ISSUE No. 38 • DECEMBER 2023

ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Reasonableness review requires responsive justification and reasons-first approach: *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21

Facts: Section 34(1)(e) of the *Immigration and Refugee Protection Act* ("*IRPA*") states that permanent residents or foreign nationals are "inadmissible on security grounds" for "engaging in acts of violence that would or might endanger the lives or safety of persons in Canada."

M and D are both foreign nationals. M was previously charged with two counts of attempted murder and two counts of discharging a firearm following an argument in a bar (the charges were stayed due to delay). D allegedly engaged in violent acts against former partners and other persons. Some of the charges against D for these incidents were stayed; for three charges, D pled guilty and got a conditional discharge. It was not alleged that either M or D engaged in acts of violence with a link to national security or the security of Canada.

M and D underwent admissibility hearings before the Immigration Division ("ID"), where the focus was on whether their past conduct

fell within the scope of s. 34(1)(e). The ID held that M's conduct lacked any element that would elevate it to "security grounds" and thus s. 34(1)(e) could not apply. On appeal before the Immigration Appeal Division ("IAD"), this decision was reversed, on the basis that "security" should be understood in a broader sense—namely, as ensuring Canadians are secure from acts of violence that would or might endanger their lives or safety. Thus, M was inadmissible under s. 34(1)(e). Applying this same approach to D's case, the ID concluded D was also inadmissible.

M and D applied for judicial review. The Federal Court allowed the applications, holding that it was unreasonable to interpret s. 34(1)(e) as applying to acts of violence without a nexus to national security. It certified two "serious questions of general importance" for appeal relating to the interpretation of s. 34(1)(e), pursuant to the certified questions regime in s. 74(d) of the *IRPA*. The Minister appealed and the Federal Court of Appeal allowed the appeal, holding that it was reasonable to interpret s. 34(1)(e) as not requiring a nexus to national security or the security of Canada. M and D then appealed, with leave, to the Supreme Court of Canada.

Decision: Appeal allowed; administrative decisions at issue set aside (*per* Wagner CJ and Karakatsanis, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ; Côté J, concurring).

The standard of review is reasonableness. None of the six categories of correctness review apply.[1] In particular, although the proper interpretation of s. 34(1)(e) is important for the affected persons and the proper administration of the *IRPA*, it does not affect the legal system or the administration of justice as a whole, have legal implications for many other statutes, or affect other institutions of government. The fact that the Federal Court certified questions under s. 74(d) of *IRPA* does not affect the standard of review to be applied.

The Federal Court of Appeal strayed from the reasonableness review methodology set out in *Vavilov*.[2] Rather than starting its analysis with the reasons of the decision-maker, the Court of Appeal grafted on an extra step of conducting a preliminary analysis of the text, context and purpose of the legislation to understand the statutory "lay of the land". This is inconsistent with *Vavilov* and risks leading a court to slip into correctness review.

Reviewing courts must conduct reasonableness review mindful of the impact of the decision on the affected individual. The reasons provided by the administrative decision-maker must reflect the stakes. Here, the impact on M and D's rights and interests is severe, as the decisions impact whether two individuals could

[1] Those categories are: (i) where the legislature explicitly prescribes standard of review; (ii) where the legislature provides for a statutory right of appeal to a court; (iii) constitutional questions; (iv) general questions of law of central importance to the legal system as a whole; (v) questions related to jurisdictional boundaries between two or more administrative bodies; and (vi) where courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute.

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

be deported from Canada. Yet the IAD's reasons failed to address critical points of statutory context and the broad consequences of its interpretation of s. 34(1)(e) that were raised by M and were "core planks" of his position (para 97). While not raised by the parties, the IAD also failed to consider that the *IRPA* must always be interpreted with Canada's international obligations in mind, including the principle of non-refoulement, which is the cornerstone of the international refugee protection regime.

These significant omissions reflected a failure of responsive justification and, cumulatively, rendered the IAD decision unreasonable. The ID's decision in D's case, which simply followed the IAD's interpretation in M's case, was unreasonable for the same reasons.

The relevant legal constraints point overwhelmingly to only one reasonable interpretation of s. 34(1)(e): the provision requires a nexus to national security or the security of Canada. The provision can only be invoked to render a person inadmissible when their acts of violence that would or might endanger the lives or safety of persons in Canada have a nexus with national security or the security of Canada.

In her concurring opinion, Justice Côté would have recognized a new category of correctness review for certified questions under s. 74(d) of the *IRPA*. Questions certified under that provision will, by definition, have implications beyond the immediate parties and raise issues of broad significance within Canada's immigration and refugee protection scheme. Both Parliamentary intent and the rule of law require a singular, determinate and final answer to a question certified as a serious question of general importance under the *IRPA*. She held that the majority's interpretation of s. 34(1)(e) is correct.

Commentary: The Court's decision in *Mason* is notable for a number of reasons.

First, with respect to standard of review, the Court holds the line on limiting the categories of correctness review. Despite a rather compelling set of arguments from Justice Côté on why correctness review would be more consistent with the underlying rule of law and respect for legislative intent rationales set out in *Vavilov*, the majority is clearly not interested in opening that door when it comes to certified questions, reaffirming the Court's previous holding that such matters do not require correctness review.[3] In the result, the decision effectively prioritizes predictability and stability over any further evolution when it comes to the standard of review analysis, sending a message to litigants that they should not be quick to argue for new categories of correctness review—especially where the matter has been settled (even if pre-*Vavilov*).

Second, the majority's instruction that reviewing courts should not adopt the "lay of the land" approach to reasonableness review of statutory interpretation is an important, if somewhat puzzling, directive. It is important because counsel will now have to take extra caution not to frame cases in a way that could invite a "lay of the land"-type analysis, and to

[3] *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44.

adhere closely to a "reasons-first" approach. At the same time, it is puzzling because it is hard to object to reviewing courts simply looking at the full relevant statutory context and purpose to ensure they have a basic understanding of the statutory landscape before their review of an administrative decision that focuses on particular aspects of that scheme. Of course, this analysis cannot go too far: a reviewing court cannot conduct its own statutory interpretation analysis and then use that as a "yardstick to measure what the administrator did" (*Vavilov* at para 83). But merely gaining familiarity with the statutory lay of the land, in order to ensure the reviewing court has the relevant background for its consideration of the administrative decision, seems not only appropriate but advisable in many cases.

In the end, it is not practically possible to conduct judicial review without getting a "lay of the land" with respect to the statute at issue; indeed, *Vavilov*'s requirement that administrative decisions must be consistent with statutory text, context and purpose of the relevant provisions *requires* such an undertaking by reviewing courts. The question is really one of the analytical order in which this step is undertaken. Following *Mason*, the "lay of the land" step will likely occur—at least on paper—following the initial review of the administrative decision. This respects *Mason*'s insistence on the need for a "reasons-first" approach, while not sacrificing the obvious need for a reviewing court to properly understand the statutory context and purpose of the legislative regime at issue when assessing reasonableness.

Third, *Mason* serves as a stark reminder that responsive justification requires the reasons of administrative decision-makers to grapple with the submissions of the parties, at least insofar as they relate to "key issues", "central arguments" (*Vavilov* at para 128) or "core planks" (*Mason* at para 97). Decision-makers should address such issues explicitly, otherwise reviewing courts will not be quick to draw an inference that an argument has been considered or addressed; for example, the majority in *Mason* parted ways with the Federal Court of Appeal's conclusion that the decision-makers had implicitly considered some of M's arguments (see paras 96 and 101). Thus, while reviewing courts must review decisions "with sensitivity to the institutional setting and in light of the record" (*Vavilov* at para 96), *Mason* suggests there are limits to how far reviewing courts will go in overlooking an administrative decision-maker's failure to expressly address a key issue raised by one of the parties.

Fourth, *Mason* illustrates that there will be other legal constraints that bear on administrative decisions—even if those issues are not raised by the parties. In particular, the majority relies on the fact that Parliament intended the *IRPA* to be interpreted in conformity with Canada's international obligations (as made explicit in the text of the statute), which is a point that the administrative decision-makers never considered. Despite the parties never raising this issue, the Court concluded it was unreasonable to adopt an interpretation that allows foreign nationals to be returned to countries where they may face persecution, contrary to Canada's non-

refoulement obligations under international law.

Finally, when it comes to the ongoing debates over whether *Vavilov* has ushered in an era of heightened reasonableness review, *Mason* is an important data point suggesting that it has. Despite paying heed to the need for a "reasons-first" approach, the substance of the Court's reasonableness review is quite robust indeed—in terms of the standard expected for responsive justification given the stakes, in terms of taking the decision-makers to task for failing to (expressly) consider points of statutory context, and in terms of relying on issues not raised by the parties as a limiting legal constraint on what constitutes a reasonable decision.

Robust conception of *Doré* framework is here to stay: *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31

Facts: Five sets of parents living in the Northwest Territories wished to enrol their children in one of the Territory's two French language schools. None of the parents had a constitutional right under s. 23 of the *Charter* to have their children educated in French. As a result, they were required to request that the Minister of Education, Culture, and Employment exercise her discretion to admit their children.

In each case, the Conseil scolaire francophone des Territories du Nord-Ouest ("CSFTNO") assessed the children and recommended their admission, essentially because it would promote the development of the Francophone community of the Northwest Territories. Nevertheless, the Minister denied each of the applications for admission. She determined that the applicants did not meet the criteria for the admission of non-rights holders under the Territory's directives and that admitting the children would require her to admit other children in similar circumstances, which would have unpredictable budgetary consequences.

The parents and the CSFTNO sought judicial review of the Minister's decisions. The Supreme Court of the Northwest Territories allowed the application, holding that the Minister did not proportionately balance the protections under s. 23 of the *Chater*. The Court of Appeal for the Northwest Territories allowed the Minister's appeal, concluding that the decisions were reasonable.

The parents and the CSFTNO appealed to the Supreme Court.

By the time of the Supreme Court hearing, all of the children were either admitted to the French schools or moved out of the Northwest Territories. Nonetheless, the Supreme Court decided to rule on the matter anyway.

Decision (*per* Wagner C.J. and Karakatsanis, **Côté**, Martin, Kasirer, Jamal and O'Bonsawin JJ.)**:** appeal allowed; the Minister's decisions were unreasonable because she did not properly balance the values underlying s. 23 of the *Charter* against the government's interests.

The parties agreed that the standard of review is reasonableness. The Court must apply the framework set out in *Doré v. Barreau du*

Québec[4] for assessing the reasonableness of decisions that engage the *Charter*. The *Doré* framework applies not only to administrative decisions that directly infringe *Charter* rights, but also where the decision simply "engages a value underlying one or more *Charter* rights, without limiting these rights" (para. 64). Thus, the framework is still applicable, despite the fact that none of the applicant parents held rights under s. 23.

Where an administrative decision limits *Charter* values, it will only be reasonable if the decision-maker conducted a proportionate balancing of the *Charter* values with the statutory objectives. While reasonableness review typically has courts simply assess whether the decision-maker took all relevant considerations into account, reasonableness under the *Doré* framework requires the court to consider the weight accorded by the decision-maker to the relevant considerations.

In this case, the values underlying s. 23 of the *Charter* were engaged by the Minister's decisions because they were likely to impact the preservation and development of the French language minority community in the Territory. The Minister was therefore required to consider these values in exercising her discretion to decide whether to admit the applicants to the French schools. However, the Minister's reasons show that she did not truly take these values into account. Instead, the Minister mischaracterized the parents' motivation for applying and gave disproportionate weight to the potential costs. As a result, the decisions were unreasonable.

[4] 2012 SCC 12.

Commentary: For a while, particularly following *Vavilov*,[5] many have questioned the Supreme Court's continued commitment to the framework for assessing administrative decisions that engage the *Charter*, as established in *Doré* and *Loyola High School v. Quebec (Attorney General)*.[6] Indeed, as recently as 2018, Justice Côté herself penned a lengthy dissent (together with Justice Brown), which outlined a number of her fundamental concerns with the *Doré* analysis (including its reliance on *Charter* values).[7] In this case, however, the Supreme Court has not only unanimously reaffirmed the *Doré/Loyola* framework, but also expanded its scope and intensity.

While Côté J. claims that the case is "a straightforward application" of *Doré* (para. 59), the decision does tweak (or at the very least clarify) the framework in at least two key ways.

First, the Court holds that the *Doré* framework can apply even where the decision has no impact on the *Charter* rights of the applicants. Here, it was undisputed that the applicant parents had no rights under s. 23; their rights could not possibly have been infringed. Nevertheless, the Court held that the Minister needed to consider the impact of her decisions on other third parties, whose interests under s. 23 were impacted. The Court also relatedly holds that *Doré* balancing is still necessary

[5] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.
[6] 2015 SCC 12.
[7] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 302-314. Justice Rowe also shared some of these concerns in the course of his concurring opinion: see paras 162-208.

when *Charter* values are engaged, even if no actual rights are limited.

One might argue that these conclusions flow from the unique collective and positive nature of s. 23 rights (which Côté J. highlighted in the first paragraphs of her decision). It will therefore be important to see whether the Court embraces this expanded view of *Doré* in the context of other *Charter* rights and values, which do not necessarily share the same collective dimension as the language rights at issue here.

Second, the Supreme Court's decision articulates and reflects a particularly robust form of review under the *Doré* framework. In conducting the reasonableness review pursuant to *Doré*, not only must the courts consider whether the decision-maker took into account the relevant *Charter* rights and values, but the court must also "inquire into the weight accorded by the decision maker to the relevant considerations in order to assess whether a proportionate balancing was conducted" (para. 72; emphasis added). This appears to tread very closely to saying that the court can re-weigh the relevant factors to determine whether the decision-maker 'got it right' when it comes to proportionality—which is typically anathema to the deferential posture of reasonableness review. In this way, reasonableness review where the *Charter* is engaged is even more robust than elsewhere.

As a practical matter, the decision suggests *Doré* review will be a more intense exercise moving forward. Administrative decision-makers engaged in discretionary decision-making should be sure to address how their decision may have engaged *Charter* values (even if there is no rights infringement that has taken place), including by impacting the *Charter*-protected interests of other parties. Administrative decision-makers will then have to identify the relevant constitutional considerations and show that they have been weighed against the relevant statutory objectives as part of the proportionate balancing exercise.

Constitutional questions regarding tribunal's territorial jurisdiction reviewed for correctness: *Sharp v. Autorité des marchés financiers*, 2023 SCC 29

The Facts: The Appellants, four British Columbia residents were alleged to have improperly manipulated the price of stock in contravention of the Quebec *Securities Act*. Specifically, they allegedly engaged in a "pump and dump" scheme in relation to the shares of Solo International Inc. ("Solo"). This scheme is alleged to have injured investors, including investors in Quebec.

Quebec's securities regulator brought these allegations against the Appellants before Quebec's Financial Markets Administrative Tribunal (the "FMAT"), a Quebec administrative tribunal. The Appellants challenged the FMAT's jurisdiction over them as out-of-province defendants. However, the FMAT rejected this challenge. Applying the test from *Unifund*,[8] it ruled that it had jurisdiction over the matter because of a real and substantial connection between the infractions and Quebec. The

[8] *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40.

FMAT highlighted five key factors which established a real and substantial connection: 1) Solo was a reporting issuer in Quebec; 2) Solo had a business address in Montreal; 3) Solo was under the direction of a Quebec resident at all material times; 4) the promotion of Solo's activities was available to Quebec residents; and 5) some Quebec residents ultimately were defrauded by the Appellants' scheme.

The Superior Court dismissed the Appellants' application for judicial review. The Appellants appealed to the Court of Appeal. The Court of Appeal upheld the Superior Court's decision.

The Appellants appealed to the Supreme Court.

Decision: Appeal dismissed (per Wagner CJ and Karakatsanis, Brown, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ; Côté J dissenting). The FMAT has jurisdiction over the Appellants.

The parties agreed that the standard of review for the FMAT's decision is correctness. The FMAT's decision raises a constitutional issue regarding the territorial reach of provincial legislation. Therefore, the presumption of the reasonableness standard is rebutted and the standard of review is correctness. In the alternative, even if the jurisdiction issue could be resolved by applying the Quebec *Civil Code* ("*CCQ*"), the standard would still be correctness because this is a general question of law of central importance to the legal system as a whole. Whether the *CCQ* grants jurisdiction over out-of-province parties requires a uniform answer because of its implications for many other statutes.

The private international law rules in the *CCQ* do not give the FMAT jurisdiction over the Appellants. First, art. 3134 CCQ provides that Quebec authorities have jurisdiction if the defendant is domiciled in Quebec. The Appellants are not domiciled in Quebec. Second, art. 3148 stipulates that, in personal actions of a "patrimonial nature", Quebec authorities have jurisdiction if "a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec". However, the allegations against the Appellants were not of a "patrimonial nature" because they could not result in a transfer between patrimonies.

Nevertheless, the FMAT does have jurisdiction over the Appellants under the Quebec *Securities Act* and the *Act respecting the regulation of the financial sector*. As neither statute expressly provides that the FMAT can assert jurisdiction over out-of-province parties, they must be interpreted in light of the *Unifund* test. Interpreted in light of *Unifund*, the Quebec securities scheme provides for jurisdiction over out-of-province parties with a "sufficient connection" or a "real and substantial connection" to Quebec. Thus, the jurisdictional question turns on where there a real and substantial connection between the Appellants and Quebec? The answer is yes. The Appellants participated in a fraudulent securities manipulation scheme with important ties to Quebec. The Appellants allegedly used Quebec as the face of their securities manipulation and injured Quebec investors. Therefore, the FMAT has jurisdiction over the Appellants.

Commentary: From an administrative law framework, this case is notable as a rare example of the courts applying the correctness standard of review. It demonstrates a broad acceptance of the correctness standard when a Tribunal's territorial jurisdiction is challenged.

The judgment clarifies that whether a provincial tribunal has jurisdiction over residents of another province is a constitutional question, attracting the correctness standard. This ruling is consistent with *Vavilov*,[9] in which the SCC explained that the extent of a legislature's power, including when delegated to an administrative body, is a constitutional issue. In her dissenting decision, Côté J argues that the Appellants' claim is merely a jurisdictional issue not a constitutional one. However, the extent of a legislature's power is a constitutional question; "extent" should be interpreted to include geographical limits. Furthermore, the division of powers between provinces is a constitutional issue. In other words, if a province asserts power without jurisdiction it acts unconstitutionally.

The majority of the Court goes even further here, claiming that the territorial jurisdiction question would attract the correctness standard, even if it was not a constitutional question. In the alternative, the Court held that the correctness standard would be applicable because the application of the jurisdictional provisions of the *CCQ* to the securities regime is a "general question of law of central importance to the legal system as a whole" that requires a uniform answer. This potentially provides a greater opening for the use of the correctness standard whenever a Tribunal's territorial jurisdiction is challenged.

Finally, this decision is a useful reminder that it is not always obvious whether a decision is a question of law or fact. At first blush, whether the Appellants have a substantial connection to Quebec appears to be a factual question, or at least a mixed question of fact and law. However, because of the nature of the Appellants' challenge, the alleged facts are assumed to be true. Therefore, the Court could not consider whether the FMAT's factual findings were justified. The Court's role was limited to applying the *Unifund* test to the factual findings. It is not clear how much deference would apply when a party alleges that a tribunal had improperly claimed jurisdiction on the basis of an unjustified factual finding. Would the courts show any deference to a Tribunal's factual findings underlying its conclusions on territorial jurisdiction.

Limited appeal rights and availability of judicial review: *Georgopoulos v Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2023 ABCA 285

Facts: G suffered a workplace injury. The Workers' Compensation Board found that injury to be compensable and determined his compensation rate, permanent clinical impairment rating, and disability status. G appealed the compensation decision to the Board's internal Dispute Resolution and Decision Review Body. Still unsatisfied, G appealed again to the external Appeals

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

Commission. The Commission confirmed the Board's decisions as to G's permanent clinical impairment rating and non-economic loss entitlement.

G appealed the Commission's decision to the Alberta Court of King's Bench under the appeal provision in s. 13.4 of the *Workers' Compensation Act*,[10] which allows appeals on questions of law or jurisdiction. He also applied for judicial review.

The chambers judge found that the procedural fairness grounds raised in G's appeal were questions of law on which an appeal was available but concluded that the Commission's procedures were fair. G did not show any errors in the interpretation of the Act or the Board's policies. On the judicial review application, the chambers judge found the Commission's analysis and ultimate decision were reasonable. G appealed.

Decision: Appeal dismissed (per Feehan and Kirker JJ.A.; Slatter J.A. concurring).

The majority found that the chambers judge made no reviewable error in refusing to reweigh the medical evidence that was before the Commission. Judicial review is not a *de novo* reassessment of the decision under review. It was not unreasonable for the Commission to prefer one body of expert evidence or over another. Conclusory allegations that the Commission or the chambers judge failed "to appropriately consider the evidentiary record and factual matrix" are not sufficient to demonstrate a reviewable error.

The concurrence agreed with the majority's reasons for dismissing the appeal but focused on the appropriateness of the appellant's judicial review application, brought in parallel to the statutory appeal.

As a general rule, a statutory right of appeal from the decision of an administrative tribunal is intended to exhaust the remedies available to the applicant. In the end, the availability of judicial review is a matter of statutory interpretation, but there is generally no right to supplement the statutory right of appeal with common law judicial review.

The legislature has a wide jurisdiction to determine the procedures by which administrative decisions are to be reviewed by the superior courts. Although the legislature cannot complete insulate administrative decisions from judicial review,[11] the legislature has a very wide mandate to define the nature and availability of judicial review as illustrated in various ways, such as legislation governing the availability, procedures and remedies of judicial review, statutory limitation periods on judicial review and legislated standards of review. There is no constitutional reason why a legislature cannot provide that the exclusive method of challenging a particular administrative decision will be through a statutory appeal, not common law judicial review, and there is no reason why the legislature cannot limit judicial review to questions of law.

Whether a statutory right of appeal is intended to be the exclusive remedy for reviewing administrative decisions must always be a

[10] RSA 2000, c W-15.

[11] *Crevier v Québec (Attorney General)*,[1981] 2 SCR 220

question of statutory interpretation. When conducting that analysis, one must not assume that statutory rights of appeal and common law judicial review are two separate processes. They are two procedural alternatives of accomplishing the same thing: judicial review of administrative decisions.

The existence of a statutory right of appeal is relevant but not conclusive on the issue of whether judicial review is available; the statute as a whole must be interpreted. Further, judicial review is discretionary and relief can be denied when there are alternative effective remedies.

Here, the *Workers' Compensation Act* deals with both judicial review and statutory appeals. It grants a right of appeal limited to questions of law or jurisdiction, and it has a full privative clause for other types of questions. On a proper interpretation of the statute, the statutory appeal right was intended to exclude judicial review by any other process.

The legislature expressly provided for appeals on questions of law and jurisdiction, thereby excluding any appeals on questions of fact or mixed fact and law. It is inconsistent with this legislative intention to conclude that review of questions of fact or mixed fact and law is not prohibited, but is merely to be conducted through a separate procedure—a judicial review application—even though that procedure is expressly excluded by the privative clause. The scheme of the statute is that the Appeals Commission has the final say on questions of fact and mixed fact and law. In the view of the concurring judge, it is not open to challenge factual decisions of the Commission by applications for judicial review.

Commentary: With his concurrence, Justice Slatter adds his voice to the chorus of judges who have weighed in on the thorny issue of whether and to what extent judicial review is available where a party wants to challenge an administrative decision on grounds that fall outside the scope of a limited statutory appeal right. Several of these judicial opinions have come from appellate courts and no two have been entirely aligned.

The debates in this area emerge from paragraphs 45 and 52 of *Vavilov*, which note, without analysis, that the extensive of a circumscribed right of appeal does not preclude judicial review of aspects of a decision falling outside the appeal right.

The appellate decisions and opinions broadly reflect three approaches:

1. Those who are of the view that a limited appeal right demonstrates a legislative intention to limit court review to only those issues that may be the subject of an appeal. Judicial review is not available for other aspects of a decision.[12]

2. Those who are of the view that judicial review is always available, without restriction, for issues that cannot be raised through a circumscribed appeal mechanism.[13]

[12] See, for example, the opinion of Near JA in *Canada (Attorney General) v Best Buy*, 2021 FCA 161, which is reviewed in Issue No. 31 of this newsletter.
[13] See, for example, the majority opinion of Gleason JA in *Canada (Attorney General) v Best Buy*, 2021 FCA 161, and the decision in *Smith v The Appeal Commission*,

3. Those who are of the view that judicial review is available where there is limited appeal right but that the court will only rarely exercise its discretion to grant the remedy of judicial review.[14]

The Supreme Court will soon weigh in on these divergent views. In November 2023, it heard oral argument in the appeal from the Ontario Court of Appeal's decision in *Yatar v TD Insurance Meloche Monnex*.[15] The Court of Appeal favoured approach #3 above. Although Ontario's *Judicial Review Procedure Act*,[16] which expressly allows for judicial review "despite any right of appeal", is not mirrored in most other provinces or the *Federal Courts Act*, we do not anticipate that legislation to be determinative in the Supreme Court's analysis. While the Supreme Court may emphasize (as did Slatter JA in *Georgopoulos*) that statutory interpretation must play a key role, we anticipate that in the same spirit as *Vavilov* (and other cases decided since then), the Supreme Court will seek to remove complexity by setting out an approach that is meant to apply generally—even if it may result in strained statutory construction from time to time.[17]

We eagerly await the decision.

2023 MBCA 23, which is reviewed in Issue No. 35 of this newsletter.

[14] *Yatar v TD Insurance Meloche Monnex*, 2022 ONCA 446, which is reviewed in Issue No. 33 of this newsletter.

[15] 2022 ONCA 446.

[16] RSO 1990, c J.1.

[17] See, for example, the discussion of the majority's reasons in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, above.

Robust reasonableness review concludes regulations went beyond enabling legislation: *Responsible Plastic Use Coalition v. Canada (Environment and Climate Change)*, 2023 FC 1511

Facts: The Federal Government sought to address the growing issue of plastic pollution due to the negative effects on the environment and human health. The Governor-in-Council added "Plastic Manufactured Items" ("PMI") to the list of toxic substances in Schedule 1 of the *Canadian Environmental Protection Act, 1999*.[18] At the time, s. 90(1) of *CEPA* permitted the GIC to make an order adding "a substance" to the list of toxic substances "if satisfied that [the] substance is toxic". *CEPA* contains definitions of "substance" and "toxic".

When a substance is listed in Schedule 1, the GIC then has broad powers to make regulations regarding the substance. Because PMI was listed as a toxic substance, the GOC was able to adopt the *Single Use Plastics Regulations*,[19] prohibiting the manufacture, import and sale of six categories of single use plastics.

A group of applicants – consisting of a not-for-profit corporation comprised of companies from the plastics industry, chemical and plastic resin manufacturers, a petrochemical manufacturer, and the Provinces of Saskatchewan and Alberta – challenged the order adding PMI to the list of toxic

[18] S.C. 1999, c. 33 ("*CEPA*").

[19] SOR/2022-138.

substances.[20] They brought an application for judicial review, arguing that the order was unreasonable because it did not comply with the *CEPA*.

Decision: Application allowed (*per* Furlanetto J.).

The order to list PMIs in Schedule 1 of *CEPA* was unreasonable and therefore invalid.

All parties agreed that the order should be reviewed on the reasonableness standard. Given that the GIC is constrained by the statutory scheme, the central question is whether *CEPA* reasonably allows for the decision.

Courts should not lightly interfere with decisions of the GIC, who has broad authority to make regulations. However, a higher level of deference is not warranted in this case. Because the language of s. 90(1) of *CEPA* requiring the GIC to be satisfied that the substance is toxic is not discretionary, the order is not "quintessentially executive in nature" (para. 66). Further, more deference is not justified simply because the order aligns with the government's broader policy goals regarding eliminating harmful plastic pollution.

A "substance" must comply with the provisions of s. 90(1) to be validly included on the list of toxic substances. The applicants argued that the order did not comply with the statutory provisions in two respects: (1) PMI are not a "substance"; and (2) PMI are not "toxic".

PMI is a broad category of items that can vary in their form, shape, chemical composition, chemical structure, and physico-chemical properties. Therefore, they appear broader than the definition of "substance" in the act, which seems to refer only to singular items. However, this alone is insufficient to make the order unreasonable.

The true issue is whether PMI can be considered "toxic". *CEPA*'s definition of "toxic" is broad and includes a substance that has or may have "an immediate or long-term harmful effect on the environment or its biological diversity".[21]

The government's own assessment indicated that not all plastic waste becomes harmful plastic pollution. It is insufficient to deem all PMI as toxic because all PMI *have the potential* to become plastic waste. PMI are extremely variable and only a small number of specific items have been identified in the scientific literature to have adverse effects on animals. From this, the GIC could not reasonably conclude that *all* PMI are toxic. PMI as a broad category includes some items with no reasonable apprehension of environmental harm.

As a result, it was unreasonable for the GIC to list the entire category of PMI as toxic in Schedule 1 in an unqualified manner.

The Court also found that the listing of PMI on Schedule 1 was unconstitutional as it goes beyond the federal criminal law power.

[20] The case was not a direct challenge to the *Single Use Plastics Regulations*.

[21] *CEPA*, s. 64(a).

Commentary: The impact of this decision extends beyond its effect on Canadians' access to their beloved plastic straws.

This decision is an example of the Federal Court carefully scrutinizing the GIC's regulation-making authority for compliance with the enabling statutory scheme. While the standard of review was reasonableness, the Court still examined the *CEPA* requirements and the evidence before the government in detail. It refused to show greater deference to the GIC simply because the order was an exercise of enacting subordinate legislation (similar to enacting regulations), or because it furthered the government's public policy objectives. This recognizes a robust role for the courts to ensure that subordinate legislation complies with the strict requirements of the enabling statutory regime.

In addition, the decision demonstrates how the government can run into trouble when it acts too broadly in exercising its power to enact regulations or similar subordinate legislation. There was little doubt in the case, and from the scientific evidence before the GIC, that *certain* PMI and single use plastics can be harmful to the environment and human health. Further, the language of *CEPA* is incredibly broad in how it defines both "substance" and "toxic", giving the executive wide-ranging powers to regulate environmentally harmful substances. Nevertheless, the government still overstepped its statutory bounds in this case by adding *all* PMI to the list of toxic substances. The irony is that the government's subsequent actions – enabled by the impugned order – was only to regulate the manufacture and sale of a much smaller category of single use plastics. Thus, the listing of all PMI in Schedule 1 was unnecessary to the government's objective of addressing the subset of harmful PMI. We can expect the likely result of the case to be a narrower order listing a more carefully defined category of plastic substances to be regulated.

Ultimately, this case serves as an important reminder to governments crafting regulations to ensure they are carefully crafted and not broader than permitted by the enabling legislation. Otherwise, the courts will find them unreasonable.

Decision-maker admits reasons were inadequate and gets to try again: *Association for Reformed Political Action Canada v. Hamilton (City of)*, 2023 ONSC 6443 (Div Ct)

Facts: In March 2021, the Applicants sought to post an advertisement on the City of Hamilton's buses that identified an unborn fetus as a person. The City of Hamilton replied by email saying that the ad was inaccurate and that the ad "would need to be revised so as to not reflect personhood in relation to the image." The City also suggested some revised wording for the ad.

The Applicants responded to the email saying that they did not understand the issue regarding "accuracy" and asked for an explanation of the "legal problem." The City replied by email again advising that the ad could not refer to the unborn fetus as a person and suggesting the same revised wording. The City also referred the Applicant to an Ad Standards Council decision which was available on the Council's website dealing with a similar

issue and which found an advertisement to be misleading in light of Clause 1 of the Canadian Code of Advertising Standards and the *Criminal Code*, R.S.C. 1985, c. C-46.

Rather than continue the conversation by email, the Applicants initiated a judicial review of the City's decision saying that the reasons in the email were inadequate and the decision violated s. 2(b) of the *Charter of Rights and Freedoms*—freedom of speech.

Prior to the hearing, the City of Hamilton conceded that its reasons were inadequate.

Decision: Application allowed (*per* Lococo, Emery and Schabas JJ.).

The decision was quashed and remitted back to the decisionmaker.

The parties were aligned that the emailed reasons were inadequate and they could not be supplemented after the fact on the judicial review.

The parties were opposed on what relief the Court could offer. The Applicants urged the Court to "weigh in on the controversial issue of whether a fetus is a person and, depending on the outcome, have th[e] Court order the Ad be posted". The City argued that the Court ought to remit the decision back to the City where it would reconsider its position and, if rejected, provide reasons.

The City's position is accepted. Relying on *Guelph and Area Right to Life v. City of Guelph*,[22] "it is not for the Court to engage in reasoning that ought to have been undertaken by the decision-maker" (para. 13). As the Court said in *Guelph*: "… it is not the court's role at this stage to weigh in on an evaluation of the advertisements. Rather, it is first for the City to weigh the issues identified by the Coalition against the applicant's right to freedom of expression."

Following *Vavliov*,[23] "[t]he discipline of providing reasons will require the City to carefully consider and articulate its objectives and concerns regarding the nature of permitted advertising on its public transit, and to balance those objectives with the important constitutional right to freedom of expression" (para. 15). If the City rejects the ad again, and the Applicants seek another judicial review, the Court will then have the benefit of the City's reasons and can subject them to appropriate scrutiny.

Although this gives the City a "second kick at the can", this is appropriate because there was no apparent bad faith on the part of the City in its initial inadequate response. This was not a circumstance, like a tribunal, where legal reasons would typically be expected. It was an email discussion about whether the City would enter into a contract with the Applicants.

Commentary: By falling back on its limited role on a judicial review, the Divisional Court was able (at least temporarily) to side-step the thorny issue of the content of the Applicants' ad and whether a municipality is required under s. 2(b) of the *Charter* to display those ads. The City will now need to undertake a *Doré/Loyola* analysis following the Court's

[22] 2022 ONSC 43.

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

guidance in *Guelph* and, if it chooses not to accept the ad, provide more fulsome reasons for its decision.

This decision is consistent with the Court's role in administrative law. While there are pros and cons to both the Applicants' and Respondents' positions, this decision represents the balance our court system has struck. The legislatures delegate their authority to bodies who presumably have the knowledge and expertise (including expertise in the regulatory schemes) to make the decision. The Courts rely on those bodies to provide reasons and a full evidentiary record so they can assess the reasonableness or correctness of those decisions. A decisionmaker should not be granted multiple opportunities to correct its mistakes and the courts should not incentivize carelessness or laziness by a decisionmaker. However, where an admittedly incorrect analysis is done in good faith, the decisionmaker should be able to go back and try again because, in the process the parties will hopefully build an evidentiary record based on the correct test in the event the decision needs to be reviewed again. While this balance risks adding more burden on our court system (if the parties judicially review the new decision), it ensures that the court does not make ill-informed decisions based on limited records and inadequate understanding of the applicable legislative and regulatory schemes.

This decision also offers useful guidance for municipalities and other entities that are subject to the *Charter* in their dealings with members of the public, including their contractors and vendors. Although they may find themselves making a determination that does not initially appear to be a decision that requires legal analysis, such as negotiating a contract, their employees and agents must have adequate training to identify whether their communications could be viewed as a decision by an administrative decision maker and what the necessary legal considerations are in forming that decision. It may not be sufficient to merely rely on prior decisions by municipalities or organizations. A municipality must show it turned its mind to the *Charter* issues and explain how it arrived at the balance it reached.

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THE NEWSLETTER

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