of the Act is public protection and the Act contains a unique scheme for public participation which cannot be meaningful if the Agency does not explain to objectors how it interpreted the relevant provisions of the legislation and why a notice of objection was rejected having proper regard for the mandatory factors the Agency must consider. An important purpose of reasons is to demonstrate that the administrator properly exercised its statutory authority so the court, and perhaps more importantly, affected individuals, can be confident the exercise of power was legal. If the reasons don't meet that purpose, the decision must be quashed as unreasonable.

A novel aspect of this judgment was the court's decision to provide "guidance" to the Agency in going about the redetermination. In doing so, the court noted three points: this was the first time the court has reviewed a decision of the Agency; a number of years have passed since the re-evaluation decision was made in 2017; and the guidance may avoid a further judicial review application.



The court's decision to provide guidance to the Agency should be applauded and considered in other cases. Administrators whose decisions are not frequently subject to judicial review may struggle to decide matters and provide reasons in a way that meets the requirements set out in *Vavilov*. Clear messages from the court as to what the administrator should consider and what should be reflected in reasons will improve the quality of reasons, which will benefit all participants in the administrative system.

Failure to carry out *Doré/Loyola* analysis makes decision unreasonable: *Guelph Area Right to Life v City of Guelph*, 2022 ONSC 43 (Div Ct)

Facts: The City of Guelph's Advertising Acceptability Policy governs the City's approval of advertising on City property. The Policy provides, among other things, that advertisements must be "consistent with the Canadian Code of Advertising Standards". The Policy further provides that any member of the public who objects to an advertisement can complain to Advertising Standards Canada ("Ad Standards"), a national non-profit self-regulatory body that investigates and determines whether advertising is compliant with the Code. The Policy allows the City to reconsider whether advertising should remain on City property after a complaint has been received.

Guelph Area Right to Life ("GARL") is a group that advocates against abortion. It posted three anti-abortion advertisements on City property, all of which were initially approved by the City. After the advertisements were posted, the City received complaints. The City referred the complainants to Ad Standards. Ad Standards concluded that all of the advertisements violated clause 1 of the Code (which addresses accuracy in advertising) and that two of the three advertisements also violated clause 14 of the Code (which deals with unacceptable or demeaning depictions or portrayals of individuals).

The City then directed that the three advertisements be removed. In its communications with GARL at the time, the City referred only to the Ad Standards rulings as the basis for the removal decisions.

GARL brought an application for judicial review, challenging the City's decisions as unreasonable on the basis that the City's direction to remove the advertisements failed to properly balance GARL's right to free expression under s. 2(b) of the *Charter*, and that the City improperly fettered its discretion by delegating the decision-making process to Ad Standards.

In responding to the application, the City sought to supplement the reasons it originally provided for removing the advertisements. While those reasons referred only to the Ad Standards rulings, the City adduced affidavit evidence on the applications from a representative who was partly responsible for the impugned decisions, stating that the City "considered the City's legal responsibilities under the *Charter*, the Policy and the Code" and explaining the representative's rationale for agreeing with the Ad Standards rulings.

Decision: Application allowed (per Edwards RSJ, McKelvey and Favreau JJ). Matter remitted to the City to be decided in accordance with the *Doré/Loyola* analysis.

The City's affidavit evidence setting out justifications for its decisions was not properly before the court. In its contemporaneous communications with the applicant at the time the advertisements were removed, the only justification provided by the City was its reliance on the rulings made by Ad Standards. It is improper for the City to supplement its reasons for decision by having the decision

maker state after the fact that she considered the matters she was required to consider at the time she made the decisions in the absence of any indicia that she did so at that time. What was in the mind of the decision maker but not articulated at the time cannot be relevant to the exercise of reasonableness review.

The City's decisions to remove the advertisements were unreasonable. The City based its decisions on the rulings made by Ad Standards. Ad Standards concluded that the ads breached certain provisions of its Code. In reaching this conclusion, Ad Standards did not undertake any *Doré/Loyola* analysis. It did not identify or assess the City's legislative objective, nor did it have any regard for the applicant's right to freedom of expression (including the fact that free expression can include the right to express unpopular views or even untruths). Accuracy of advertisements is not irrelevant, and in some cases inaccuracy may be sufficient to justify removing or rejecting advertisements. But when dealing with political speech, concerns about inaccuracy cannot be the end of the analysis; such concerns must be weighed against the right to free expression.

Ad Standards cannot be faulted for failing to perform the *Doré/Loyola* analysis. Nor can the City be faulted for obtaining and relying on the Ad Standards rulings in the course of considering whether to remove the advertisements. However, the City cannot effectively rely on the Ad Standards rulings as the final arbiter of this issue.

Even if the City's affidavit evidence were to be taken into account, its decisions would still be unreasonable. The affiant's reasoning suffers from the same flaws as the Ad Standards rulings in that it fails to consider and weigh concerns with accuracy against the applicant's rights to freedom of expression. While the affiant states that she considered the applicant's right to freedom of expression, this is a statement without substantive content. The *Doré/Loyola* analysis must be robust and must have regard to whether the right to free expression is affected as minimally as reasonably possible. Simply acknowledging or mentioning the applicant's *Charter* rights is not sufficient.

Commentary: This case illustrates some of the practical complications caused by the *Doré/Loyola* line of cases, particularly when its requirements are applied to discretionary decisions made by "line decision makers" who are not operating in an adjudicative setting, do not have the benefit of adversarial submissions, and are not trained in the finer aspects of *Charter* rights (and, in many cases, are not even lawyers at all). These concerns have been noted by commentators and courts alike.[8] As the court put it here, when paraphrasing a different decision, there is a concern that "a transit manager cannot be expected to engage in the *Doré/Loyola* analysis."[9]

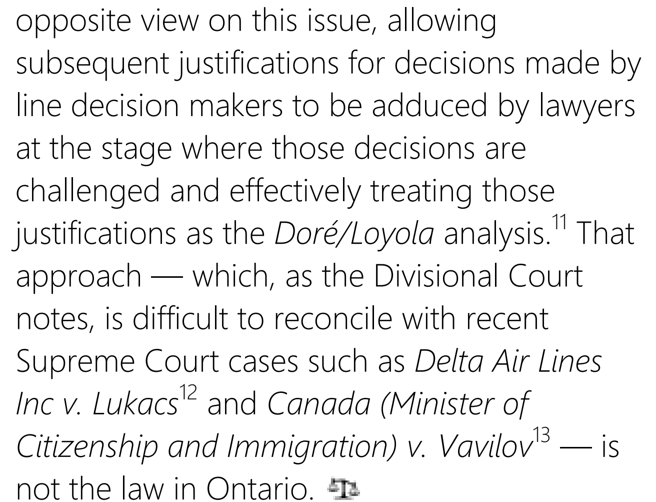
Whatever the challenges of this approach, however, the court's decision confirms that line decision makers must undertake a robust *Doré/Loyola* analysis and transparently explain

[8] See, e.g., *ET v Hamilton-Wentworth District School Board*, 2017 ONCA 893, at paras 108-125.
[9] At para 75.

their reasoning at the time the decision is made. The Court recognizes that "[t]his no doubt poses a challenge for municipalities when having to consider whether to post contentious advertisements", but ultimately concludes that "if a municipality wants to sell advertisement space on its public buses, it must comply with the law and it must have decision makers in place capable of performing the *Doré/Loyola* analysis when confronted with contentious advertising".[10] While this approach presents some practical and logistical difficulties, it is also a principled one. Short of jettisoning the *Doré/Loyola* model, or subjecting the decisions of line decision makers to a lower degree of deference, administrative decisions impacting constitutional rights must properly consider and justify such impacts.

The court's refusal to take into account the further reasons for removing the advertisements provided by way of affidavit evidence on the application for judicial review is an important lesson for those seeking to defend (or impugn) administrative decisions by line decision makers. This case is a reminder that decisions need to be justified in the reasons provided at or around the time of the decision itself —and that in order to demonstrate that the *Doré/Loyola* analysis has been undertaken, those reasons need to do more than simply mention the *Charter* in passing.

It is worth noting that this result was not necessarily a foregone conclusion. Indeed, the Alberta Court of Appeal has taken the opposite view on this issue, allowing subsequent justifications for decisions made by line decision makers to be adduced by lawyers at the stage where those decisions are challenged and effectively treating those justifications as the *Doré/Loyola* analysis.[11] That approach — which, as the Divisional Court notes, is difficult to reconcile with recent Supreme Court cases such as *Delta Air Lines Inc v. Lukacs*[12] and *Canada (Minister of Citizenship and Immigration) v. Vavilov*[13] — is not the law in Ontario.



Cautionary tale about use of "expanded record" on judicial review: *Wendt v Office of the Independent Police Review Director*, 2022 ONSC 166 (Div Ct)

Facts: W complained to the Office of the Independent Police Review Director ("OIPRD") that the Toronto Police Service ("TPS") had failed to assist her in responding to her reports that unknown individuals were following her and breaking into her home and car, among other things. She also complained that TPS officers had discriminated against her by referring to her as "EDP" or Emotionally Disturbed Person in the related police reports.

The OIPRD concluded that it was not in the public interest to proceed with W's complaint because, given the nature of the allegations, an investigation was unlikely to result in reasonable grounds to establish misconduct. This effectively "screened out" the complaint,

[10] At para 75.

[11] See, e.g., *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154, at para 36.

[12] 2018 SCC 2.

[13] 2019 SCC 65.

closing the file before it proceeded to an investigation.

W applied for judicial review, seeking to have the OIPRD decision quashed and the matter remitted for fresh consideration on the grounds that the decision that the complaint did not disclose misconduct was unreasonable and that the decision was also unreasonable due to inadequate reasons.

For the purposes of the application, W filed relevant police occurrence reports that were not before the OIPRD in considering her complaint. Both parties consented to the court considering this "expanded record" for the purposes of the judicial review application. W submitted that the reports showed that the police did not do enough in response to her reports. The OIPRD submitted that the reports did not show that the decision was unreasonable and illustrated the inappropriateness of W's requested remedy.

Decision: Application dismissed (per Sachs, Backhouse, Lederer JJ).

The OIPRD determination that the complaint did not disclose misconduct was not unreasonable. The use of "EDP" by police officers in describing a member of the public has been found by the Human Rights Tribunal of Ontario not to be inappropriate or discriminatory. Therefore, the decision that the complaint did not disclose misconduct based on the "EDP" reference was not unreasonable. With respect to W's allegation that the police did not investigate her complaints because of her perceived mental disability, the complaint itself did not support this conclusion. In the unique circumstances of this case, where W sought to have the police reports considered by the court and where the reports would inevitably be considered if the matter were to be sent back to the OIPRD for reconsideration, it is appropriate for the expanded record to be considered in determining whether the remedy sought by W should be granted. The newly filed police reports added additional support for a finding that the police did investigate and undermined W's assertion of differential treatment.

Regarding W's complaint that the OIPRD's reasons were inadequate and devoid of any substantive analysis of the relevant test for "misconduct", the decision maker had broad discretion to decide not to deal with the complaint before any investigation was undertaken. At the screening stage, there was no requirement for a legal analysis of the concept of misconduct. The reasons for screening out a complaint need not be lengthy or complex, but must at least answer the question "Why?"

The decision maker's reasons could not be said to be inadequate when supplemented by the expanded record. The investigations disclosed in the reports supported the finding that the officers did investigate W's concerns and did not support that the police neglected their duties or acted in a discreditable manner towards W. The reports reinforced the reasonableness of the OIPRD decision that W's complaint, even if investigated, could not have resulted in a finding of misconduct against members of the TPS.

Commentary: This case is notable because of the reviewing court's reliance on an "expanded record" — i.e. material that was not before the administrative decision maker. The general rule regarding evidence on judicial review is that the record is limited to what was before the decision maker, subject to a narrow set of exceptions, none of which comfortably apply here. The court's approach in this case suggests a more flexible approach to consider the admission of additional evidence on judicial review, particularly when it is put forward on consent.

The court's reliance on the expanded record to bolster the adequacy of reasons provided by the decision maker is somewhat difficult to justify. The expanded record was not part of what the decision maker considered and thus could (and should) not have influenced the decision that was reached. Relying on new evidence in this way arguably strays into the realm of courts impermissibly substituting their own justifications for those actually relied on by an administrative decision maker.

This case also serves as a cautionary tale for parties seeking to expand the record by way of such additional evidence. Although it was the applicant who sought to have the record expanded, the court ultimately used the additional material to bolster the reasonableness of the decision under review, and ultimately to support the conclusion that reconsideration would be futile. Practitioners considering whether to attempt to supplement the record on judicial review would do well to consider carefully what use the court might make of the new material, and whether it is best advanced on judicial review or reserved in the event that the applicant is granted reconsideration.

Test for determining whether the decisions of a public body are subject to judicial review: *Astro Zodiac Enterprises Ltd. v Board of Governors of Exhibition Place*, 2022 ONSC 1175 (Div Ct)

Facts: Exhibition Place is a large area of parkland, exhibition space, and other buildings owned by the City of Toronto. The Board of Governors of Exhibition Place is a body corporate and agent of the City under the *City of Toronto Act, 2006*.[14] Under the governing legislative scheme, the Board has a long-term mandate for the operation, management, and maintenance of Exhibition Place. The Board has the authority to enter into contracts and agreements under its own name and to approve and execute specified categories of licences and leases with respect to Exhibition Place areas and facilities without City Council approval.

Since 1993, the applicants — members of the Gidaro family and two of their businesses — have operated amusements and events at Exhibition Place by entering into short-term rental agreements with the Board. In May 2021, Exhibition Place declined to rent space to the applicants for an event they sought to host and informed them that it was terminating its relationship with them and other Gidaro family companies due to a history of employee harassment complaints since 2011.

[14] SO 2006, c 11, Sch A.

The applicants applied for judicial review of the Board's decision.

Decision: Application dismissed (Corbett, Matheson, and Kristjanson JJ).

The Board's decision to decline to enter into a rental agreement with the applicants is not subject to judicial review. Declining to rent space at Exhibition Place to a private company for a profit-making activity was an exercise of the Board's private power of contracting, not an exercise of state authority of sufficiently public character that public law remedies are available.

The court rejected the applicants' argument that the decision is subject to judicial review because it was an exercise of a statutory power of decision under the Toronto *Municipal Code*, which gives the Board authority to approve and execute licences over Exhibition Place lands. Case law had established that not every exercise of a power conferred by or under a statute amounts to an exercise of a statutory power of decision; the power "must be a specific power or right to make the very decision in issue."[15] That was not the nature of the power exercised in this case: while the Board's power to enter contracts flows from the Act and the Code, that power is permissive and the legislative scheme does not dictate how the Board's discretion to enter, negotiate, or terminate the type of contract at issue here is to be exercised.

The question whether the Board exercised a statutory power of decision was not determinative in any event, because the court's judicial review authority is not limited to statutory powers of decision, and not all exercises of a statutory power of decision are subject to judicial review. Rather the relevant question for determining the court's jurisdiction was whether the Board's decision not to enter a contract is (a) an exercise of state authority and (b) of sufficiently public character that public law remedies are available. There seems to have been no dispute that the Board was a state actor. The question whether a decision by a state actor is of sufficient public character to be subject to judicial review should be determined with regard to the factors set out in *Air Canada v Toronto Port Authority*.[16] Applying those factors — which include the character of the matter under review, the extent to which a decision is founded and shaped by law rather than private discretion, and the decision maker's relationship to other statutory schemes — the court found the matter here to be a private contract dispute and not amenable to public law remedies.

Commentary: In this decision, the Divisional Court follows its decision in *Wise Elephant Family Health Team v Ontario (Minister of Health)*[17] to explicitly affirm the continued applicability of *Air Canada v Toronto Port Authority* following the Supreme Court of Canada's decision in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v*

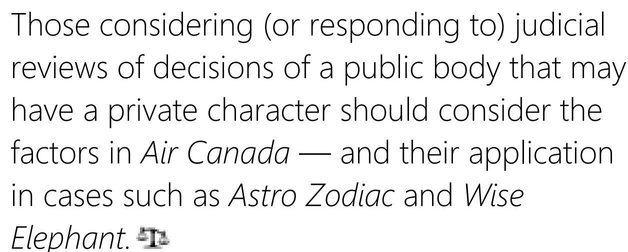
[15] At para 26, quoting *Paine v University of Toronto* (1981), 34 OR (2d) 770 (CA), at 722.

[16] 2011 FCA 347.

[17] 2021 ONSC 3350 (Div Ct).

Wall.[18] In particular, the court explains that determining whether a decision is subject to judicial review requires asking whether the decision is (a) an exercise of state authority and (b) of sufficiently public character that public law remedies are available. *Wall* concerned the decision of a religion organization, the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses — a private body that was in no way exercising state authority. The Supreme Court in *Wall* held that the decisions of such *private* bodies are not subject to judicial review — whether or not those decisions can be said to be "public" in the sense of having some broad import for members of the public. What was not directly at issue in *Wall* — but was the focus of the Divisional Court's decision here — was when the decision of a *public* body will fall outside the scope of a court's judicial review authority because of the "private" nature of the decision. The Divisional Court's decision reaffirms the continued applicability, after *Wall*, of the *Air Canada* factors where what is at issue is the public nature of a *decision* rather than a decision *maker*.

Those considering (or responding to) judicial reviews of decisions of a public body that may have a private character should consider the factors in *Air Canada* — and their application in cases such as *Astro Zodiac* and *Wise Elephant*.



QUOTES FROM THE CASES

Dhalla v College of Physicians and Surgeons, 2022 MBCA 7

On the distinction between appellate and administrative standards of review:

[66] In my view, it is important to recall that *Vavilov* is about administrative standards of review. The reasons in *Vavilov* only devote one paragraph to civil standards of review. After stating that civil standards are to be applied in cases where there is a legislated right of appeal, the majority referred to the *Housen* standards as an example of them. *Vavilov* was not intended to constitute an examination or variation of the law governing civil standards of review. Had the Supreme Court intended such a result, it would have clearly stated so.

Hakizimana v. Canada (Public Safety and Emergency Preparedness), 2022 FCA 33

On the mootness doctrine:

[23] Finally, the appellants claim, based on the Federal Court's decision in *Thamotharampillai v. Canada (Solicitor General)*, 2005 FC 756, 274 F.T.R. 146 (*Thamotharampillai*), that there is no risk for the Court, in deciding the present matter on its merits, of usurping the law-making function of the legislative branch. I note that in that case, the Federal Court found the matter before it (a judicial review application of a negative pre-removal risks assessment) to be moot and declined to hear it despite its mootness. In

[18] 2018 SCC 26.

deciding not to hear it, the Court was satisfied that hearing the appeal would "encroach[] on the proper law-making function of the Governor-in-Council" (*Thamotharampillai* at para. 22).

…

[24] Ultimately, the appellants are urging the Court to create a legal precedent. However, as recently reaffirmed by the Court, it is not the Court's task to interpret legislation in a case with no practical consequences "just to create a legal precedent", as this would amount to "a form of law-making for the sake of law-making." (*CUPE* at para. 13).

Herbert v Canada (Attorney General), 2022 FCA 11

On the prematurity doctrine:

[9] The principle of judicial non-interference with ongoing administrative processes is important because it "prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway". This principle allows reviewing courts, when a matter comes to them "at the end of the administrative process", to "have all of the administrative decision-maker's findings", which "may be suffused with expertise, legitimate policy judgments and valuable regulatory experience" (*CB Powell* at para. 32).

…

[12] These principles were reiterated with vigor in the recent case of *Dugré v. Canada (Attorney General)*, 2021 FCA 8, [2021] F.C.J. No. 50, where this Court, raising the issue on its own motion, held that the non-availability of interlocutory relief was "next to absolute" (*Dugré* at para. 37). It underscored the fact that the "very rare" circumstances that would allow a party to bypass the administrative process "require that the consequences of an interlocutory decision be so 'immediate and radical' that they call into question the rule of law".

Lovell v Ontario (Minister of Natural Resources and Forestry), 2022 ONSC 423 (Div Ct)

On the appropriate remedy for a breach of procedural fairness:

[9] The argument on this point is as follows. The decision-maker below failed to accord the applicants an opportunity to respond to information received by the decision-maker from others (notably the Ministry of Mines). If the applicants had been given an opportunity to respond to this information, the would have provided the impugned information, which, they say, would have been materials to the permitting decision.

[10] There are two problems with this argument. First, it does not bear on whether the applicants were entitled to respond to the material provided by the Ministry of Mines….

[11] Second, if there has been a failure of procedural fairness below, the remedy in this court, in the circumstances of this case, is not to permit the parties to adduce fresh evidence bearing on the merits, and then for this court to make a fresh decision of the underlying issue. If there was a failure of procedural fairness, the remedy in this court is to send the case back for a fresh determination in accordance with this court's decision respecting the fair procedure required. Otherwise, responding parties would have to adduce responding evidence in this court, and the case would quickly transform into a contest on the substantive merits of the underlying issue. That is not this court's role.

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