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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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True questions of jurisdiction continue to create divisions: *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron*, 2018 SCC 3

FACTS: C suffered an employment injury, was unable to resume his pre-injury employment, and was advised by his employer that alternative suitable employment was unavailable. In addressing the issue of alternative suitable employment, the *Act respecting industrial accident and occupational diseases*[1] ("*Act*") does not expressly provide that employers have a duty to accommodate employees, beyond the terms of the *Act*. However, C argued that the duty arising under Quebec's *Charter of human rights and freedoms* ("*Charter*") should apply.

The Commission de la santé et de la sécurité du travail ("CSST") and, on appeal, the Commission des lésions professionnelles ("CLP"), both held that the duty to accommodate does not apply to matters under the *Act*.

On judicial review, the Superior Court set aside the CLP's decision and ordered that the case be reconsidered in accordance with the duty to accommodate under the *Charter*. The Quebec Court of Appeal agreed. The CSST appealed.

DECISION: Appeal dismissed (Côté and Rowe JJ, concurring).

[1] CQLR, c. A-3.001.

Writing the five-judge majority opinion, Abella J. framed the question before the Court as whether the Commissions must take into account the employer's duty to reasonably accommodate an injured worker in determining if and how a return to work is possible under their statutory scheme. Justice Abella described the case as being "in classic reasonableness territory – the CLP is interpreting the scope and application of its home statute."

The majority concluded that the Commissions' interpretation of the *Act* was unreasonable. The duty to reasonably accommodate is a core principle of the *Charter*, and all Quebec law should be interpreted in conformity with the *Charter*. The duty applies when interpreting and applying the provisions of the *Act*. The fact that the *Act* expressly sets out some types of accommodation does not negate the broader, general accommodation required by the *Charter*.

Justice Rowe, writing for himself and Côté J, reached the same end result as the majority. But the concurring judges took a decidedly different analytical path. Three key points stand out.

First, the concurring judges found that correctness review applies. They characterized the matter not as a tribunal interpreting its home statute, but as "one relating to the scope of its statutory grant of power, *i.e.* its jurisdiction", since the Commissions found that they could not apply the *Charter* under their enabling legislation.

Second, the concurring judges applied the test from *R v Conway*[2] in order to determine whether the Commissions enjoy the jurisdiction to apply *Charter* remedies. They concluded that the CSST does not, given its "administrative nature" and the lack of a general power to decide questions of law. They reached the opposite conclusion in respect of the CLP, given its general power to decide questions of law, ability to hear matters *do novo*, and broad remedial powers.

Finally, Rowe J makes it clear that he considers the majority's approach to be tantamount to erroneous reliance on the "*Charter* values" interpretive principle (which, for Rowe J., applies both in the context of the *Charter* and the *Canadian Charter of Rights and Freedoms*). The concurring judges draw a distinction between a "blanket presumption of conformity" with the *Charter*, which would frustrate legislative true intent, and the narrow purpose of using a presumption of compliance with the *Charter* to choose between two competing interpretations of a statute.

COMMENTARY: This marks yet another case in what has become a parade of recent split decisions from the Supreme Court on the applicable standard of review.

The tension between the majority and the concurrence in this case is not a new one. Drawing the line between a matter of home statute interpretation and a true question of *vires* can be a tricky conceptual exercise. Indeed, some might argue that it is hard to see any real difference between interpreting the outer bounds of a home statute and deciding matters of "true jurisdiction" (with the potential exception of where a tribunal delineates between matters within its jurisdiction and those within the jurisdiction of a different tribunal).

Perhaps in an attempt to provide practical guidance on this issue, the Court's post-*Dunsmuir* jurisprudence has tilted consistently in favour of characterizing such questions as matters of statutory interpretation – not jurisdiction. The high watermark of this approach was in *Alberta Teachers Association,* where the majority openly mused about doing away with the "true question of jurisdiction" category altogether.[3]

[2] 2010 SCC 22.

[3] *Alberta (Information and Privacy Commisioner) v Alberta Teachers Association,* 2011 SCC 61 at para 34. See also *ATCO Gas and Pipeline Ltd v Alberta (Utilities Commission),* 2015 SCC 45 at para 27.

More recently, however, a segment of the Court has demonstrated a willingness to breathe life into what once was more a moribund category of correctness review. Justices Côté, Brown and Rowe are leading the charge. In *Guérin,* all three judges found that a true question of jurisdiction was raised,[4] and their dissenting opinion in *Edmonton East* explicitly declined to adopt the majority's finding that no true question of jurisdiction was raised.[5] While the views of these judges remain in the minority for now, changing court dynamics – including the departure of former Chief Justice McLachlin and the addition of Justice Martin – could eventually lead to a shift in how a majority of the Court approaches this category of correctness review.

Additionally, the diverging views of the majority and concurring judges on the role of *Charter* values reflects a fundamental disagreement on exactly how far these values can be relied upon in the exercise of statutory interpretation. But what is equally worthy of note is that none of the seven justices adopted the *Doré* framework[6] as their mode of analysis (*i.e.* inquiring into whether the CSST reasonably and proportionately balanced *Charter* values with the mandate under the *Act*). Yet that is exactly how the Quebec Superior Court approached the issue.

The Supreme Court's unanimous side-stepping of the *Doré* framework suggests that it does not apply to questions of statutory interpretation – or, for that matter, true questions of jurisdiction. In other words, the implicit message of *Caron* is that the *Doré* framework applies only to administrative decisions that involve the exercise of discretion, such as a decision on an appropriate sanction (as was the case in *Doré*) or whether to grant an exemption (as was the case in *Loyola High School*[7]). This is how most courts and commentators have read *Doré*.[8] Still, it is regrettable that the Court did not take the opportunity to explore this question and address it explicitly, as at least one appellate court has concluded that the *Doré* framework does apply to non-discretionary matters of statutory interpretation.[9] Particularly if other appellate courts follow suit, this issue is one that will likely require the Supreme Court's attention in the near future.

Questioning the existence of jurisdictional questions: *Canadian Copyright Licensing Agency (Access Copyright) v Canada*, 2018 FCA 58

FACTS: Access Copyright is a "collective society" under the *Copyright Act*[10] and in accordance with licence agreements collects royalty payments on behalf of authors and publishers. As such, Access Copyright operates a "licensing scheme" under the Act and is subject to provisions in the Act that allow Access Copyright to propose royalty tariffs to the Copyright Board for approval. Objections to the proposed tariffs may be filed, and the Board adjudicates the fairness and appropriates of the proposed tariffs. At the end of the process, the Board "shall certify the tariffs as approved, with such alterations to the royalties and to the terms and conditions related thereto as the

[4] *Quebec (Attorney General) v Guérin,* 2017 SCC 42 at paras 68-70 (*per* Brown and Rowe JJ, concurring) and para 83 (*per* Côté J, dissenting). The case was discussed in Issue No. 12 of this Case Review.

[5] *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 90. This case was discussed in Issue No. 8 of this Case Review.

[6] *Doré v Barreau du Québec*, 2012 SCC 12.

[7] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12.

[8] See, for example, J. Safayeni, "The *Doré* framework: Five Years Later, Four Key Questions (And Some Suggested Answers)" 31 Can. J. Admin. L. & Prac. 31.

[9] See, for example, *Taylor-Baptiste v Ontario Public Service Employees Union*, 2015 ONCA 495 at paras 56*ff*.

[10] RSC 1985, c C-42.

Board considers necessary, having regard to any objections to the tariffs."[11]

Access Copyright proposed a tariff for royalty rates for the years 2010-2014. The proposed tariff included the making and distribution of digital copies of published works in the Access Copyright repertoire, subject to certain terms. One of those terms required government licensees to cease using digital copies once they were no longer covered by the tariff, and to delete those copies (the "Deletion Provision"). Following a lengthy hearing, the Board certified the tariff, but it excluded digital copying from the tariff and removed the Deletion Provision.

Access Copyright sought judicial review in the Federal Court of Appeal.

DECISION: Application dismissed.

Justice Stratas wrote the principal set of reasons for the Federal Court of Appeal's unanimous decision. Justices Rennie and Near wrote brief concurring reasons, agreeing with Stratas JA in the result and with much of his analysis, but disagreeing with his *obiter* comments on two doctrinal issues: the existence of jurisdictional questions, and the role of reviewing courts on procedural fairness questions.

All three judges agreed that the standard of review is reasonableness. Access Copyright argued that the correctness standard applied because the application involved a jurisdictional issue: whether the Board had exceeded its jurisdiction in making its decision. However, in deciding what it could and could not do, the Board had to interpret the Act, its home statute. The Supreme Court's case law is clear that reasonableness is the presumed standard of review of an administrative decision maker's interpretation of legislation with which it is familiar or that it frequently uses. Justices Rennie and Near agreed with Stratas JA on those points.

Justice Stratas then commented at length on Access Copyright's submission that where "jurisdiction" is involved, the standard of review is correctness. Justice Stratas noted a tension between the presumption of reasonableness review of a decision-makers interpretation of its home statute, and correctness review for a certain category of such interpretation issues – the interpretation of whether the tribunal has jurisdiction to make a certain decision.

Justice Stratus observed that arguments that "jurisdiction" issues attract correctness review generally follow two streams. In the first stream, it is argued that the so-called "jurisdiction" issue is a fundamental issue relation to the limits of the Board's power. According to Stratas JA, the Federal Court of Appeal has rejected that sort of submission "over and over again" based on Supreme Court jurisprudence. If a "jurisdictional question" is a question of whether the decision-maker has done something it did not have power to do, such a question calls for an interpretation of the legislation that gives the decision-maker power. Conceived in this way, a "jurisdictional question" is really a question of statutory interpretation, for which reasonableness is the presumptive standard of review.

This argument harkens back to the "preliminary questions doctrine", which prevailed in judicial review through the 1970s and allowed the court to intervene in an administrative decision by simply labelling something a "preliminary" question and calling it "jurisdictional". That approach was discarded by the Supreme Court in *CUPE v New Brunswick Liquor Corp*[12] due to its evident flaws. In *Dunsmuir*, the Supreme Court again cautioned against a highly formalistic, artificial "jurisdiction" test that could be easily manipulated.

In post-*Dunsmuir* cases, the presumption of reasonableness for questions of statutory interpretation has a strong foothold. However,

[11] Act, s. 70.15.

[12] [1979] 2 SCR 227.

due to some uncertainty in the Supreme Court's standard of review jurisprudence recently, parties have been encouraged to argue for correctness review of "jurisdictional" questions. Nonetheless, in the Supreme Court's most recent decision on the issue, *Guérin*, a majority of that court continued to apply the presumption of reasonableness.

The second stream of submissions identified by Stratas JA seeks to base correctness review on the category of "true questions of jurisdiction" recognized in *Dunsmuir*. Justice Stratas stated that the Supreme Court has never defined what a "true question of jurisdiction" is and in fact has warned that this category "will be narrow". In three cases since *Dunsmuir*, the Supreme Court has questioned whether the category even exists.[13] Justice Stratas stated he was not going so far as to suggest that this avenue for correctness review is permanently foreclosed, as it is a feature of *Dunsmuir* and the Supreme Court has not removed it from the law. However, the Supreme Court has not yet had resort to this category.

Therefore, even if the Board's decision were characterized as an issue of jurisdiction, the standard of review is reasonableness, not correctness.

Justice Stratas went on to assess whether the Board acted reasonably in deciding not to include the Deletion Provision in its tariff, and concluded that it did.

Next, Stratas JA considered Access Copyright's arguments that the Board had breached its duty of procedural fairness. Justice Stratas began his analysis with the observation that "[t]he standard of review for procedural decisions made by administrators or decisions made by administrators that have procedural impacts is currently unsettled in this Court". However, it was not necessary to determine the standard of review or define precisely the level of procedural fairness the Board owed the parties since none of Access Copyright's procedural fairness concerns had any merit.

Justices Rennie and Near, in their concurring reasons, did not agree with the suggestion that the existence of jurisdictional questions has been foreclosed or that in *Guérin* the Supreme Court rejected the correctness standard of review for jurisdictional questions. To the contrary, the majority applied the reasonableness standard only after concluding that the issue was not a true jurisdictional question. The Supreme Court abrogated the "preliminary question" doctrine in *CUPE*, but it did not say that jurisdictional questions do not exist. Rather, courts should refrain from quickly labelling issues as "jurisdictional". The presumption of reasonableness can be rebutted by a jurisdictional question; indeed some members of the Court have identified jurisdictional questions in recent cases. The majority reasons noted that jurisdictional questions are closely connected to the rule of law and courts' constitutional responsibility to ensure administrative decision makers do not act outside their legislative authority.

Finally, Rennie and Near JJA disagreed with Stratas JA that the law with respect to the role of reviewing courts in assessing procedural fairness is unsettled. They cited three cases demonstrating that the law is settled.[14]

COMMENTARY: The Federal Court of Appeal had the decision in this case under reserve for 21 months. According to Stratas JA's reasons, the unusually long reserve was due to the Court

[13] See *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 64; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 25-33; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 26.

[14] *Mission Institution v Khela*, 2014 SCC 24 at paras 79-80; *Wsánec School Board v British Columbia*, 2017 FCA 210 at para 23; *Maritime Broadcasting System Ltd v Canadian Media Guild*, 2014 FCA 59 at para 79.

awaiting the Supreme Court's decision in *Guérin*. However, as seen in *Guérin* and the most recent decision in *Caron*, the Supreme Court itself remains deeply divided on so-called "jurisdictional questions". So it is not surprising that judges of the Federal Court of Appeal are also struggling on the proper approach to such questions.

As we understand it, the current state of the law is that where "true questions of jurisdiction" arise, they are properly subject to correctness review. Justice Stratas rightly points out a tension between presumptive reasonableness review of a tribunal's interpretation of its home statute, and correctness review of jurisdictional questions – which involve a tribunal's interpretation of its home statute. However, this tension can be resolved by understanding that a jurisdictional question rebuts the presumption of reasonableness – a point made by Rennie JA in his concurring reasons.

Justice Stratas suggests that the conventional idea of jurisdictional questions – whether a decision maker does or does not have the power to do something – was put to bed in the Supreme Court's 1979 decision in *CUPE*. This a common reading of *CUPE*, but it may also be a *mis*reading of the decision. Justice Dickson (as he then was) did not say in *CUPE* that there is a conceptual problem with jurisdictional questions; rather, courts should not "quickly label" something as a question of jurisdiction in order to intervene where it is inappropriate to do so. *CUPE* is a caution to courts not to manipulate the test to arrive at an outcome that allows for greater interference with administrative decision. But properly applied, the concept of jurisdiction is fundamental to judicial review and the rule of law, and *CUPE* is not inconsistent with the idea that it is appropriate to review "true questions of jurisdiction" (as opposed to questions that are *not* "true" jurisdiction questions, but rather other kinds of questions that a court simply calls "jurisdictional" in order to intervene) on the correctness standard.

May be what the majority of the Supreme Court intended when it identified "true questions of jurisdiction" in *Dunsmuir*, and given the clear connection between questions of jurisdiction, rule of law, and the supervising role of reviewing courts, it is not suprising that this category of correctness review has never been foreclosed. Indeed, in recent cases it has seen new life with certain members of the Supreme Court.

When Stratas JA separates "true questions of jurisdiction" in *Dunsmuir* from jurisdiction questions as conventionally understood, he may be drawing a distinction that the mjaority never intended in *Dunsmuir*. The category of "true questions of jurisdiction" in *Dunsmuir* refers to those issues *properly* described as jurisdiction. And contrary to Stratas JA's assertion, the Supreme Court majority did attempt to define that category in *Dunsmuir*. They described it as follows: whether the tribunal had the authority to make the inquiry. Such questions arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter."[15] While some judges who favour broad reasonableness review have tried to limit this category, and have declined to find a "true question of *vires*" where others have identified such a question, the concept is conceptually sound and has not (yet) been definitively rejected.[16]

Standard for constitutional review of proposed federal legislation: ***Schmidt v Canada (Attorney General)***, 2018 FCA 55

FACTS: Legislation requires the federal executive to examine proposed legislation and regulations

[15] Para 59.

[16] This point was made by Beetz J three decades ago in *Bibeault v. U.E.S. Local 298*, [1988] 2 S.C.R. 1048, where he commented that the "theoretical basis of [jurisdictional questions] is… unimpeachable, which may explain why it has never been squarely repudiated."

for inconsistencies with the *Charter* or *Bill of Rights*, and to report on them to Parliament (the "examination provisions").[17] In 2012, S, a federal government lawyer, commenced an action for declaratory relief; he was concerned that the government was applying a "no credible argument" standard for constitutional "inconsistency", under which an argument in favour of constitutionality with only a 5% chance of success could prevent a report to Parliament. He asserted that the right standard was whether the legislation was more likely than not to be found to be inconsistent with the *Charter* or *Bill of Rights*. He sought a declaration to that effect.

The day after commencing his action, S was suspended without pay and his employment with the government eventually ended. The Federal Court dismissed his action and he appealed to the Federal Court of Appeal.

DECISION: Appeal dismissed.

The Federal Court of Appeal held that the "no credible argument" standard was reasonable, and indeed that it was correct.

First, in response to a preliminary objection by the Attorney General, the Court held that S had standing to request a declaration and, alternatively, that he would qualify for public interest standing.

Second, the Court then decided that, although the action was for declaratory relief on the interpretation of legislation, a standard of review analysis was required since the action was in its "essential character" an application for judicial review of the interpretation of the examination provisions.

Third, the Court held that the standard of review was reasonableness, since the relevant executive actors (the Minister of Justice and the Clerk of the Privy Council (in consultation with the Deputy Minister of Justice)) are interpreting statutes closely connected to their function.

Fourth, the Court analyzed the text of the provisions and concluded that the "no credible argument" standard was correct, and certainly reasonable. To "ascertain" "inconsistency" means to come to a determination as to whether the legislation is inconsistent with the *Charter* or *Bill of Rights*. The "no credible argument" standard best permits this, since constitutional litigation is highly uncertain: it is easier to ascertain whether there is a credible argument than to ascertain whether an argument is more likely than not to succeed. The "no credible argument" standard is also most consistent with the respective roles of Parliament and the executive: it is not the executive's function to give legal advice to Parliament.

COMMENTARY: Despite the many court decisions invalidating federal legislation, there has never been a single been a report to Parliament under the examination provisions relating to inconsistency with the *Charter*. From 1960 to 1985, only one report was made in relation to the *Bill of Rights*. Part of the reason is surely the high threshold for "inconsistency" selected by the Department of Justice and now affirmed by the Federal Court of Appeal. In almost every case there will be at least one "credible argument" that legislation either does not infringe a *Charter* right or is justified under s. 1.

One questionable aspect of this decision is whether judicial deference is appropriate at all. The action was for declarations regarding the interpretation of mandatory statutory provisions. The issue in the case does not relate to an exercise of discretion on the part of the Minister or Clerk. The Minister and the Clerk do not have greater expertise than the courts in the constitutional review of legislation. There is no obvious "decision" in a particular matter under review – they simply arrived at an interpretation of the legislation and enshrined it in a policy or

[17] *Canadian Bill of Rights*, SC 1960, c 44, s. 3; *Department of Justice Act*, RSC 1985, c J-2, s. 4.1; *Statutory Instruments Act*, RSC 1985, c S-22, s. 3.

practice. It is not the policy or practice that is at issue in the case, but rather the interpretation of legislative provisions. Further, there are two different actors interpreting similarly-worded provisions which the Federal Court of Appeal held must receive the same interpretation (paras 16 and 74). One imagines that this should have pointed towards a correctness standard of review.

The second questionable aspect of the decision is the determination that the "no credible argument" standard of inconsistency is reasonable and, indeed, correct. We see nothing obviously unworkable or hostile to the role of Parliament in a standard of "more-likely-than-not inconsistent." In particular, if that were the correct standard, it would not tie Parliament's hands: it would simply require that Parliament receive a report to that effect. Parliament would be free to pass the legislation notwithstanding the report.

Arguably both interpretations are consistent with the statutory language and so both are reasonable. However, reasonableness as the standard arises only because of the court's decision to characterize the action as in substance a judicial review rather than a straightforward action for a declaration, and the resulting conclusion that deference is called for.

Mr Schmidt's legal battle has attracted significant media and public attention. It first arose under the Harper government but the Trudeau government has continued it.[18] This decision will likely not mark its end; leave to appeal to the Supreme Court of Canada will likely be sought and, if it is, we expect leave will be granted.

Jurisdiction to review decisions of unincorporated associations: *Association of Professors of the University of Ottawa v University of Ottawa*, 2018 ONSC 1191

FACTS: The University of Ottawa offered a salary increase to two non-unionized employees. The Association of Professors of the University of Ottawa sought judicial review of that decision on the grounds that it violated certain public sector wage freeze legislation.

The University brought a motion to quash the application for judicial review on the grounds that Divisional Court lacked jurisdiction because the compensation decisions neither involved the exercise of a "statutory power" under s. 2(1)2 of the *Judicial Review Procedure Act* ("JRPA") nor had a sufficiently public dimension to trigger the Divisional Court's jurisdiction under s. 2(1)1, based on the framework for judicial review of private associations adopted by the Court of Appeal in *Setia v Appleby College*.[19] The motion judge held that there was no exercise of "statutory power" but that the issues involved were of sufficient public importance that judicial review was appropriate.

The University brought a motion before a full panel of the Divisional Court under s. 21(5) of the *Courts of Justice Act*[20] to set aside the decision of the motion judge.

DECISION: Justice Swinton, writing for a three-judge panel, set aside the decision of the motion judge and quashed the application for judicial review.

Justice Swinton relied on the Court of Appeal in *Paine v University of Toronto*[21], where the Court doubted whether a generalized statutory

[18] This is despite the Trudeau government's new practice of issuing "*Charter* statements" that report on possible *Charter* implications of all proposed legislation.

[19] 2013 ONCA 753.
[20] RSO 1990, c C.43.
[21] (1981), 1981 CanLII 1921.

authority to appoint teaching staff was a "statutory power of decision" under s. 2(1)2 of the JRPA. She held that for judicial review under s. 2(1)2, there must be direct statutory authority to make the specific decision that is challenged. The University's empowering statute confers a number of general powers on the Board of Governors of the University, including the power to fix the number, duties, salaries and other emoluments of officers, members of the teaching staff, agents and servants of the University. Justice However, those general powers do not render individual compensation decisions the exercise of a "statutory power of decision".

With respect to s. 2(1)1 of the JRPA, Justice Swinton disagreed with the motion judge regarding the proper application and weighing of the *Setia* factors. She concluded that the compensation decisions were not sufficiently public in nature to warrant judicial review. The key factors were as follows:

(i) No effect on the public: The compensation to be paid to two non-unionized employees in a particular period of time does not affect the broader university community, nor is it principally founded on public law. It is an employment-related decision, albeit one that may be constrained by a range of employment and other laws and one that is supported by public funding.

(ii) The nature of the decision maker: While the University has the express legislative purpose of the advancement of learning, compensation decisions affecting individual employees are not closely related to that statutory purpose.

(iii) Private nature of contractual relationship: As the Supreme Court of Canada observed in *Dunsmuir v New Brunswick*,[22] even in the case of public office holders, contract law, not public law principles, governs the employment relationship.

(iv) Unsuitability of public law remedies: Judicial review is meant to be a summary proceeding, usually based on the review of a decision and a record of proceedings. Here, there was no clearly identified decision that is questioned, and there was no record of proceedings or reasons for a decision. This application would have required affidavit evidence and cross-examinations, and would have required factual determinations to be made in order to determine if there was non-compliance with the wage restraint legislation.

COMMENTARY: Procedurally, this case was a motion to a full panel of the Divisional Court under s. 21(5) of the *Courts of Justice Act* to set aside a decision of a single motions judge of the Divisional Court. Subsection 21(5) has been interpreted as providing effectively a right of appeal from a decision of a single motion judge. The procedure creates an unusual result for interlocutory appeals. A party bringing an appeal from an interlocutory decision of a Superior Court judge must seek leave to the Divisional Court, but there is no requirement for leave under s. 21(5). This means, surprisingly, that a party appealing an interlocutory order of a single judge of the Divisional Court is in a better position than a party appealing an interlocutory order of a Superior Court judge. This result is difficult to explain and it may be that future panels of the Divisional Court will use the doctrine of prematurity to restrain such interlocutory appeals except in clear cases.

The Divisional Court's reliance on the *Paine* decision is in tension with the Court's approach in the *Christian Medical and Dental Society v CPSO*.[23] In that case, the Court held that the adoption of policy guidance by the CPSO was subject to judicial review as an exercise of statutory power. The statutory authorization for the CPSO to adopt a policy flowed from its general power to regulate the medical profession

[22] 2008 SCC 9 at para. 81.

[23] 2018 ONSC 579, discussed in Issue No. 15 of this Case Review.

in the public interest.[24] The apparently different approaches may be reconciled on the basis that the analysis in *U of O* focussed on whether decision was a "statutory power of decision", whereas the *CPSO* decision was considering "statutory powers" more broadly.

On the broader issue of the extent to which private groups may be subject to judicial review, *U of O* may mark a retreat from recent advances in judicial willingness to entertain public law supervision of private associations.[25] On the other hand, the purely contractual nature of the issues in dispute in *U of O* made it a clearer case than other recent decisions in this area. Indeed, Justice Swinton cited with approval the decision in *Asa v. University Health Network*[26] where the court intervened in disciplinary action taken by a hospital against two of its researchers.

Costs in SPPA proceedings involving a First Nation: *Mohawks of the Bay of Quinte v Waste Management of Canada*, 2018 ONSC 1929 (Div Ct)

FACTS: The Environmental Review Tribunal "ERT") issued a decision following a lengthy hearing concerning the Richmond Landfill Site ("Site") in the Town of Napanee. The Site is owned by Waste Management Canada ("WMC"). The Mohawks of the Bay of Quinte (the "MBQ"), a First Nation whose territory is downstream of the Site, was granted permission to intervene in the hearing.

After the hearing, the MBQ sought costs of $445,000, including for expert reports and legal fees, incurred over a decade of involvement in the proceedings, both during and prior to the actual hearing.

Costs in ERT proceedings are governed by s. 17.1 of the *Statutory Powers Procedure Act*[27] ("*SPPA*"), which allows for a costs award only where "the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith." Where that condition is met, the tribunal has a further discretion over whether to order costs, and in what amount.

The MBQ alleged that WMC's conduct had been unreasonable, but did not allege frivolous, vexatious, or bad-faith conduct. Further, it apparently conceded that WMC's conduct was not unreasonable in the abstract but was unreasonable only because it was directed at MBQ, a First Nation that had suffered historical disadvantage, has constrained finances, and is particularly dependent on well-water. The MBQ alleged that, in light of those special circumstances, defending the appeal was itself unreasonable and WMC should have simply agreed to the order that MBQ sought.

The ERT refused to award costs, finding that WMC's conduct was not unreasonable and that the MBQ's status as a First Nation was not relevant to the reasonableness of WMC's litigation conduct. The MBQ appealed to the Divisional Court.

DECISION: Appeal dismissed.

The Divisional Court held that the standard of review was reasonableness since the issue was the interpretation of the SPPA and the discretion over costs.

[24] See paras. 28-30, 40-47 and 72-76.

[25] See for example *Islington Rangers Soccer League v Toronto Soccer Assn*, 2017 ONSC 6229; *Capelli v Hamilton Wentworth (Catholic School Board)*, 2017 ONSC 5442 (Div Ct); and others. In contrast, in *Milberg v North York Hockey League*, 2018 ONSC 496, discussed in Issue No. 15 of this Case Review, the court took a more restrained view of judicial review of such decisions.

[26] 2016 ONSC 439.

[27] R.S.O. 1990, c. S.22 (as amended).

It then held that the "polluter pays" principle did not apply to costs proceedings in the face of the SPPA's costs provision. Rather, that principle may inform the substantive order imposing conditions and obligations upon WMC.

The Divisional Court disagreed with the apparent holding of the ERT that the status of the requesting party as a First Nation and the attendant disadvantage could not turn otherwise reasonable conduct into unreasonable conduct. It stated "[i]t is certainly possible that the matters raised by the MBQ could be relevant to the [unreasonableness of the adversary's litigation conduct]."

However, the Court agreed with the ERT's ultimate conclusion that WMC's conduct was not unreasonable. The WMC participated in a mediation process in which some issues were settled, with only the remaining contentious issues proceeding to a hearing. None of the examples of unreasonable conduct in Rule 225 of the ERT's Rules was present, which, while not establishing that no unreasonable conduct had occurred, is suggestive.

COMMENTARY: This decision attempts to strike a compromise between the MBQ's position that merely *defending* an administrative proceeding is unreasonable and the ERT's problematic suggestion that the identity and circumstances of the opposing party are never relevant to whether a party's conduct is unreasonable. The latter position would risk insensitivity to the circumstances of litigants: surely the very concept of "reasonableness" is relational and must take into account the circumstances of the person that our actions affect. The former position, however, could easily turn into a "loser pays" rule. That would of course undermine the rule that costs in *SPPA* proceedings are very much exceptional: the approach is quite different than the one that governs in civil court proceedings (where costs generally follow the event and the litigation conduct of the parties is a secondary consideration). ⚖

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