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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Reviewing courts will not save deficient *Doré* analysis: *Lauzon v Ontario (Justices of the Peace Review Council)*, 2023 ONCA 425

Facts: L, a justice of the peace, wrote an article sharply critical of the operation of bail courts and the conduct of some Crown prosecutors. Three complaints about the article were made to the Justices of the Peace Review Council. After an investigation, the Council's complaints committee ordered a formal hearing, and the hearing Panel unanimously found that L committed judicial misconduct in *how* she had written the article in question. In particular, the Panel found that the issue was whether, in writing the article, L had "failed to exercise caution and restraint and thereby crossed a line giving the appearance of bias and undermining public confidence in the judiciary".

Later, in the Panel's disposition/penalty reasons, however, the majority's description of L's misconduct changed and escalated: the majority asserted that her misconduct showed "a reasonable apprehension of bias, if not actual bias" against Crown prosecutors and that L had "inappropriately used the power and prestige of her judicial office to exact retribution on Crown Attorneys who she thought were disrespectful to her."

Two members of the Panel recommended L be removed from office. The dissenting member found that an appropriate sanction would be a reprimand and a 30-day suspension without pay.

L brought an application for judicial review, which was dismissed. L appealed the dismissal to the Court of Appeal.

Decision: Appeal allowed (Lauwers, Roberts and Miller JJA). Majority disposition quashed and dissenting disposition substituted (recommendation of reprimand and 30-day suspension without pay).

The Panel's disposition decision was not reasonable in the sense demanded by *Vavilov*. The conclusion that L committed judicial misconduct by publishing the article in the form and the tone that it took was reasonable. But the majority's finding of the misconduct that led to the recommendation that L be removed from office — ongoing personal bias against Crown prosecutors — was unreasonable: it was rooted in a decontextualized approach to the evidence, it discounted the factual veracity of L's criticisms, and it reflected an unjustified escalation in the majority's description of L's misconduct. The evidence does not support a finding that L was biased against Crown prosecutors.

In the absence of a reasonable finding that L was biased, it was plainly disproportionate for a majority of the Panel to recommend L's removal as the penalty. The majority's assessment of the seriousness of L's misconduct was not reasonable. It was at odds with precedents setting a high bar for a recommendation of removal from office; while the majority did advert to some of these cases, it "cherry-picked quotes without engaging in an analysis of the nature and seriousness of the misconduct at issue in the cases". The majority also effectively turned L's adamant defence of her position into an aggravating factor, which is an error in principle as it interferes with L's right to make full answer and defence.

The most serious error the Panel made was failing to take L's rights under s. 2(b) of the *Charter* into account in both the merits and disposition decisions, and in failing to reconcile those rights with the constitutional principles of judicial independence and the separation of powers. The requisite "robust proportionality analysis" under the *Doré* framework[1] largely mirrors the *Oakes* analysis. Instead of undertaking a full *Doré* analysis, the majority simply said in the merits decision that it would be "guided by *Charter* principles" and did not revisit the matter in its penalty/disposition reasons at all. In the circumstances of this case, where the analysis was complex and involved many competing interests, the Panel had to do more.

An administrative decision-maker must bear in mind the elements of the affected *Charter* rights and determine whether the proposed disposition would be an unreasonable limit — including whether it limits the right more than is necessary to achieve the statutory objectives in the particular context. The context here included the fact that L is a public office holder protected by the constitutional principles of

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

judicial independence associated with the separation of powers.

Here, the Panel had to inquire into: (i) the negative or deleterious effects that the removal recommendation would have on L's exercise of rights and any collateral effects (such as a chilling effect on others); (ii) the positive effects or benefits of that disposition in terms of the public good; and (iii) the proportionality analysis by assessing whether the positive effects outweigh the negative effects. The Panel did not do that work and it is not up to a reviewing court to salvage the disposition by reconstructing what the Panel's approach would have been.

Commentary: This decision serves as an important reminder of what reasonableness requires post-*Vavilov*. Each of the three key errors relied upon by the Court of Appeal point to a different fundamental flaw in the Panel's reasoning.

First, the Panel was inconsistent in its description of the actual misconduct at issue, and used increasingly severe and even hyperbolic descriptions to describe what L did. That is a problem. Decision-makers and counsel alike must be sensitive not to reframe misconduct in varying (and particularly escalating) ways, with special attention paid between the merits and any penalty/disposition phase.

Second, the Panel made a basic error in how it accounted for L's forceful defence of her own position. That can never be an aggravating factor (though it can be the absence of a mitigating one), and tribunals will err if they "effectively" treat it as one, even if they do not say so explicitly.

Finally, and perhaps most importantly, this decision is perhaps the strongest word yet from the Court of Appeal that (i) the *Doré* framework is a rigorous one, akin to *Oakes*; and (ii) reviewing courts should not be quick to interfere to save a deficient or non-existent *Doré* analysis where one is required.

On the first point, while *Doré* has from the outset been said to exercise the same "justificatory muscles" as *Oakes*, the Court of Appeal's language here ties *Doré* to *Oakes* even more closely. For example, the Court of Appeal says that the analysis "must advert to the proportionality analysis developed" in *Oakes* (para 148), inviting more rigour and structure in the *Doré* framework rather than the looser "value-vs-objective" framing that arguably flows from *Doré* itself.

The Court of Appeal is also more demanding when it comes to decision-makers 'showing their work' in terms of a *Doré* analysis. Many reviewing courts have upheld *Doré* analyses that were quite sparse — along the lines of the brief reference to "*Charter* principles" made by the majority of the Panel here — and *Doré* itself affords flexibility in what is required from decision-makers when it comes to actually explaining their reasoning in this regard. The Court of Appeal's approach here is markedly different. It is wary of any approach to *Doré* that could "tempt tribunals to elide key steps in the analysis" (at para 149) and expected the Panel to expressly identify and address the relevant constitutional issues.

While the Court does not expressly say this, the stricter approach to *Doré* seen here may be, at least in part, a function of the context: the decision-makers were comprised mostly of appointed judicial decision-makers themselves and, thus, more can reasonably be expected from them when it comes to showing their analysis (as compared to, for example, non-legal or "line" decision-makers). And as is clear from the Court of Appeal's decision, the stakes here were high — not just for L, but for broader principles relating to judicial independence and the ability of justices of the peace to speak their minds freely. Still, if it takes root more broadly, this decision reflects an approach to *Doré* that will require more of many decision-makers in terms of demonstrating analytical rigour, at least in Ontario.

Appointment of *amicus* to defend a decision: *Société Radio-Canada v. Canada (Attorney General)*, 2023 FCA 131

Facts: In a six-and-a-half minute radio segment on Radio Canada, the title of a book that included a racial slur was mentioned four times. An individual complained to Radio Canada about the repeated use of the word in the segment. Radio Canada dismissed the complaint. Its Ombudsman determined that the use of the word complied with Radio Canada's *Journalistic Standards and Practices*.

The complainant asked the Canadian Radio-television and Telecommunications Commission to review the Ombudsman's decision. In a split decision, a majority of the CRTC upheld the complaint on the basis that the content broadcast on Radio Canada "goes against the Canadian broadcasting policy objectives and values" set out in the *Broadcasting Act*. The majority found that the broadcast of the segment did not meet the high programming standard in the Act. It ordered Radio Canada to implement various measures including providing a written apology to the complainant and putting in place necessary reasonable measures to mitigate the impact of the broadcast content that could be offensive.

Two members of the CRTC dissented and criticized the majority for ignoring relevant provisions of the legislative scheme and disregarding Radio Canada's free expression rights.

Radio Canada sought and was granted leave to appeal. The respondent, the Attorney General of Canada, agreed with Radio Canada that the CRTC exceeded its jurisdiction. He brought a motion for the appeal to be granted on consent. The CRTC sought standing to oppose the Attorney General's motion and defend its decision was leave was denied. The Court of Appeal then appointed *amicus curiae* on its own motion to ensure it had a complete picture of the issues before it.

Decision: Motion on consent granted, appeal allowed, and CRTC decision set aside (per **Noël CJ**, Boivin and Goyette JJA).

Pursuant to its delegated authority to regulate what can and cannot be said on the airwaves, the CRTC enacted rules of conduct regarding the use of language and expressions on air. In this case, however, the CRTC made no findings based on those rules. Instead, it made findings based solely on the Canadian broadcasting

policy. The Act does not give the CRTC power to sanction a broadcaster based on broadcasting policy. Subsection 3(1) of the Act describes the broadcasting policy Parliament was pursuing when it enacted the Act and it circumscribes the exercise of discretionary power granted to the CRTC, but it is not a jurisdiction-conferring provision. Similarly, s. 5(1) of the Act which confirms that the CRTC may develop guidelines for the exercise of its discretionary powers under other sections of the Act, does not provide for imposing sanctions on the sole basis of the broadcasting policy.

Further, the CRTC did not conduct a proportionate balancing exercise required by the *Charter*. The CRTC's decision circumscribes what words may be used on the air and therefore engages s. 2(b) of the *Charter*. But the decision did not mention Radio Canada's freedom of expression and the record does not suggest that the majority was alive to its duty to ensure Radio Canada's freedom of expression was not restricted more than necessary to achieve the objectives of the Act.

Given that Parliament has mandated the CRTC to act as the initial decision-maker with respect to what can and cannot be said on the air, the matter should be returned to the CRTC to re-determine the merits of the complaint based on the rules of conduct, after duly weighing the impact that its decision could have on Radio Canada's freedom of expression.

Commentary: This decision is procedurally and substantively notable for a few reasons.

First, it is rare but not unprecedented[2] for the Attorney General to consent to a court remedy on a party's challenge to an administrative decision, whether by appeal or judicial review. The Attorney General is the respondent in many judicial review applications but he is obligated to take positions that he considers to be consistent with the applicable law. From time to time, the Attorney General may form the view that an administrator's decision was not consistent with the law and that, as a result, an appeal or judicial review application should be granted. However, this situation presents a challenge for the court. Courts prefer to decide cases in an adversarial setting and if the Attorney General and the appellant/applicant are joined in their view that the decision should be quashed, the Court receives no opposing arguments in defence of the decision under review.

The Court's solution in this case was to appoint *amicus*. In some circumstances the decision-maker may appropriately be granted standing to defend its own decision, but the appointment of *amicus* gives the court the benefit of arguments in defence of the decision without potentially impairing the actual or perceived impartiality of the decision-maker in the event the matter must be remitted for a new decision.

Second, the decision is noteworthy because of the somewhat nuanced but important distinction the court draws between a provision like s. 3(1) of the *Broadcasting Act* — which reflects legislative policy and must guide

[2] See, e.g., *Smith v Canada (Attorney General)*, 2020 FC 629

discretionary decisions — and provisions that confer jurisdiction. Regulators must understand these nuances in their enabling statutes in order to apply them properly.

Finally, the decision demonstrates the court's inflexible approach on a statutory appeal to a decision-maker's failure to conduct a *Charter* (or *Doré/Trinity-Western*) analysis where a decision restricts a person's *Charter* rights. Deference may be owed to the analysis if it is conducted, but the absence of any indications that the administrator considered the impact of the decision on *Charter* rights is likely fatal, leading a court to remit the matter.

Divisional Court improperly applied Reasonableness Standard by mischaracterizing Tribunal Decision: *Imperial Oil Limited v. Haseeb*, 2023 ONCA 364

Facts: H was an international student studying in Canada. At the relevant time, he was neither a Canadian citizen, nor a permanent resident. Upon graduation, H was entitled to a post-graduate work permit ("PGWP") that would enable him to legally work full-time, anywhere in Canada, for any employer, for up to three years.

H applied for a job with IO to commence after his graduation. IO had a hiring policy that required permanent eligibility to work in Canada, established either by Canadian citizenship or permanent residency. H was the top candidate and IO offered him the job, conditional upon him providing proof that he satisfied the requirement of permanent eligibility to work in Canada. After H disclosed that he was not a Canadian citizen or permanent resident, IO rescinded the job offer.

H applied to the Human Rights Tribunal of Ontario, alleging discrimination on the prohibited ground of citizenship. The Tribunal ruled in H's favour and awarded him over $120,000 in damages. It concluded that IO discriminated against H on the basis of citizenship by imposing an employment condition that excluded PGWP-holders, who were all non-citizens.

IO brought an application for judicial review before the Divisional Court. A majority of the Divisional Court found that the Tribunal decision was unreasonable and that the claim of discrimination based on citizenship had not been established. The majority stated that the Tribunal conflated citizenship with permanent residency and created a new ground of discrimination based on permanent residency that was not protected by the Ontario *Human Rights Code*. A dissenting judge concluded that the Tribunal decision was reasonable and would have dismissed the application.

H appealed the decision to the Court of Appeal.

Decision: Appeal allowed (van Rensburg, Sossin and Copeland JJA)

The Tribunal was reasonable to conclude that IO's hiring policy discriminated on the basis of citizenship. The policy denied employment only to non-citizens (PGWP-holders). The fact that one sub-group of non-citizens, permanent residents, were also able to be hired does not insulate it from being discriminatory. The exception for permanent residents only makes the policy partially

discriminatory, which is still prohibited under the legislation and the relevant jurisprudence. Even though not all non-citizens were excluded, the excluded group consisted solely of non-citizens.

The majority of the Divisional Court incorrectly applied the reasonableness standard in overturning the Tribunal decision. The majority committed three principal errors in its application of reasonableness review.

First, the majority did not take as a starting point respectful attention to the reasons of the Tribunal. Instead, the majority conducted the analysis of whether the policy was discriminatory from scratch. This error was evident from the majority's large focus on hypothetical scenarios of non-citizens without the legal right to work in Canada, which did not arise from the Tribunal's analysis or the record before it.

Second, the majority mischaracterized the reasons of the Tribunal. They characterized the Tribunal as creating a new protected ground based on permanent residency, and then found that conclusion to be unreasonable. But that was not the basis on which the Tribunal decided the case. Mischaracterizing the Tribunal's reasons is antithetical to respectful attention to the reasons.

Third, the majority failed to account for well-established principles of human rights jurisprudence. This included that partial discrimination is still discrimination and potential hardship to an employer is only relevant to defences once *prima facie* discrimination is established.

At its core, the reasons of the Divisional Court majority were driven by a floodgates concern that any non-citizen anywhere in the world could make a claim for employment discrimination. This concern was unfounded because the case only addressed a narrow group of non-citizens: those with PGWPs and therefore fully entitled to work anywhere in Canada.

IO is not entitled to raise a defence under s. 16(1) of the *Code* because it did not raise it before the Tribunal and cannot raise it for the first time on judicial review. IO's decision not the raise the defence was clearly tactical as it thought the defence would undermine its primary arguments. The Tribunal was not unreasonable for failing to provide detailed reasons for rejecting a defence that IO never raised before it.

Commentary: The Court of Appeal's unanimous decision in this case is a forceful defence of focussing on the reasons of the decision-maker in reasonableness review.

The Court's criticism of the majority of the Divisional Court for undertaking a *de novo* assessment of the issue in the case is nothing new in administrative law. It is a perennial complaint (and ground of appeal) that courts that are supposed to be conducting reasonableness review improperly start with their own interpretation of the statutory provisions at issue. Post-*Vavilov*, there can be no legitimate dispute that such an approach is inconsistent with reasonableness review, which must begin with "respectful attention" to the

reasons of the decision-maker.[3] The Court of Appeal forcefully reaffirmed this principle.

Interestingly, Copeland JA commented that, given the reasonableness standard of review, she was "cautious about elaborating on the interpretation of s. 5 of the *Code* beyond the reasons given by the tribunal" (para. 118). Nevertheless, she went on to analyze the statutory interpretation given that it was the first time that the Court addressed employment discrimination on the basis of citizenship. While the Court of Appeal was right to emphasize how reasonableness review is focussed on the reasons of the tribunal, these comments suggest that a court upholding a decision under reasonableness review should do little more than recite the reasons given and label them reasonable. Such an approach does not properly recognize the role of courts in ensuring that decisions of administrative bodies are justified and justifiable. This will almost invariably involve testing the reasons given by the tribunal against the constraints that operate on the decision, including the text, context, and purpose of the relevant legislative provisions. This is ultimately what the Court of Appeal did in this case, by considering the Tribunal's reasons alongside the statute and human rights jurisprudence. Such an approach benefits the accountability of administrative bodies, even when the issue is not one of first instance for the courts (as it was in this case).

The Court of Appeal also noted that mischaracterizing a tribunal's reasons is fundamentally incompatible with reasonableness review and the requirement of paying 'respectful attention' to the reasons. While this proposition is not necessarily contentious on its face, there is perhaps a fine line between mischaracterizing what a tribunal decided and appropriately recognizing the unstated implications or essential effects of a tribunal's decision. Here, the majority of the Divisional Court overstepped that line by characterizing the Tribunal decision as recognizing a new protected category for people without Canadian permanent residency status. Going forward, courts – and litigants challenging administrative decisions – should take care in how they characterize the reasons of the decision-maker.

Finally, the Court of Appeal declined to even consider the application of a statutory defence where the party did not advance the defence before the tribunal for tactical reasons. As a result, litigants must be very careful about choosing not to advance a potentially available defence at first instance, as that will preclude them from raising it on judicial review. As part of this consideration, parties should also confirm whether the tribunal permits alternative arguments that might be inconsistent with a primary argument.

Applicants bear substantial burden to add parties to a judicial review after the 30-day time limit: *Jonker v Township of West Lincoln*, 2023 ONSC 1948 (Div Ct)

Facts: J, a councilor with the township brought a motion to add the Integrity Commissioner for the township to an application for judicial review, pursuant to s. 5 of the *Judicial Review*

[3] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 84.

Procedures Act ("*JRPA*"). That provision sets out that while an application for judicial review must generally be made "no later than 30 days after the date the decision or matter for which judicial review is being sought was made or occurred" (unless another statute provides otherwise), the Court retains discretion to allow late applications "if it is satisfied that there are apparent grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay".

The Township Council had issued a decision on July 18, 2022, to impose penalties and remedial measures on J related to his continued participation in the Freedom Convoy Rally in Ottawa after it was deemed unlawful. J brought an application seeking judicial review 31 days after the decision. He amended the application on September 23, 2022, also seeking judicial review of the Commissioner's Report, which recommended the imposition of penalties and remedial measures. On December 22, 2022, J served the Commissioner with the motion to add it as a respondent, which marked the first time the Commissioner was served with the proposed application.

Through the motion, J sought a judicial review of the Report; a declaration that the Report was *ultra vires*; a declaration that the Report was invalid due to errors in law, jurisdiction, fact, or mixed fact and law; disclosure of all information relied on by the Commissioner in creating the Report; and an order of *certiorari* quashing the Report.

Decision: Motion dismissed.

The primary issue before the court was whether J had discharged his onus to meet both parts of the test under s. 5(2) of the *JRPA*: (i) demonstrating that there were "apparent grounds for relief" with respect to the application to judicially review the Report; and (ii) whether J had shown there was no prejudice.

J's position was that the respondents would not suffer non-compensable harm if the Commissioner was added as a respondent in the judicial review. The Commissioner opposed the motion on the grounds that it was brought four months after the expiry of the applicable 30-day limitation period to seek judicial review. The Township supported the Commissioner's position.

J had failed to satisfy his onus under the test in s. 5 of the *JRPA* to grant leave to extend the limitation period with respect to the proposed respondent Commissioner.

With respect to the "apparent grounds of relief" requirement, it allows for a limited assessment of the merits of the claim to determine if the moving party has met its onus and may consider the evidentiary record in support of the underlying claim for that purpose. The standard to show "apparent grounds of relief" is more demanding than the standard for striking or amending a pleading. Here, there was no merit to any of the grounds for relief: the Commissioner discharged its duty of procedural fairness by ensuring J knew the case to be met and providing him with many opportunities to be heard.

With respect to whether substantial prejudice or hardship would flow from adding the Commissioner, the Court held that a presumption of prejudice arose in the circumstances once the 30-day limitation period had expired. While the presumption could be displaced by a cogent explanation for the delay in adding the Commissioner as a party to the proceeding, J had not provided such an explanation for the delay. He had therefore not displaced the presumption of prejudice arising out of the expiry of the limitation period.

Commentary: The case clarifies the test governing when an application for judicial review can be commenced or amended following the 2020 amendment to the *JRPA*.

Within the 30-day limitation period in s. 5 of the *JRPA*, an applicant can commence an application for judicial review as of right and in line with rule 5.04 of the *Rules of Civil Procedure*. After the expiration of that limitation period, the application can only commence with leave of the Court.

With respect to the interpretation of the *JRPA*, *Jonkey* affirmed recent holdings from *Unifor and its Local 303 v Scepter Canada Inc.*,[4] *Yan v.Law Society of Ontario*[5] and *Hevey v Hevey*.[6] In order to show apparent grounds for relief, there must be an assessment of the substantive merits of the application for judicial review. Assessing whether apparent grounds for relief exist permits a review of the evidentiary record.

Even where no substantial hardship or prejudice results from the delay, in the absence of apparent grounds for relief, the Court may not grant leave to commence an application for judicial review. Where one seeks to add a party after the expiration of a limitation period, a court will also consider whether special circumstances justify the exercise of its discretion to allow the amendment.

Following *Jonkey*, counsel need to be particularly conscious of the 30 day limitation period in s. 5 of the *JRPA*. Unlike statutory limitation periods that apply to civil actions, courts do have the discretion to extend the limitation period under the *JRPA*. However, applicants will have to clear two key hurdles to convince the court to even allow their late application to proceed: justifying that the application has apparent grounds for relief and adducing evidence to explain the delay and rebut a presumption of prejudice. Obviously, it will be much easier for applicants to bring their application as of right within the 30 day time period.

[4] 2022 ONSC 5683.
[5] 2023 ONSC 1290.
[6] 2021 ONCA 740.

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