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JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN CANADA

Brown and Evans

Release No. 2, June 2022

Publisher's Special Release Note 2021

The pages in this work were reissued in May 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the May 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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This award-winning publication is an in-depth presentation of the law of judicial review of administrative action in Canada. Written by Donald J. M. Brown, Q.C. and The Honourable John M. Evans, both widely regarded as experts in the field of Administrative Law, *Judicial Review of Administrative Action in Canada* offers a substantive view of the law along with practical guidance on the issues that can arise in the judicial review process. This publication is a comprehensive research and working tool for administrative bodies, practitioners and legal scholars and is used across Canada and in academic and court libraries throughout the common law world. Designed to be a primary source of the statute and case law in the field of judicial review, the text also includes important legislation, regulations, rules, forms and practice directions for each jurisdiction.

Judicial Review of Administrative Action in Canada was the recipient of the prestigious Mundell Medal in 1999. A highly sought after prize, the Mundell Medal is awarded for a "distinguished contribution to letters and law".

This 3-volume looseleaf captures developments in this ever-changing subject that is relevant to so many areas of the law. In a continuing effort to ensure that the legislation and other documentation throughout the treatise are current and relevant, this release includes significant updates made to the commentary and case law.

What's New in this Update

This release features updates to the case law and commentary in the following chapters: 9 (Pre-Hearing Participatory Rights), 10 (The Hearing and Participatory Rights), 11 (Interest, Bias and Independence), 12 (Review of the Decision-Making Process), 13 (The Grant of Authority), 14 Review of the Exercise of Authority) and 15 (Review of Non-Adjudicative Administrative Action). This release also includes updates to the legislation found in Appendices B (Federal Statutes, Rules and Forms), G (Ontario Statutes, Rules, Forms and Practice Directions), H (Quebec Statutes and Civil Code) and O (Nunavut Statutes, Rules and Forms).

Highlights — Developments in Administrative Law in the Second Half of 2021

Courts continue to wrestle with issues raised by the Supreme Court's decision in *Vavilov*. Issues surrounding determining what standard of review applies to a particular situation and how to apply the different standards featured in a number of decisions.

Determining the Standard of Review

For example in *Canada (Public Safety and Emergency Preparedness) v. Gaytan*, 2021 FCA 163, the Federal Court of Appeal upheld

the decision of the Federal Court finding that it is open to the Immigration Appeal Division of the Immigration and Refugee Board ("the IAD") to consider the criminal law defence of duress when assessing whether a permanent resident or a foreign national is inadmissible to Canada because they are a member of a criminal organization or for engaging in the criminal activities of that organization (under paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, SC. 2001, c. 27).

The Federal Court of Appeal concluded, not surprisingly, that the standard of reasonableness applied to a review of the IAD's application of the defence of duress to the claimants' circumstances. However, on the issue of whether the Board is entitled to consider the defence of duress, the Federal Court of Appeal was less sure that the standard of reasonableness applied.

Although it did not decide the issue, the Federal Court of Appeal raised an interesting issue with respect to whether the presumption of reasonableness might be rebutted in the circumstances. The Federal Court of Appeal noted that in *Vavilov*, the Supreme Court held that the presumption of reasonableness review can be rebutted where the issue involves questions regarding the jurisdictional boundaries between two or more administrative bodies. The Federal Court of Appeal then stated as follows: "The examples given by the Supreme Court in support of this exception to the presumption of reasonableness review all deal with administrative bodies deriving their authority from different statutory regimes, not, as is the case here, from the same statutory framework. The issue of the applicability of this exception to the case at bar not having been raised or addressed by the parties, it is preferable to leave it for another day."

Ultimately, the Federal Court of Appeal concluded that the Federal Court decision that the IAD is entitled to consider the defence of duress when determining whether an individual is inadmissible under paragraph 37(1)(a) of the Act was not only reasonable but correct. The appeal was therefore dismissed.

Similarly, in *Manitoba Federation of Labour et al. v. The Government of Manitoba*, 2021 MBCA 85, the Manitoba Court of Appeal addressed two issues. First, whether provisions of the *Public Services Sustainability Act*, CCSM c. P272, violated section 2(d) of the Charter and, second, whether Manitoba's conduct during a specific round of collective bargaining violated section 2(d). The Court concluded that the legislation did not run afoul of section 2(d) but that the Province's conduct did.

In reaching this conclusion, the Manitoba Court of Appeal distinguished between the standard of review applicable to a review of the legislation at issue and the standard of review applicable to a review of the Province's conduct during collective bargaining. The Manitoba Court of Appeal concluded, not surprisingly, that the constitutional validity of the impugned legislation was "the quintessential question of law" and therefore attracted the correctness

standard.

Conversely, whether Manitoba's conduct infringed section 2(d) required a multi-faceted analysis that attracted a less exacting standard of review than the correctness standard. First, a court must ensure that the judge applied the correct legal principles. The standard of correctness applies to this step. The appellate court is then required to review the relevant facts underlying the Charter analysis to see if there was an error. According to the Manitoba Court of Appeal this part of a judge's decision is entitled to deference absent palpable and overriding error. Third and finally, the appellate court is required to review the application of the relevant legal principles to the relevant facts. In the civil law context this is reviewed for palpable and overriding error (unless an extricable legal error is evidence in which case correctness applies).

The Manitoba Court of Appeal concluded that the different standards of review stemmed from the differing nature of the questions being posed. The constitutional validity of the legislation at issue involves the interplay between the legislation and the Constitution. Conversely whether conduct infringes a Charter right is more fact specific and therefore more entitled to deference.

Carrying out the Review in the Absence of Reasons

In *Catalyst Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FC 505, the issue was not which standard to apply but rather how to apply the reasonableness standard in the absence of formal reasons from the administrative decision maker. At issue, broadly speaking, was the decision of the Minister of Health to issue a Notice of Compliance with respect to a New Drug Submission. The applicants argued that the Minister's decision violated the Food and Drug Regulations.

The Federal Court noted that as part of ensuring proper supervision over administrative decision makers, courts must be able to assess the reasonableness of the decision at issue. In Catalyst Pharmaceuticals Inc., the Federal Court quashed the decision. The Federal Court concluded that the while the Minister was not required to provide reasons for its decision, the Court was left with no reasons to review and no rationale for the decision could be discerned or inferred from reviewing the record. Accordingly, the matter was returned to the Minister for redetermination.

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