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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Contextual factors that constrain decisions on reasonableness review: *Entertainment Software Assn v Society of Composers*, 2020 FCA 100

Facts: The Society of Composers, Authors and Music Publishers of Canada ("SOCAN") administers the right to "communicate" music works on behalf of copyright owners. It filed with the Copyright Board proposed tariffs for certain years for the communication of works in its repertoire through an online music service. The Board had to assess the appropriateness of the proposed tariffs under the *Copyright Act*.[1] After SOCAN filed the proposed tariffs, the Act was amended by the addition of s. 2.4(1.1), which stipulates that "communication of a work or other subject-matter to the public by telecommunications includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public."

Subsection 2.4(1.1) raised the question whether the mere making available of a work on a server for the purpose of later streaming or

[1] RSC 1985, c C-42.

download by the public was an event for which a tariff was payable. A few days after the addition of the new provision to the Act, the Supreme Court released a decision holding that the transmission over the internet of a musical work that results in a download of that work is not a communication by telecommunication.

SOCAN argued that s. 2.4(1.1) obligated persons, such as online music services, to pay royalties to SOCAN when they post musical works on their internet servers in a way that allows access to them by their end-user customers, regardless of whether the musical works are later transmitted to end-users by way of downloads, streams or not at all.

After inviting full submissions from all affected parties, the Board made a decision accepting SOCAN's position. In short, in the Board's view, s. 2.4(1.1) deems the act of making a work available to the public a "communication to the public" under the Act and, thus, an act that triggers a tariff entitlement. The effect of this interpretation was to create two separate tariff-triggering events: (1) the act of making a work available to the public on an internet service, and (2) any subsequent transmission through a download or a stream.

Entertainment Software Assn and Apple Inc. applied for judicial review challenging the Board's interpretation of s. 2.4(1.1).

Decision: Application granted. Board's decision quashed.

Subsection 2.4(1.1) of the Act falls to be interpreted by both the Board and the courts. The Supreme Court has held that the standard of review for Board interpretations of such provisions is correctness.[2] However, the Supreme Court's recent recalibration of the governing approach to substantive review[3] calls into question the continuing application of those authorities. The parties did not make submissions on whether the correctness standard would still apply to the court's review of the Board's interpretation of the Act. That issue should be left for another day. For the purposes of this case, the Court assumed (without deciding) that the reasonableness standard applies.

The Court explained that in *Vavilov*, the Supreme Court adopted the Federal Court of Appeal's view that administrative decisions are easier or more difficult to set aside depending on certain contextual factors that liberate or constrain the decision-maker. *Vavilov* identifies categories of such contextual factors, almost all of which the Federal Court had previously identified and applied.

- Decision-makers that apply fact-driven criteria of a non-legal or less-legal nature are relatively less constrained and so their decisions are harder to set aside under the reasonableness standard.

[2] See, *e.g.*, *Society of Composers, Authors and Music Publishers of Canada*, 2004 SCC 45; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57.
[3] See *Vavilov v Canada (Minister of Citizenship and Immigration)*, 2019 SCC 65.

- Public interest determinations based on wide considerations of policy and public interest, assessed on polycentric, subjective or indistinct criteria and shaped by the decision-makers' view of economics, cultural considerations and the broader public interest are very much unconstrained.

- Complex, multi-faceted and sensitive weightings of information, impressions and indications using criteria that may shift and be weighted differently from time to time depending upon changing and evolving circumstances, all other things being equal, are relatively unconstrained and are harder to set aside.

- Assessments legitimately drawn from the expertise or specialization of decision-makers, all other things being equal, may be unconstrained and may be harder to set aside.

- Where decision-makers act under broad statutory wording that is capable of various meanings, they are relatively less constrained in the statutory interpretations they reach, all other things being equal.

- Decision-makers are less constrained by provisions that vest them with a broad scope of discretion.

- Decisions of decision-makers that are constrained by specifically worded statutory provisions or settled court decisions may be set aside if they ignore those constraints.

- Administrative decisions more akin to the legal determinations courts make, which are governed by legal authorities, not policy, can be relatively constrained.

- Specific methodologies and strict language set out in statutes can constrain and, if they are not respected, reversal can result.

- Decisions of great significance to the individual call for decision-makers to provide more justification and explanation.

This case challenged the Board's interpretation of a statutory provisions. Administrative decision-makers interpreting legislative provisions must consider the text, context and purpose of the provision. They must conduct a genuine analysis of the legislation and apply it faithfully. An analysis that is expedient, result-orientation or skewed to advance a policy extraneous to the legislation may be quashed.

The Court summarised additional guidance from *Vavilov* on the proper approach to judicial review of administrative decision-makers' statutory interpretations, emphasising that the focus must be on the decision-maker's reasoning.

In this case, the Baord was heavily constrained in what it could acceptably do by the text, context and purpose of s. 2.4(1.1), case law on the meaning of "communication to the public by telecommunication", and case law concerning the relationship between domestic law and international law.

The Court identified two unacceptable features in the Board's reasons. First, the Board's legislative interpretation was unacceptable. Although the Board identified the accepted method of interpretation and the need to look at the text, context and purpose of the legislation, the analysis that followed left out important elements, such as the Supreme Court's leading case. It also made leaps of reasoning that cannot be justified. Those defects lead to a fatal loss of confidence in the Board's interpretation of s. 2.4(1.1).

In addition, the Board misapprehended the interrelationship between international law and domestic law. Although a treaty may potentially bear on the legal problem, the analysis must start by discerning the meaning of the domestic law. If the domestic legislation is clear and unambiguous, it must be given its authentic meaning and applied, even if it conflicts with international law. The Board considered an article of the relevant treaty,[4] asserted a view of the article's meaning without any supporting reasoning, and then made s. 2.4(1.1) of the Act conform to that view. This is not a legally acceptable methodology.

On the issue of remedy, although the Board's decision was unreasonable and the usual remedy is to quash the administrative decision and send it back to re-determination, in this case no purpose would be served by sending the matter back. In a related decision, the Board found that insufficient evidence had been adduced for it to reach a conclusion about what the tariff should be in this case. Sending the interpretation of s. 2.4(1.1) back to the Board for reconsideration would not change the result on the merits—no tariff would be set.

The applicants sought declarations as to the proper interpretation of s. 2.4(1.1). Declarations are extraordinary remedies, granted only when necessary and when they are of practical utility. When reasons for judgment suffice, the added remedy of a declaration is of no practical use and will not be granted. The appropriate remedy is to quash the Board's decision, grant the applicants costs, and no more.

Commentary: This case represents one of the meatier discussions of *Vavilov*'s instruction on reasonableness review to emerge from a lower court. There are at least three notable aspects of the decision.

First, the Court of Appeal raised the question of the continuing validity of case law directing that the correctness standard applies on judicial review of a decision of the Copyright Board where the Federal Court would have had parallel first instance jurisdiction. The Supreme Court recognised the correctness standard in such cases in the 2012 decision *Rogers Communications Inc.*[5] The Court of Appeal recognised arguments on both side of the issue but did not decide it, finding that even on deferential reasonableness review the Board's decision could not stand.

[4] Article 8 of the *WIPO Copyright Treaty*, 20 December 1996, Can. T.S. 2014/20

[5] *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35

However, there is sure to be a case where the issue will be raised squarely and will need to be decided. At least one commentator has opined that *Vavilov* would trump and that *Rogers Communications Inc.* is no longer good law.[6] However that issue is ultimately decided, *Entertainment Software* is but one of what will likely be many cases where reviewing courts grapple with whether pre-*Vavilov* precedents continue to apply.

Second, this decision provides a concise and clear list of contextual factors that can liberate or constrain a decision-maker as identified both in *Vavilov* and in the Federal Court of Appeal's own pre-*Vavilov* jurisprudence. While the Supreme Court considered *Vavilov* to be a recalibration of the approach to substantive review, this decision reveals that at least some judges of the Federal Court of Appeal see *Vavilov* as adopting an approach their court had already laid out. Indeed, Justice Stratas commented in the reasons that for the Federal Court of Appeal in a case like this, "*Vavilov* hardly changed anything at all"[7] and if *Vavilov* did not exist, the same reasons would have been given.[8]

On a more practical level, the categories of contextual factors identified in this case may be useful to counsel framing their case on judicial review, with applicants trying to fit their case into categories that constrain the decision and respondents looking to categories that make it harder to set aside a decision.

Third, the decision comments on the situations in which a declaration will and will not be granted, emphasising that the key concept underlying the availability of the remedy is practical utility. Declarations are often sought in judicial review applications as a matter of course, perhaps without much consideration given to the necessary and practical utility of the remedy. As extraordinary remedies, declarations should not be granted as a matter of course. This decision urges applicants to be disciplined in requesting declarations and is a good reminder that although judicial review remedies are flexible, their availability must still be guided by principle.

Procedural fairness requires more disclosure than rules provide: *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130

Facts: B became a permanent resident of Canada in 1984. Following multiple criminal convictions, he was found to be inadmissible to Canada. An appeal of his deportation order was dismissed in October 2011. B was then held in custody until September 2016, when he was deported to Jamaica. While B was in custody, Canada had made numerous unsuccessful attempts to have the Jamaican consulate issue a travel document for him.

B's continued detention was reviewed by the Immigration Division ("ID") in 2014, at which time B asserted that his detention of over three years contravened ss. 7, 12, and 15 of the *Charter*. The ID concluded that B was a danger to the public and could not be trusted to

[6] See Paul Daly, Vavilov Hits the Road (Updated August 20), https://www.administrativelawmatters.com/blog/2020/02/04/vavilov-hits-the-road/
[7] Para 23.
[8] Para 37.

comply voluntarily with his conditions of release, including appearing for removal. His continued detention was therefore warranted. The ID rejected B's *Charter* arguments, finding that there were regular reviews of B's detention and, therefore, the impugned legislation was constitutional.

B, together with a third party with public interest standing, applied for judicial review of the ID's decision. They argued that the legislative scheme that permitted his continued detention violates the *Charter*. Among other grounds, their argued that the detainee is not given a reasonable opportunity to know or respond to the case to be met in detention reviews.

The Federal Court agreed to hear the application, notwithstanding that B had since been deported. It dismissed the application. B and the third party appealed on the basis of a question certified by the Federal Court under the *Immigration and Refugee Protection Act* (IRPA).

Decision: Appeal dismissed.

The Court of Appeal found the detention scheme to be *Charter* compliant. It creates a continuing legal burden on the Minister to establish that detention is justified pursuant to the IRPA, the Regulations promulgated thereunder, and the *Charter*. The burden rests on the Minister throughout the detention review and resurfaces every 30 days, when the continued detention must be reviewed by the ID. Where there are regular detention reviews that give full and fair consideration to non-exhaustive considerations set out in legislation, prolonged detention is constitutional.

The Court of Appeal also considered the content of the duty of procedural fairness required for a detention review that complies with the *Charter* and administrative law. Proceedings with stakes analogous to those in criminal cases will merit greater vigilance by courts since the liberty of the subject is involved. That is the case with detention reviews. Relying on Supreme Court decisions in *Ocean Port*[9] and *Kane*,[10] the Court of Appeal noted that the common law duty of procedural fairness can be displaced only by statutory language or necessary implication. As there is no statutory language in the detention scheme that ousts the duty of procedural fairness, the *Immigration Division Rules* (Rules) (which are a regulation to the IRPA) respecting disclosure in detention reviews are supplemented by the common law duty of procedural fairness.

The applicable Rules provide that documents on which the parties intend to rely must be disclosed in advance. The Federal Court had noted that B raised "legitimate concerns about the timeliness and quality of pre-hearing disclosure". The Court of Appeal found those concerns to be substantiated by the evidence. The Rules' restriction of disclosure to only the information on which the parties intend to rely is insufficient to fulfill the duty of procedural fairness. To be meaningful, the disclosure obligation must extend to *all* evidence relevant to the criteria to be considered in the detention review, including the likelihood of removal. A duty of this scope captures

[9] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para. 22.
[10] *Kane v. Bd. Of Governors of U.B.C.*, [1980] 1 S.C.R. 1105 at 1113.

information that is to the detainee's advantage only, regardless of whether the Minister relies on it to support continued detention. Where disclosure in a specific case is inadequate, judicial review can be sought in the Federal Court on an expedited basis and a detention decision vitiated if the lack of timely disclosure of relevant documents results in a denial of procedural fairness.

Commentary: This case provides a helpful illustration of the circumstances in which a court will supplement statutory procedural protections in order to ensure compliance with the common law duty of procedural fairness.

In *Ocean Port*, the Supreme Court cautions that "[i]t is not open to a court to apply a common law rule in the face of clear statutory direction."[11] Here, however, the Rules (which form part of the statutory regime) did not expressly or by necessary implication oust the duty of fairness. They merely address the procedure and timing governing a situation where "a party wants to use a document at a hearing." The wording of the Rules lacks the requisite specificity to signal that the legislature intended to limit the scope of procedural protections to which a detainee is entitled.

When dealing with cases that raise the scope of disclosure or other procedural obligations, counsel and tribunals are advised to consider (a) the procedure(s) set out in applicable statutes, regulations, and/or rules; (b) whether those governing documents oust – explicitly or by necessary implication – the common law duty of procedural fairness; and (c) if not, what additional requirements the common law duty imposes on the proceeding at issue. It is also important to bear in mind that the Rules in this case were made a regulation to the IRPA. Where a tribunal adopts rules that do not form part of the statutory scheme, there is an open question as to whether they can oust the common law in the same way that a statute or regulation can.

[11] At para 22.

Deference on appellate review: *Quadrexx Hedge Capital Management Ltd. v. Ontario Securities Commission*, 2020 ONSC 4392 (Divisional Court)

Facts: The Ontario Securities Commission (OSC) found that two former directing minds of the Quadrexx hedge fund committed fraud in three different securities offerings, costing investors over $3 million. The OSC imposed a lifetime ban on both men from trading or acquiring securities; acting as a directors or officers for any issuer or registrant of securities; acting as investment fund managers or promoters, as well as monetary penalties and costs.

The two appealed the decision and the sanctions imposed upon them.

Decision: The appeal was dismissed in its entirety.

Three areas of the Court's ruling are of particular interest: the Court's discussion of the applicable standards of review post-*Vavilov*;[12] the importance of procedural fairness as a

[12] *Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65

separate ground of appeal; and the Court's discussion of what constitutes adequate reasons.

A preliminary issue for the Court was the appropriate standard of review in light of the Supreme Court's decision in *Vavilov*. The Ontario *Securities Act* contains a broadly worded statutory appeal provision, without any limitations on the type of questions that can be raised on appeal.[13] Following *Vavilov*'s direction, the Court ruled that statutory appeals from the OSC must be dealt with on appellate standards of review — rather than the correctness/reasonableness paradigm — such that questions of law are reviewable on a correctness standard, and questions of fact and mixed fact-and-law are reviewable on a palpable and overriding error standard (unless there is an extricable question of law).

The Court classified all twenty-three of the errors alleged by the two former directors as either questions of fact or questions of mixed fact and law. Given the high burden that must be met to establish an error of this sort, it is no surprise that all of the grounds of appeal were dismissed. (There were also allegations of a lack of procedural fairness, which were dismissed as well).

The Court also highlighted procedural fairness as a separate ground of appeal in the OSC appeal context and indicated that the standard of review on such issues, while often described as correctness, is really an assessment of whether or not adequate fairness was granted, based on the factors outlined by the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*.[14] The Court ruled that the duty of procedural fairness had been met in the Quadrexx OSC proceedings. Although the appellants claimed that a higher level of scrutiny had been applied to their oral evidence than that of others, the Court found that the OSC had adequately explained why it preferred evidence contrary to that of the appellants.

Finally, the Court considered the appellants' submissions that the OSC's reasons had provided inadequate justification for its decision on both liability and sanction. The Court recognized that the inadequacy of reasons was a legitimate ground of appeal and that, in light of *Vavilov*, administrative tribunals were required to provide "reasons [that], viewed in light of the record and counsel's submissions on the live issues presented by the case, explain why the decision was reached, by establishing a logical connection between the evidence and the law on the one hand, and the decision on the other."

However, the Court held that the OSC had provided extensive reasons in its 21-page decision. In the circumstances, the Court had no trouble finding that the OSC had explained to the appellants exactly why they had breached the *Securities Act*, in such a way that the reviewing Court was able to understand and assess its decision.

Commentary: In the wake of *Vavilov*, many commentators (as well the dissent in that decision) were concerned that the changes in

[13] RSO 1990, c S.5, s 9

[14] [1999] 2 SCR 817

the law regarding the standard of review in the statutory appeal context would bring about an unhelpful sea change. In particular, there were concerns that courts may intrude on the domain of specialized tribunals by overturning legal interpretations that tribunals are better placed to make given their experience and expertise in a particular field.

Decisions like *Quadrexx* suggest that such concerns may be overblown. By characterizing all of the grounds of appeal as either raising questions of fact or questions of mixed fact and law, the Court granted the OSC at least the same degree of deference it would have been afforded under the reasonableness framework. Such a characterization is not necessarily a foregone conclusion: the distinction between a pure question of law, a question of mixed fact and law, and a question of mixed fact and law with extricable legal principles, can be subtle indeed. For example, as the Court itself acknowledge (at para. 79), a decision made based on no evidence can be framed as both a palpable error (question of fact) and an error of law (a question of law).

Quadrexx may portend a trend where reviewing judges are more inclined to categorize alleged errors as being questions of fact or mixed fact and law, reviewable on the deferential palpable and overriding error standard, as opposed to questions of law. This inclination may be particularly pronounced where the tribunal is considered to have expert knowledge in an area less familiar to courts. Such an approach would be consistent with *Vavilov*'s approach to statutory appeals. In practice, however, it would reflect a relatively modest departure from the pre-*Vavilov* framework, rather than the sea change the dissenting judges warned about in that case.

At the same time, the decision demonstrates that the statutory appeal framework opens the door to some arguments that would have been unavailable pre-*Vavilov*. For example, the appellants here made a stand-alone attack on the adequacy of the OSC's reasons — an argument that, prior to *Vavilov*, would have been unavailable (although one could have attacked adequacy as part of a broader argument of substantive unreasonableness). The Court decided this issue relying on case law from the appellate context — not judicial review jurisprudence.

As for procedural fairness, *Quadrexx* confirms that the traditional pre-*Vavilov* analysis (based on the *Baker* factors) will continue dominate the analysis, even in the context of appellate review.

New paradigm for reviewing decisions of voluntary associations: *Karahalios v. Conservative Party of Canada*, 2020 ONSC 3145

Facts: The plaintiff, K, was a candidate for leadership of the respondent political party, CPC, which is an unincorporated, voluntary association. The CPC disqualified K from the leadership contest, following a complaint from another candidate that K made certain allegedly racist comments. The complaint was investigated by the CPC's Chief Returning Officer (CRO), who imposed a reporting obligation and financial penalty on K. K appealed that ruling to the Dispute Resolution Appeal Committee (DRAC). The DRAC relied

on the CRO's findings and determined that K should be disqualified altogether.

K denied making racist comments and claimed that the CPC unlawfully took advantage of the complaint against him to drive him out of the leadership contest. He brought a civil claim against the CPC, seeking mandatory orders restoring his candidacy and the right to participate in the CPC's leadership contest in accordance with the CPC's Leadership Rules. K then brought a motion for summary judgment, seeking to have these issues determined by way of a motion rather than a full trial.

Decision: Motion granted.

As an unincorporated and voluntary association operating in the private sphere, the decisions of the CPC are subject to private law review and not public or administrative law review.

The court's jurisdiction to intervene in the affairs of an unincorporated association operating in the private sector depends on the presence of a legal right founded in tort, contract, restitution or a statutory provision. If no civil or property right is involved in a group's activities, then a court will not intervene.

When an unincorporated association or group has a written constitution and by-laws, then these instruments constitute a contractual relationship setting out the rights and obligations of the unincorporated association and its members. There is an obligation on the group's members to observe its constitution and by-laws. Courts have jurisdiction to review, interpret and enforce the contractual rights of members of an unincorporated association or group. However, this jurisdiction is limited and will be engaged only if a significant private law right or interest is involved — for example, where a member has been expelled, or a member has lost their ability to pursue a vocation associated with the group.

Courts will not review the merits of such decisions. Courts will review whether a purported expulsion or loss of membership conforms to the association's rules, whether the association acted in accordance with the principles of natural justice, and whether the association acted *bona fide*. This remains so even where an association's rules or by-laws purport to make decisions "final and binding" or beyond the scope of judicial scrutiny.

In this case, the body that purported to disqualify K — the DRAC — had no jurisdiction to do so under the Leadership Rules. The Leadership Rules place that authority with a different CPC entity: the Leadership Election Organizing Committee (LEOC). While the Leadership Rules allow LEOC to delegate its authority in writing, that did not occur in this case. As a matter of contractual interpretation, the DRAC did not have the authority to disqualify K and its decision must be set aside. The CRO did have the authority to make the orders it did, and so its orders should be restored.

An expectation of procedural fairness may arise where a contract exists between members of an unincorporated association or group in the private sector. The requirements

of natural justice depend on the subject-matter that is being dealt with, the particular context, the circumstances of the case, the nature of the inquiry, and the rules under which the decision-maker is acting. The ultimate question is whether the procedures adopted were fair in all the circumstances. At a minimum, the requirements of natural justice are (a) adequate notice of what is to be determined and the consequences; (b) an opportunity to make representations; and (c) an unbiased tribunal. In the context of group operating in the private sector, an unbiased tribunal in accordance with the principles of natural justice is one that has not prejudged the matter and is open-minded to being persuaded.

K argued that he was denied procedural fairness in this case because the DRAC heard *ex parte* submissions from the CRO; because the DRAC awarded a harsher penalty without notice that it was considering that penalty; and because the DRAC provided no reasons. The court found K was entitled a lower degree of procedural fairness since this was not a discipline proceeding, the process was investigatory (not adversarial) in nature, and the ultimate objective was to safeguard the principles of the CPC (something that K and the other candidates all agreed to do). That standard was met here. K had the relevant documents, understood the case to meet and was given an opportunity to meet that case. The DRAC's reasons essentially adopted the reasoning of the CRO.

Comment: This is one of the first decisions to apply the Supreme Court of Canada's decision in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall* in a case challenging a decision of an unincorporated association.[15] It provides a useful illustration of whether and how courts will review the decisions of unincorporated or voluntary associations operating in the private law realm — decisions that, as the Supreme Court makes clear in *Wall*, are not subject to the public law remedy of judicial review.

At the outset, this case serves as a helpful procedural guide. In the wake of *Wall*, some practitioners were left wondering exactly *how* to get the timely and efficient equivalent of judicial review with only private law tools in the toolbox. *Karahalios* suggests an answer: bring an action and seek summary judgment on an expedited basis. (K had originally brought his proceeding as an application, but the court converted it to an action and set a tight timetable for a motion for summary judgment.[16] An application may still be appropriate where the case turns purely on issues of interpretation, but where other factual issues are in play an action may be the better option.)

The decision also demonstrates that private law remedies can be an adequate substitute for public law ones. The court's use of declarations and injunctions essentially put K in the same position he would have been in if the decision being challenged were set aside by *certiorari*-type relief.

But *Karahalios* is perhaps most useful in setting out the substantive principles that will govern

[15] 2018 SCC 26
[16] 2020 ONSC 1947

whether courts will review the decisions of unincorporated or voluntary associations or groups operating in the private realm *at all* — and, if so, the limited grounds upon which courts may be willing to intervene. With the merits of a decision lying beyond the bounds of review, it would appear that the cleanest path to success in most cases lies in identifying a failure of a group to follow its own rules (as K was able to do here). Arguments relating to procedural fairness or natural justice may gain more traction in a disciplinary and/or adversarial context. Although theoretically available, a challenge to the *bona fides* of the group's decision will face considerable hurdles, particularly in the summary judgment context, where a court is somewhat constrained in its ability to resolve serious evidentiary or credibility disputes.

Ultimately, *Karahalios* shows that quickly and successfully reviewing the decisions of unincorporated associations or groups using private law tools is possible.

Hospital's COVID-19 policy not subject to judicial review: *Sprague v Ontario*, 2020 ONSC 2335 (Divisional Court)

FACTS: Sprague's father is a patient at North York General Hospital, and Sprague is his father's substitute decision maker for medical decisions. In response to the COVID-19 pandemic, NYGH instituted a "no visitor" policy. Sprague did not come within any of the exceptions to this policy. Sprague applied for judicial review, alleging that the policy violated his rights under ss. 7, 12, and 15 of the *Charter*.

DECISION: Application dismissed.

The Divisional Court held that the "no visitor" policy was not subject to judicial review. Judicial review lies where a decision is an exercise of state authority and that exercise is of a sufficiently public character. The Court took the factors to consider in this assessment from *Air Canada v Toronto Port Authority*, 2011 FCA 347. Some of the important factors were the following.

First, the court looked at the character of the matter—whether it was "a private commercial matter", or one with "broader import to members of the public." The court held that the hospital's exercise of authority derives from its right as owner/occupier to control access to its premises and its duty to protect its patients and staff. Simply because the policy affects the public in a generic sense did not mean it involves the "public" in the public law sense.

Second, the court looked at the nature of the decision-maker and its responsibilities, namely whether it is public in nature and charged with public responsibilities, and whether the decision under review is closely related to those responsibilities. Public hospitals in Ontario are independent non-profit corporations that are funded by the government. They are not agents of government, as they are not directed, controlled, or significantly influenced by government.

While the court raised the separate issue of whether, outside administrative law, the hospital was subject to the *Charter* by way of s. 32, the applicant had not pursued that issue and so the court did not rule on it. The court was satisfied for other reasons that, even if the

Charter applied, no *Charter* right had been infringed.

COMMENTARY: Often when parties seek judicial review in respect of decisions of public institutions, it is obvious or assumed that the remedy is available. This decision reminds us that, while common, judicial review remains discretionary and will not inevitably be granted. Even hospitals, which many of us think of as quintessentially "public" services, are not subject to judicial review when they rely on private law rights to control access by the public to their property. Judicial review is available in respect of the use of state authority. Accordingly, to assess whether judicial review is available, lawyers must consider not just the identity of the decision-maker, but also the nature of the decision. If a public actor is exercising private powers, judicial review may not be available. Similarly, if a hospital is exercising a more public power, such as one expressly granted by a statute for a government purpose, then judicial review may be available in respect of the exercise of that power.

The leading case on the issue of whether a decision is amenable to judicial review is the 2018 decision of the Supreme Court of Canada, *Highwood Congregation of Jehovah's Witnesses v Wall*.[17] There, the Supreme Court resolved some uncertainty in the law by deciding that judicial review is not available in respect of the membership decisions of private voluntary organizations. It is available only "where there is an exercise of state authority and where that exercise is of a sufficiently public character."

[17] 2018 SCC 26.

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