ISSUE No. 39 • MARCH 2024

ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

CO-EDITORS: **JUSTIN SAFAYENI & SPENCER BASS**

IN THIS ISSUE

CONTRIBUTORS


Karen Bernofsky


Taskeen Nawab


Geri Angelova

Statutory appeal provisions do not limit judicial review on issues outside their scope: *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8

Facts: Y was injured in an automobile accident in February 2010 and sought benefits under the *Statutory Accident Benefits Schedule*.[1] In a letter sent in January 2011, her insurer, TD, denied her application for three categories of benefits as a result of her failure to submit a completed disability certificate. Y then attended two examinations by TD's chosen assessor, after which TD again denied her claim for two of the benefits for which she had applied. TD initially confirmed that she was eligible for the third form of benefits: income replacement. However, a few months later TD deemed Y ineligible for income replacement benefits too.

Y initiated various forms of dispute resolution that were available at the time under the SABS and the *Insurance Act*[2]. In 2018, and following extensive amendments to the *Insurance Act* and the SABS, Y made an application to the

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

[2] RSO 1990, c I.8

Licence Appeal Tribunal. The LAT held a preliminary hearing to determine whether Y was precluded from proceeding with her application because she missed the statutory two-year limitation. The LAT adjudicator found that the January 2011 letter contained a clear and unequivocal denial of benefits. As a result, the limitation period started to run at that time and expired several years before Y initiated the application. The adjudicator dismissed the application. The same adjudicator dismissed Y's request for reconsideration.

Y appealed to the Divisional Court under s. 11(6) of the *Licence Appeal Tribunal Act, 1999*[3] which grants a right of appeal from a decision of the LAT relating to a matter under the *Insurance Act* on a question of law only. Y also sought judicial review in the event the Court determined that LAT's errors were errors of fact or mixed fact and law.

The Divisional Court dismissed the appeal, as well as Y's application for judicial review, on the basis that there were "no exceptional circumstances" that would justify judicial review, particularly given the legislative intent to limit judicial review to questions of law only. The Court of Appeal dismissed Y's appeal, holding that it would only be in "rare cases" that the remedy of judicial review would be exercised given the presence of a statutory appeal route.

Decision: Appeal allowed and matter remitted to the LAT adjudicator (per Rowe J. for a unanimous court).

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

There is no proper basis to infer a legislative intent to eliminate judicial review of issues outside the scope of the statutory appeal route (i.e. for questions of fact or mixed fact and law). The legislative decision to provide for a right of appeal on questions of law only denotes an intention to subject such questions to correctness review. Section 2(1) of the *Judicial Review Procedure Act* preserves the right of litigants to seek judicial review "despite any right of appeal". Errors of fact or mixed fact and law, thus, are not subject to correctness review — and proceeding with a judicial review on these questions is fully respectful of the legislature's institutional design choices.

In addition, the availability of a statutory appeal under the *LAT Act* cannot be considered an adequate alternative remedy for a judicial review. The right of appeal is restricted to errors of law only. Y is raising errors of fact or mixed fact and law, which cannot be pursued under the statutory right of appeal.

Accordingly, Y's judicial review application should proceed and the LAT adjudicator's decision should be assessed on the reasonableness standard.

The decision was unreasonable as it failed to take into account relevant legal constraints. In particular, the adjudicator failed to consider the legal effect of the fact that Y's income benefits were reinstated between February and September 2011 (after Y received the letter advising she would not receive further benefits in January 2011) — and that some earlier tribunal decisions have held that when such

reinstatement occurs, the limitation period can only be triggered when they are validly terminated again. It is arguable that there still needs to be a valid denial of Y's benefits to start the clock running. This is a question properly to be decided by LAT.

Commentary: This hotly anticipated decision definitively resolves what had been an ongoing dispute in the jurisprudence regarding the role of limited statutory appeal provisions. We now know that such appeal rights do not oust—or even weaken—the ability to seek judicial review. As the Court tells us, the limits of what can be inferred from statutory appeal provisions is simply that whatever falls outside of those provisions may be subject to judicial review. In other words, the legislative intent of a limited statutory appeal provision is restricted to what the majority decided in *Vaviliov*: appellate standards of review ought to apply to those questions.

The Court has now reaffirmed and clarified its earlier statement in *Vavilov* that "the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal" (para. 52).

This approach of 'rolling out the welcome mat' to judicial reviews will have practical consequences. Many tribunals operate on the basis of a statutory scheme with limited appeal rights. *Yatar* sends a clear signal that any aspect of these underlying decisions may now be challenged, whether via an appeal or by way of a judicial review proceeding in tandem with that appeal (or, as may be the case, standing alone). Whatever reticence might have been caused by the uncertainty surrounding this issue post-*Vavilov* — and, at least in Ontario, the chill brought over parallel judicial reviews after the Divisional Court's decision in *Yatar* — has now dissipated. Simply put, we can expect more judicial review applications in a post-*Yatar* world.

Counsel seeking to challenge tribunal decisions subject to a limited statutory right of appeal are well advised to bring both an appeal and a judicial review application if they seek to challenge the decision on multiple grounds (i.e. both questions of law and questions of fact or mixed fact and law). This will ensure that the court can address all of the arguments.

While *Yatar* brings welcome clarity to what can be inferred from a statutory appeal provision when it comes to judicial review applications on issues outside the scope of that provision, it expressly avoids pronouncing on the thornier question of whether, and to what extent, legislatures may restrict judicial review. Courts have long ignored wholesale privative clauses seeking to fully insulate decision-makers from judicial review, finding such attempts to be unconstitutional.[4] But what if a legislative scheme merely *restricts* judicial review while also providing a limited right of statutory appeal or review on certain questions? The Court notes conflicting recent case law on this point, yet decides to "leave that question for another day" (para 50).

[4] See, for example, *Crevier v. AG (Quebec)*, [1981] 2 SCR 220.

In fairness, resolving that question was not strictly necessary in *Yatar*, given that the statutory scheme included only an appeal provision and no privative clause. But an answer will be required sooner rather than later, given the ongoing jurisprudential uncertainty on this very question, particularly in the federal courts.[5]

Disguised Correctness Review for Cabinet Confidences?: *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4[6]

Facts: A reporter with CBC made a request under Ontario's freedom of information legislation for all mandate letters that Premier Ford provided to his Ministers upon forming government in 2018. Unlike previous governments, Premier Ford did not publicly release his mandate letters. The government refused to disclose the letters to the requestor. It claimed that the letters were exempt from disclosure under s. 12(1) of the Act which protects records that would reveal the "substance of deliberations" of Cabinet.

The Information and Privacy Commissioner of Ontario ("IPC") found that the exemption did not apply and the letters ought to be disclosed. The IPC considered the claim for exemption in light of the two underlying rationales for preserving Cabinet confidentiality: candour (ensuring that ministers can be frank with each other on contentious policy matters) and solidarity (that all ministers must publicly stand behind decisions of the executive). He found that disclosing the letters would not undermine these purposes. He also noted that there was insufficient evidence that the contents of the letters were the subject of any past deliberations by Cabinet or would return to Cabinet for future deliberations. Further, he found that the letters would not reveal the "substance" of the Premier's deliberations, but only the "outcomes" of that process, which are not protected from disclosure.

Ontario sought judicial review of the IPC decision. Both the Ontario Divisional Court and a majority of the Court of Appeal determined that reasonableness was the appropriate standard of review and that the IPC's decision was reasonable.

Decision (*per* Wagner C.J. and Karakatsanis, Rowe, Martin, Jamal and O'Bonsawin JJ.; Côté J. concurring): appeal allowed; the mandate letters are exempt from disclosure under the Cabinet records exemption because they would reveal the substance of Cabinet deliberations.

It is not necessary to determine the appropriate standard of review. The parties agreed that the standard was reasonableness and argued the case on that basis. However, arguments exist as to whether the standard ought to be correctness due to the constitutional conventions engaged by the exemption. The Court does not need to resolve this issue because the IPC's decision is both incorrect and unreasonable.

[5] See, for example, *Democracy Watch v. Canada (Attorney General)*, 2023 FCA 39.

[6] Stockwoods LLP acted as counsel for the Respondent, Canadian Broadcasting Corporation.

The IPC's reasons were intelligible and transparent. He paid careful attention to the text of the legislation, the purposes of access to information legislation as a whole, and some of the purposes of Cabinet confidentiality underlying the statutory exemption. Nevertheless, his decision was still unreasonable because he "did not engage meaningfully with the legal and factual context", including the constitutional conventions and traditions surrounding Cabinet confidentiality and the role of the Premier. This led to an overly narrow interpretation of the exemption.

In particular, beyond the candour and solidarity purposes that the IPC identified, he did not address the point that cabinet confidentiality promotes the efficiency of Cabinet's collective decision-making.

The letters reflect the views of the Premier on the importance of certain policy priorities, and mark the initiation of a fluid process of policy formulation within Cabinet. Further, comparing the contents of the letters against later government policies would reveal what happened during Cabinet's deliberative process along the way. As such, they reveal the substance of Cabinet deliberations and are exempt from disclosure.

As there is only a single reasonable interpretation in this case—that the mandate letters are exempt under s. 12(1)—there is no purpose to remitting the matter to the IPC for reconsideration.

Justice Côté wrote separate concurring reasons. She rejected the majority's conclusion that it was unnecessary to select the appropriate standard of review or that the result would be the same regardless of the standard of review. Instead, she concluded that the standard of review was correctness because the issue of Cabinet privilege was a general question of law of central importance to the legal system as a whole (much like solicitor-client privilege or parliamentary privilege).

On the merits of the matter, Côté J. agreed with the majority's interpretation of s. 12(1) and its application to the mandate letters. She concluded that this was the *correct* result. However, just because the majority disagrees with the IPC's conclusion does not make it unreasonable. Indeed, she criticized the majority for engaging in "a *de facto* correctness review", reaching its own interpretation of the statute and then using that interpretation as a yardstick with which to measure the IPC's decision (para. 74). Ultimately, she states: "While I agree with my colleague's interpretation of s. 12(1), it is exactly that — her interpretation" (para. 83).

Commentary: Perhaps one of the most interesting aspects of the Supreme Court's decision is the debate between the majority and Côté J. over the methodology of judicial review, despite their complete agreement over the underlying issue of whether the mandate letters are exempt from disclosure under the relevant legislation.

Justice Côté makes a forceful and compelling argument that the majority is engaged in disguised correctness review. Interestingly, in order to make this point, she provides a

detailed defence of the IPC's decision, despite concluding that it was incorrect. She almost goes as far as expressly stating that it was reasonable. She points out that the decision was consistent with longstanding precedent, relies on the purposes of the legislation, and cites judicial decisions on the issue from across the country—all things that the Court in *Vavilov* told decision-makers to do. Justice Côté also notes that the "efficiency" rationale, which the majority heavily relies on to call the decision unreasonable, was not raised by the parties before the IPC and had never previously been articulated in those terms by the courts.

As the Court stressed in *Vavilov*, reasonableness review and correctness review start from different places. They are methodologically distinct. For that reason, Côté J. is right to point out the inconsistency in the majority claiming that selecting the standard of review would make no difference. If reasonableness and correctness review are indeed different forms of judicial review, then the court's reasons should look substantially different depending on which standard they are applying.

Finally, for those critical that the more "robust" form of reasonableness review mandated by *Vavilov* would come to resemble correctness review in substance (if not name), the decision in *Information and Privacy Commission* is an important data point. The majority relies on considerations never raised before the decision-maker and never previously articulated by the courts to label the IPC's decision unreasonable, despite recognizing that it is intelligible and transparent and engages in a detailed discussion of the text, context, and purpose of the provision. This is similar to another recent application of reasonableness review in *Mason v. Canada (Citizenship and Immigration)*,[7] where the majority found the decision-maker's interpretation unreasonable for failing to consider Canada's international obligations, even though they were not raised by the parties. In both *Information and Privacy Commission* and *Mason*, the Court—while purportedly applying reasonableness review—takes it upon itself to consider these issues for the first time and thereby label the original decision unreasonable. This reasoning would not be out of place in correctness review, but sits uncomfortably with the Court's prior descriptions of reasonableness review.

Limits of what can be challenged on a compliance application: *College of Physicians and Surgeons of Ontario v. Kilian*, 2024 ONCA 52

Facts: Dr. K was investigated by her regulator, the College of Physicians and Surgeons ("CPSO"), after the CPSO received complaints that she was issuing false COVID-19 vaccine exemption certificates and prescribing medications for COVID-19 that were not approved by Health Canada.

Although s. 76 of the *Health Professions Procedural Code* ("*Code*") required Dr. K to cooperate with the investigation, she failed to provide the investigator with the patient records for the patients to whom she wrote

[7] 2023 SCC 21.

COVID-19 vaccine exemption certificates upon request.

The CPSO brought a 'compliance application' to the Superior Court under s. 87 of the *Code* to compel Dr. K to cooperate with the investigation. Dr. K opposed the s. 87 application on the grounds that the demand by the investigator was not lawful and that s. 76 and/or s. 87 of the Code is unconstitutional.

The application judge granted the CPSO's application and dismissed Dr. K's constitutional arguments, concluding that (i) he did not have jurisdiction to consider the constitutional arguments; (ii) the CPSO met the requirements for a s. 87 order; and (iii) he would not exercise any residual discretion in favour of denying the CPSO the relief sought.

Decision: Appeal dismissed (*per* Benotto, Miller, and Thorburn JJ.A.)

On an application under s. 87 of the *Code*, a court cannot assess the lawfulness of the underlying investigation (including demands made in the course of such an investigation) or the statutory scheme. To do so would be premature and contrary to the Court of Appeal's decision in *Volochay v College of Massage Therapists of Ontario*.[8] It is a well-settled principle that the courts will not interfere with administrative processes until they are complete, except in exceptional circumstances. This prevents fragmentation of the process, piecemeal court proceedings, as well as unnecessary costs and delays. For the court to play its proper role, the professional must raise these issues before the administrative decision maker first. The court's role is only to review administrative decisions—not preempt them.

Dr. K was required to comply with the investigation, even though she intends to argue that s. 76 is unconstitutional. Until a court actually finds the impugned section of the Code unconstitutional, the Code is presumed to be valid. To do otherwise would only serve to undermine public confidence in the regulatory scheme.

With respect to the requirements for a s. 87 compliance order, they were satisfied here. Section 87 only requires the CPSO to show that the doctor breached the legislation. Here, Dr. K breached s. 76 of the Code by failing to comply with the investigator's request for documents, which was proper and consistent with the scope of the investigation.

Finally, there is no basis to interfere with the application judge's decision not to exercise his discretion to deny the s. 76 order. In ordering the investigation to be completed before seeking judicial review, the application judge was simply applying longstanding principles relating to prematurity.

Commentary: This decision is a welcome affirmation and clarification of the limited scope of what can be challenged in applications to compel compliance under s. 87 of the *Code* (and, presumably, other similar statutory regimes). Attempts to resist such applications by challenging the underlying validity of the legislative scheme will fail: regulated professionals are obliged to comply with legislation—including in the course of an investigation—until and unless that legislation

[8] 2012 ONCA 541

is found to be unconstitutional. Arguments relating to unconstitutionality should be advanced before the relevant discipline committees or tribunals at first instance (assuming they have the power to consider and address such arguments), and are then subject to review by courts under statutory appeals or judicial review applications.

The facts in *Kilian* are a stark demonstration of the problems with adopting a fragmented approach that would invite interlocutory judicial review applications on these issues, rather than letting the administrative process run its course. The CPSO investigator was appointed in late 2021 and, due to the repeated appearances before three levels of courts, over two years later, the professional had not even complied with a basic request for patient files, effectively stymieing the investigation.

A Request for Bids is Not Subject to Judicial Review Where There Are Adequate Alternative Remedies: *Thales DIS Canada Inc. v. Ontario (Transportation)*, 2023 ONCA 866

Facts: Ontario's Ministry of Transportation (the "Ministry") initiated a procurement process in 2021 by issuing a call for bids aimed at the production of driver's licenses and health cards. These identification cards were to be manufactured utilizing card stock with specific security features. Notably, the bid solicitation stipulated a prerequisite that the production of these identification cards, including the card stock, must occur within the borders of Canada. Thales, a subsidiary of a French company, put forth a proposal to manufacture the card stock at a facility in Poland.

Thales contested the stipulated requirement necessitating Canadian production of the card stock through an internal bid review mechanism within the Ontario government. Thales argued that mandating Canadian production of the card stock contravened Canada's non-discrimination obligations under the *Canada-European Union Comprehensive Economic and Trade Agreement* ("*CETA*"). Despite Thales's assertions, the complaint was dismissed on grounds that the requirement fell within the purview of the public safety exception (the "Decision"). Undeterred, Thales applied for judicial review, challenging both the dismissal of its complaint and the request for bids itself. The majority of the Divisional Court granted the application for judicial review, finding both that the Decision and the choice to issue a request for bids with a domestic production requirement in the first place was unreasonable.

Decision: Appeal allowed; Thales's application for judicial review dismissed (*per* Doherty, Hoy, Favreau JJ.A.).

1. The majority of the Divisional Court misapplied the reasonableness standard of review.

Reasonableness is the applicable standard, but the Divisional Court erred in its application of that standard by failing to assess whether the Decision, in light of the law, evidence, and arguments presented by the parties, offered a coherent line of reasoning. Specifically, the Divisional Court veered off course by conducting a *de novo* assessment to determine

whether the requirement for Canadian card stock production violated *CETA,* rather than scrutinizing the rationale behind the Decision. This departure led to three interconnected errors.

First, the majority failed to consider the broader context in which the decision was made and disregarded pertinent submissions from both parties. The Ministry relied on the WTO decision in *Brazil – Measures Affecting Imports of Retreaded Tyres* (2007) to support its position that any alternative measure would have to preserve the Ministry's desired level of protection against fraud and identity theft. Thales offered alternative measures without engaging with the precedent in *Brazil*. Crucially, Thales argued against applying the public safety exception in this case, contending that its past record demonstrated the ability to securely transport card stock from Poland to Ontario.

Second, contrary to the approach set out in *Vavilov*, the Divisional Court assessed the decision against its own interpretation of whether the public safety exception applied to the domestic production requirement. After determining that the Decision was unreasonable because it failed to apply the two-part material necessity test, the Divisional Court erred in going on to independently evaluate whether the two-part material necessity test was satisfied.

Third, even if the Decision was deemed unreasonable due to the Director's failure to apply the material necessity test, the majority erred in opting to quash the decision outright without remitting it for reconsideration. A reviewing court should refrain from conducting its own analysis to determine the appropriate outcome unless the matter fits into one of the "limited scenarios" set out in *Vavilov*, such as where a particular outcome is inevitable and where remitting the case would serve no useful purpose. This was not such a case.

In essence, the Divisional Court's misapplication of the reasonableness standard resulted in an erroneous conclusion. Contrary to their finding, the Decision exhibited logical and coherent reasoning. The Director's determination that offshore production posed inherent risks, despite one manufacturer's ability to transport securely, was a reasonable assessment.

2. <u>The Divisional Court erred in finding that the request for bids is subject to judicial review on its own apart from the Decision.</u>

Wauzhushk Onigum Nation v. Minister of Finance (Ontario)[9] does not support a sweeping proposition that the terms of a request for bids are never subject to judicial review. In this case, the question of whether the request for bids could be judicially reviewed must be examined within the context of Ontario's obligations to establish a dispute resolution process for procurement-related disputes under *CETA*.

As a general principle, if an administrative process is in place to address an issue, parties should exhaust that avenue before seeking judicial review. By doing so, the reviewing court gains insights from the administrative decision-makers' reasoning and expertise. If

[9] 2019 ONSC 3491 (Div. Ct.).

parties have already engaged in the administrative process, there is no justification for conducting a separate, fresh review of the request for bids. Such an action falls outside the purview of the court's role in an application for judicial review.

The concurring judge in the Divisional Court primarily argued that the process did not comply with *CETA* due to the distinction between a right of appeal and a right of judicial review. While this differentiation holds true as a general principle, its significance diminishes in the context of implementing *CETA*'s dispute resolution provisions. Additionally, it is not the courts' responsibility to ascertain whether Ontario's process aligns with its obligations under *CETA*. Any failure on Ontario's part to establish an appropriate dispute process could be addressed under the treaty through mediation and arbitration between the concerned parties.

Commentary: The main issue before the Director was whether a "public safety" exception could be invoked to justify a domestic production requirement. The Divisional Court failed to recognize that the parties had differing views regarding the authority and criteria for invoking this exception. This fundamental misstep resulted in the Court overlooking the parties' submissions when conducting its reasonableness analysis. The Divisional Court was persuaded that the Decision was unreasonable largely due to its insistence on adhering to trade law precedents, particularly the material necessity test set out in *Brazil*, even though they are not binding on Canadian courts or subsequent WTO panels. While the Ministry referred to and relied on the two-part material necessity test, Thales did not adopt this test. The Court of Appeal aptly noted that it is "unclear that the two-part material necessity test is a legal constraint on the decision". Thus, the Court of Appeal's decision serves as a useful caution to litigants and courts relying too heavily on importing international precedent into domestic judicial reviews without a full appreciation for the legal force of those decisions.

This decision also serves as another warning for reviewing courts to refrain from inadvertently engaging in a disguised correctness review. After deeming the Director's decision unreasonable, the Divisional Court inappropriately proceeded to adjudicate whether the domestic production requirement satisfied the public safety exception. This approach, cautioned against under the reasonableness standard, is generally ill-advised. Once a decision is deemed unreasonable, the Court should refrain from further intervention, unless exceptional circumstances warrant otherwise.

With respect to the issue of reviewability, Favreau J.A. appropriately exercised restraint. The question of whether procurement-type decisions are subject to review remains contentious and likely to persist. This determination will have to be made on a case-by-case basis. In this instance, Favreau J.A. draws an analogy to cases involving adequate alternative remedies, which holds merit. There is little practical rationale for revisiting the procurement itself if a tailored process already exists to challenge the bid. While the decision does not definitively close the door on all standalone judicial reviews of the criteria of requests for proposals, such challenges are

unavailable where administrative review procedures already exist. Unsuccessful bidders should avail themselves of such recourses first, and can then seek judicial review of the decision if they are still unsuccessful.

Lower courts lagging in considering *Charter* values in reasonableness review: *New Blue Ontario Fund v. Ontario (Chief Electoral Officer)*, 2024 ONSC 1048

Facts: The New Blue Party of Ontario, a registered political party founded in Ontario in 2020 sought payment from Elections Ontario based on the June 2022 election results. The Chief Electoral Officer of Ontario (the "CEO") determined that New Blue was ineligible for the payment it demanded.

New Blue sought the payments under the scheme established by s. 32.1 of the *Election Finances Act, 1990* (the "*EFA*").[10] Before the June 2022 Election, the Legislature enacted a new subsection, adjusting the allowance payments for 2022 and 2023 to off-set the effects of COVID-19 and help parties conduct the 2022 election. Section 32.1(2.1) specified that the second payment of the 2022 calendar year would be the amount calculated for the three remaining quarters of that year and for the first quarter of the 2023 calendar year, and that no further payments would be made for the remainder of 2022 or the first quarter of 2023. The CEO relied on this new subsection to reject New Blue's demand.

The CEO provided written reasons for its decision, stating that the quarterly allowances for the period covered by s. 32.1(2.1) could only be calculated based on the results of the 2018 election (the most recent election), and that New Blue was therefore ineligible to receive payment until the second quarter of 2023.

New Blue commenced an application for judicial review, initially seeking to quash the CEO's decision on the basis that it was contrary to the plain language of the statute, did not grapple with the purpose of the statute, and failed to take into account *Charter* values. It later amending the application to seek an order of *mandamus*, compelling the CEO to pay them for the final two quarters of 2022 and the first quarter of 2023, on the theory that the CEO did not have the power to interpret the Act, but merely occupied the role of a "mechanical, non-discretionary paymaster".

Decision: Application dismissed (*per* Sachs, Backhouse and Lococo JJ).

The CEO's decision that New Blue was ineligible for the lump-sum payment under s. 32.1 of the *EFA* was reasonable.

Mandamus was not available because the CEO's response to New Blue constituted a decision. The key question for the court, as well as the primary disagreement between the parties centered on whether a proper interpretation of the *EFA* would require the CEO to pay quarterly allowances to New Blue. The CEO exercised his statutory authority under the *EFA* in deciding that New Blue was not entitled to the quarterly allowance

[10] R.S.O. 1990, c. E.7.

payment it sought. This decision affected New Blue's legal rights and entitlement to privileges under the *EFA*. *Mandamus* only applies where a decision has not been made. As there was no refusal to perform a public duty and New Blue had no clear right to the CEO's performance of a duty to make the payments, the test for *mandamus* was not met.

The CEO rendered a reviewable decision when he informed New Blue of its ineligibility for the quarterly subsidies under s. 32.1(2.1) of the *EFA*. Per *Vavilov*, the CEO's decision was reviewable on the reasonableness standard.

The CEO's decision did not ignore the plain language of the statute. Words of a heading in a statute cannot be considered in its interpretation, as they do not form a part of the statute itself. The express language of s. 32.1(2.1) supported the CEO's interpretation of the provision as modifying a party's entitlement to the allowances as well as altering the schedule for payment of the allowances.

Even if New Blue's interpretation of the legislation was reasonable, if the CEO's decision was also reasonable, the interpretation adopted by the decision maker must be respected.

The CEO's decision did not unreasonably ignore the purpose of the statute. New Blue's letter demanding payment provided a textual interpretation of the statute but did not make any reference to the purpose of the legislation. As New Blue did not argue the inconsistency of the decision with the purpose of the legislation before the CEO, it should not be able to do so now. As an officer of Ontario's Legislative Assembly, with statutory authority to administer the *EFA*, rather than an adjudicator, the CEO was only required to explain the reasons for his decision, taking into account the arguments put before him. He is not required to consider every aspect of the statutory context that might bear upon his decision. The decision should not be considered unreasonable for failing to explicitly deal with the argument about the statute's purpose when it was not put before him.

In any event, the decision was consistent with the statute's purpose.

The CEO's decision was not unreasonable because it failed to consider *Charter* values. The *Charter* argument was similarly never raised before the CEO. In any event, the *Charter* neither favours nor disfavours subsidies to political parties being determined with reference to any particular point in time.

As the CEO did not have to consider statutory purposes and *Charter* values in making its payment decision, and had sufficient support from the wording of the provision for its interpretation of s. 32.1(2.1) of the *EFA*, the CEO's decision was reasonable.

Commentary: This decision is reflective of greater deference in lower courts towards administrative decision makers when *Charter* values and statutory purposes are in play. In doing so, there is tension with recent SCC decisions.

The court effectively found that the decision maker does not need to consider *Charter* values or statutory purposes if the parties did not raise those arguments. While the court went on to say that these arguments would

not have altered the result in any event, the holding would extend to other situations where such arguments might be determinative.

The SCC in *Mason*[11] contrastingly held that a court's review of reasonableness must take account of the impact of the decision on the affected individual. In that case, the Immigration Appeal Division had failed to consider that the *Immigration and Refugee Protection Act* was limited by Canada's international obligations. This was seen as an omission by the court, which rendered the decision unreasonable, *even though* the omission had not been raised by the parties.

Admittedly, the impact on the rights of the parties in *Mason* was severe, to the extent that a bad outcome could have led to deportation, which weighed into the court's analysis. In the case at bar, the court reasoned that the exclusionary effect of the CEO's denial on New Blue did not extend to other small political parties. In fact, if New Blue's interpretation had been adopted, other small political parties may have been excluded from the scheme instead.

This lack of appetite to follow in the SCC's footsteps regarding a consideration of *Charter* values in a reasonableness review extends to other lower courts. *Commission scolaire*[12] was released soon after the CEO made its decision in this case. However, the Divisional Court distinguished *Commission scolaire* on the basis that the decision made by the CEO was not discretionary as it had been in *Commission scolaire*. Similarly, the Federal Court of Appeal, in *Sullivan v Canada (Attorney General)*,[13] opined that "only unjustified violations of rights and freedoms can strike down legislation". There the Social Security Tribunal was found to be reasonable in holding that the applicant was precluded under legislation and related court jurisprudence from questioning the appropriateness of the termination of his employment. The *Charter* values relied on there, "freedom and equality", were seen by the court as broad and unqualified, leading the court to discuss how "everything in the Charter is subject to reasonable limits prescribed by law under section 1".

Despite clear guidance from the SCC on the importance of considering *Charter* values in order to render reasonable decisions, *Commission scolaire* appears to be having limited traction in the lower courts so far. It is worth keeping an eye on this trend as more decisions are asked to grapple with a decision maker's failure to consider *Charter* values.

[11] *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21.

[12] *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31.

[13] 2024 FCA 7.

CO-EDITORS

Justin Safayeni
416.593.3494
justins@stockwoods.ca

Spencer Bass
416.593.1657
spencerb@stockwoods.ca

THE NEWSLETTER

The Stockwoods Administrative & Regulatory Law Case Review is a quarterly newsletter published by lawyers at Stockwoods LLP, a leading litigation boutique practising in the areas of administrative/regulatory, civil and criminal law.

To sign up to receive this newsletter via email, contact alicec@stockwoods.ca. The newsletter can also be viewed and downloaded on the firm's website at www.stockwoods.ca.

For more information about the issues and cases covered in this edition of the newsletter, or to find out more about our firm's administrative and regulatory law practice, please contact Justin Safayeni, Spencer Bass, or another lawyer at the firm.