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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Public interest standing before tribunals and limits on supplementing tribunal reasons: *Delta Air Lines Inc v Lukács*, 2018 SCC 2

FACTS: The Canadian Transportation Agency has a broad discretion to "inquire into, hear and determine" complaints involving airlines, pursuant to the *Canada Transportation Act*.[1]

L filed a complaint with the Agency. He alleged that Delta's treatment of obese airline passengers was discriminatory and contrary to s 111(2) of the federal *Air Transportation Regulations*.[2]

The Agency dismissed L's complaint on the basis that he lacked standing. The Agency applied the tests for standing applicable in court proceedings. It concluded that L did not have personal standing because L was not obese, and that he lacked public interest standing because he was not challenging the constitutionality of legislation or the illegal exercise of an administrative authority.

The Federal Court of Appeal allowed L's appeal, and directed that the matter be remitted for a redetermination on a basis other than standing.

DECISION: Appeal allowed in part (Abella, Moldaver and Karakatsanis JJ dissenting). The matter is remitted to the Agency for reconsideration, whether on the basis of standing or otherwise.

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[1] SC 1996, c 10, s 37.
[2] SOR/88-58

Both the majority and the dissent applied a reasonableness standard in assessing the Agency's decision on standing.

Writing for the six judge majority, McLachlin CJC concluded that the decision was unreasonable because the Agency "presumed public interest standing is available and then applied a test that can never be met", thereby fettering its discretion. The test articulated by the Agency can never be met because the very nature of complaints against air carriers impugns the terms and conditions of a private company – not the constitutionality of legislation or the illegality of administrative action.

This total denial of public interest standing is inconsistent with the scheme of the Act. It would limit complainants only to those who are themselves targeted by an impugned policy, and prevent the Agency from hearing potentially highly relevant complaints.

This is not a case where supplementing a tribunal's reasons is appropriate. While a court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. Additional reasons must supplement and not supplant the analysis of the administrative body. In this case, the Agency clearly stated a test for public interest standing and applied that test. As such, it would be improper for a reviewing court to provide different reasons or another test to support the result reached by the Agency.

The matter should be sent back for reconsideration. But the Federal Court of Appeal should not have foreclosed the possibility that standing rules could not be considered by the Agency if they were reasonably adapted in light of its statutory scheme.

The dissenting judges, led by Abella J, would have allowed the appeal and restored the Agency's decision. The Agency was entitled to apply a principled gatekeeping mechanism, and nothing in the Agency's mandate circumscribed its ability to determine how it will decide what cases to hear.

The Agency's approach to standing enabled it to balance various competing interests and demands, such as access and resources. Requiring a tribunal to adjudicate even marginal or inadequately substantiated complaints grinds the operation of a tribunal to a halt and can be devastating to private litigants.

There is nothing wrong with a tribunal adopting similar rules of standing to those used by courts. A tribunal's standing rules will not always survive scrutiny solely because it is authorized by statute to develop its own procedures, but when a tribunal (such as the Agency) chooses to apply and exercise its broad legislative mandate by borrowing an approach long sanctioned by civil courts, reviewing courts should not be eager to interfere.

The Agency's approach to standing effectively foreclosed L's ability to meet the test for public interest standing. But the key question is whether the Agency's decision was reasonable. L brought a complaint with no underlying facts, no representative claimants, no explanation as to why a passenger affected by Delta's practices could not have submitted their own complaint and no argument, with the intention of engaging the Agency in a fishing expedition. The Agency's decision to deny L's complaint based on lack of standing was reasonable.

COMMENTARY: There are at least two key points emanating from the Supreme Court's decision in this case.

First, the majority opinion sends a strong signal to reviewing courts that they ought to tread carefully when seeking to "supplement" tribunal reasons – at least where a tribunal has articulated clear reasons in support of a decision. This is an area that has been fraught with controversy ever since the Court endorsed the view that deference should be paid to reasons that "could" have been

offered in support of an administrative decision,[3] while cautioning that reviewing courts did not have "carte blanche" to re-write decisions.[4]

The majority's approach is surely correct: it is incompatible with the notion of deference and "respectful attention" to tribunal reasons for reviewing courts to disregard those reasons and substitute their own, even if the end result is to save the tribunal's decision. And, as the majority notes, this would be tantamount to focusing the judicial review exercise solely on the outcome, rather than on reasons *and* the outcome.

But the majority's approach also leads to the possibility of absurd results. Reaffirming the Court's previous decisions on supplementing tribunal reasons, the majority states that "supplementing reasons may be appropriate where the reasons are either non-existent or insufficient" (at para. 23). Particularly after the Court's decision in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*,[5] this approach arguably leaves tribunals with a better chance of having their decisions upheld if they fail to explain them sufficiently or at all, than if they commit to a clear (but flawed) course of reasoning. This cannot be what the Court intended. (Of course, non-existent reasons in a situation where there is a duty to give reasons will amount to a breach of procedural fairness.)

Ultimately, *Delta Air Lines* calls for a recalibration – or, at least, a clarification – of when it is appropriate for reviewing courts to supplement non-existent or "insufficient" reasons.

This thorny issue arose in *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*,[6] released by the Court just two weeks after *Delta Air Lines*.

In that case, the Specific Claims Tribunal offered reasons in support of its decision that "may strike a reviewing court as conclusory." Nevertheless, a five-judge majority of the Court upheld the decision, explaining that a reviewing court may have regard to "[o]ther decisions of the Tribunal" and must "make sense of its reasons by looking to the authorities on which it relied, the submissions of the parties to which it responded, and the materials before it." The remaining four judges found that the majority was impermissibly supplementing the Tribunal's reasons.

Delta Air Lines is, in many ways, the easier case. If a tribunal has clearly committed to a path of reasoning, that path cannot be re-written on judicial review. The harder question is what factors will govern a court's ability to supplement unclear, insufficient or non-existent reasons. The various opinions in *Williams Lake* suggest the Court is deeply divided on this issue.

The second key point from *Delta Air Lines* is that tribunals should not automatically assume that it is reasonable to import the tests for standing developed in the context of court proceedings. Those tests may or may not be appropriate, depending on the tribunal's governing statutory scheme, the nature of the complaints before it, and its legislative mandate.

It will be interesting to see whether this decision brings about a change in the tests many tribunals apply to determine standing (which often mirror those used by courts). Or, it may result in tribunals taking a similarly restrictive approach to standing, but based on a different test and/or supported by a different line of reasoning (such as that proffered by the dissenting judges in this case).

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[3] See *Dunsmuir v New Brunswick,* [2008] 1 SCR 190 at para 48; *Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board),* [2011] 3 SCR 708 at para 11.

[4] *Alberta (Information and Privacy Commissioner) v Alberta Teachers Assn,* [2011] 3 SCR 654 at para 54.

[5] [2016] 2 SCR 293. In that case, the Court upheld the decision of an Assessment Board in circumstances where the Board provided no reasons and there was no proxy for reasons. The case was discussed in Issue No. 8 of this Case Review.

[6] 2018 SCC 4.

Further narrowing of *Doré* and Divisional Court jurisdiction: *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 (Div Ct)

FACTS: The applicants, religious doctors' groups and individual doctors, challenged the constitutional validity of certain policies of the College of Physicians and Surgeons of Ontario (the "CPSO"). The policies require physicians who are unwilling to provide elements of care to patients on moral or religious grounds to provide a patient requesting such care with an effective referral to another health care provider. This controversy arose in the context of the legalization of medical assistance in dying in Canada following the Supreme Court's decision in *Carter v Canada (Attorney General)*.[7]

The policies in question were adopted by the CPSO to set general expectations of physician behaviour. They were not adopted as formal regulations and there is no penalty prescribed for violating them. The policies do not bind the Discipline Committee of the CPSO, although they could inform the Discipline Committee's interpretation of the requirements of the physicians' professional conduct regulation.

DECISION: Application dismissed.

Justice Wilton-Siegel, writing for a unanimous court, held that the impugned policies violated the applicants' freedom of religion but were saved by s 1 of the *Charter*.

There was a preliminary issue of jurisdiction before the Court, namely whether the application needed to be heard as an application for judicial review in Divisional Court or whether this type of challenge could be brought in Superior Court. The Court held, applying the decision of the Ontario Court of Appeal in *JN v Durham Police Service*,[8] that the challenge was "in substance" a challenge to the exercise of a statutory power and as such needed to be brought in Divisional Court.

A further preliminary issue related to the standard of review. The Court applied a segmented approach, holding that the constitutional issues should be reviewed on the correctness standard, while certain *vires* issues should be decided on the reasonableness standard.

The Court held that, in analyzing the constitutional challenge, the *Oakes* framework was preferable to the *Doré* approach of assessing the reasonableness of a decision-maker's weighing of Charter values. The Court held that the challenge was to a policy of general application (rather than to an adjudicative decision) and so the concerns raised in *Doré v Barreau du Québec*[9] in support of the *Charter* values approach did not apply. For instance, it was clear which party should bear the burden of proof (the applicant) and there were no conceptual difficulties in assessing the purpose of the policy (as compared to considering the "purpose" of a discretionary decision). The Court held that the expertise of the regulatory body could be accommodated by granting a sufficient "margin of appreciation" at the proportionality stage of the analysis within an *Oakes* framework.

The applicants also argued that the policies fell outside of the CPSO's jurisdiction. The Court applied a reasonableness standard to this *vires* challenge on the grounds that the issue was intimately related to the CPSO's home statue. The Court relied on *Green v Law Society of Manitoba*[10] for its holding that professional

[7] 2015 SCC 5.

[8] 2012 ONCA 428.
[9] 2012 SCC 12.
[10] 2017 SCC 20.

regulators have a broad public interest mandate. The Court rejected the *vires* challenge, concluding that the CPSO was not only entitled to, but was in fact obliged to provide guidance to its members regarding how religious freedom would be accommodated within the context of professional obligations.

On the merits, the Court held that the effective referral policy infringed the freedom of religion of the doctors, but that this infringement was justified as a measure intended to balance the rights of objecting doctors with the rights of patients to access medical care.

The applicants also challenged another policy that required doctors to provide medical services in emergency situations even where such care conflicts with their conscience or religious beliefs. The Court held that it lacked a sufficient factual foundation to adjudicate this aspect of the challenge.

COMMENTARY: The headline-grabbing aspects of this case have to do with its constitutional dimensions, but the case is also an important decision on administrative law procedure.

The Divisional Court's decision places clear limits on the expanding *Charter* values approach. The Supreme Court adopted the *Charter* values approach to judicial review of *Charter* issues in *Doré* in 2012 and extended that framework outside the traditional adjudicative decision-making context in *Loyola*. The *CPSO* decision draws the line at administrative action that is more legislative in nature. Even though the policies being challenged did not have the force of law, they were policies of general application intended to have normative effect. The Court held that the *Charter* values approach is limited to decisions about specific individuals rather than rules or policies of general application. Whether that is a defensible distinction can be debated, but what is clear is that some courts are showing discomfort with the *Doré* framework as an approach of broad application and are looking for ways to confine it.[11]

This case is also noteworthy for clarifying the jurisdiction of the Divisional Court. Under the *Judicial Review Procedure Act*,[12] an application seeking a declaration or injunction relating to the exercise of a statutory power must be brought as an application for judicial review in Divisional Court (the same applies to applications for the prerogative remedies). The Court of Appeal confirmed in *JN* that this means an application that is "in substance" a challenge to the exercise of a statutory power belongs in Divisional Court. Some uncertainty to this principle was introduced by the decision of Belobaba J in *Di Cienzo v. Attorney General of Ontario*,[13] holding that a pure constitutional challenge to subordinate legislation could proceed by way of a rule 14.05 application in Superior Court. The *CPSO* decision adds further gloss to the issue. It seems that *Di Cienzo* should be understood as applying only to regulations, with this apparent departure from the language of the *JRPA* being justified on the basis of the functional similarity between primary and secondary legislation. ⚖

Injunction against unlicensed entity for controlled acts online: *College of Optometrists of Ontario v Essilor Group Canada Inc*, 2018 ONSC 206

FACTS: The Essilor Group Canada Inc. ("Essilor") is a British Columbia-based company that operates two popular online eyewear dispensaries (Clearly and Coastal) that sell prescription eyeglasses and

[11] For more examples, see the reasons of Lauwers and Miller JJA in *ET v Hamilton-Wentworth District School Board*, 2017 ONCA 893, and in *Gehl v Attorney General of Canada*, 2017 ONCA 319, which were commented on in Issue No. 14 and Issue No. 11 of this Case Review, respectively.

[12] RSO 1990, c J.1.

[13] 2017 ONSC 1351.

contact lenses to customers across Canada through their respective websites clearly.ca and coastal.com.

The College of Opticians of Ontario and the College of Optometrists of Ontario (together, the "Colleges") regulate the practice of opticianry and optometry in Ontario. In Ontario, "dispensing" prescription eyewear is a controlled act that can only be performed by registered opticians, optometrists and physicians. The Colleges applied for an injunction pursuant to s 87 of the *Health Professions Procedural Code*,[14] prohibiting Essilor from selling prescription eyewear to residents of Ontario through their websites on the basis that Clearly and Coastal were engaging in unauthorized practice by "dispensing" prescription eyewear without the direct involvement of registered opticians, optometrists or physicians.

DECISION: Application granted.

Justice Lederer first considered whether Essilor, through its online activities, was engaging in the controlled act of "dispensing" prescription eyewear contrary to s 27(1) of the *Regulated Health Professions Act* (the "Act"). He concluded that "'dispensing' is not a singular act but a series of acts that encompass the making, adjustment (fitting) and delivery of" prescription eyewear. Each of these activities must be preformed by a member of one of the Colleges. Essilor argued that there is a distinction between "selling" and "dispensing" of prescription eyewear, and that it was engaged in the former, which is not a controlled act. Justice Lederer rejected that argument, agreeing with the Colleges that, in the case of eyewear provided under prescription, "dispensing" includes selling the item. In any event, it was evident that Essilor was filling prescriptions and delivering glasses and contact lenses, which was enough to show that it was "dispensing" eyewear. The evidence showed that there was no Ontario-registered optician or optometrist responsible for providing the health care associated with obtaining eyeglasses from Essilor over the internet. As such, Essilor had acted contrary to s 27 of the Act.

Justice Lederer then considered whether Ontario legislation applied. Essilor argued that there was an insufficient connection to Ontario because its business was based in, and virtually every step in the contractual relationship between Essilor and its Ontario customers occurred in, British Columbia. Justice Lederer rejected Essilor's argument. He reasoned that a "purposive analysis of the legislation demonstrates that this situation is best characterized not as a contract for the sale of eyeglasses, but as the delivery of health care." In cases where a regulator's ability to protect the public from online activities is at issue, the "sufficient connection" test downplays the physical location of the service provider. In this case, the eyewear was ordered in Ontario and delivered to Ontario for use in Ontario. This was enough to establish a sufficient connection to the province: "to find otherwise would mean the eyeglasses are provided without obligation to adhere to Ontario regulation."

Justice Lederer granted the injunction, finding that insofar as Essilor was providing eyewear in Ontario, it was subject to the Ontario regulatory scheme.

COMMENTARY: Regulators and regulated professionals alike will want to take notice of this decision. In the age of internet commerce, one can expect to see an increasing number of cases where controlled acts are being conducted over the internet with cross-border implications. This decision sends a strong message that those engaging in regulated activities cannot avoid the legislative requirements simply by conducting business over the internet. In this case, Essilor made great efforts to characterize its online activities as purely commercial in nature, arguing that the jurisdictional issue should be resolved by employing commercial law principles. Lederer J

[14] Schedule 2 to the *Regulated Health Professions Act, 1991*, SO 1991, c 18.

rejected this narrow approach, finding that it represented an "old-world understanding of time and place" that is inconsistent with the Act's public interest and public protection purposes. While this case does not stand for the proposition that territorial jurisdiction should be ignored entirely, it does show that courts are willing to take a more nuanced approach to jurisdiction where appropriate. As Justice Lederer explained, "in a changing world it can be problematic to blindly rely on established ideas." As this case shows, this is especially so in cases involving legislation that is designed to protect the public. ⚖

Reviewability of amateur sports organizations' decisions: *Milberg v North York Hockey League*, 2018 ONSC 496 (SCJ)

FACTS: M's son, who is 11 years old, plays for the Vaughan Rangers, a select hockey team in the North York Hockey League. M wanted to watch a Rangers game for which the price of admission was $5.00 per person. M tried to buy tickets with a $100 bill, but the cashier at the arena refused to accept the bill. M became upset and confronted the cashier with inappropriate and profane language. M left the cashier's table and headed inside the arena. M's wife then purchased the tickets with a $20 bill.

Shortly thereafter, M returned to the cashier's area. The cashier advised M that she intended to report the incident, and she took M's photo to identify him for the report. At this point, M directed further profanities at her.

Later, M received an email from the Rangers' president advising him not to enter any arena where the NYHL was playing games until further notice. Two days after that, M was called to a meeting with the NYHL's chief operating officer, Paul Maich. The two discussed the incident for more than an hour. M candidly admitted to using obscene and offensive language, acknowledged his error and apologized. Maich advised M that effective that day and until the end of the regular season, M was suspended from any association with the NYHL, including attending any games, practices or out-of-town tournaments. M would be permitted to return for the playoffs if he complied with the regular-season ban. Maich's decision was supported by the NYHL.

M applied for judicial review on an urgent basis, arguing a denial of procedural fairness, and he sought an interim suspension of the decision pending the outcome of the judicial review application.

DECISION: Application dismissed.

The Court began by considering whether the decision fell within the reach of public law so as to be subject to judicial review. The NYHL is not a statutory body and does not exercise a statutory power of decision. Justice De Sa concluded from his review of the jurisprudence and the *Judicial Review Procedure Act*[15] that there are two necessary requirements for a decision to be a "public law decision": "1) The power to make the decision must ultimately emanate from the government (an exercise of a statutory power or statutory power of decision); and 2) The decision must be an exercise of the 'public' authority conferred on the decision maker in carrying out their public mandate. It cannot be a government actor or tribunal acting in a 'private' capacity".

Justice De Sa considered the decisions in *Setia v Appleby College*[16] and *Dunsmuir v New Brunswick*[17] and the reasoning that while a "public law" decision must have a "public dimension" to it, just because it has a public dimension does not make the decision a matter of public law. In order to engage the Court's review authority under the *JRPA*, the decision

[15] RSO 1990, c. J.1.
[16] 2013 ONCA 753.
[17] 2008 SCC 9.

must be an "exercise of public authority" that emanates from the government. It is not enough that the decision has implications for the public, regardless of how wide-reaching those implications might be. In De Sa J's view, the Court has no jurisdiction to provide relief under the *JRPA*; the matter is governed by private law.

Considering private law principles, De Sa J noted that courts can grant injunctions to prevent or restrain infringements of rights that are capable of being enforced at law or equity. However, Maich's actions were not arbitrary or capricious. He and M discussed the situation at length, and M was given a full opportunity to explain himself. Contrary to M's submissions, there is no ambiguity with respect to the terms of the sanction imposed.

Justice De Sa also commented in *obiter* on M's criticisms of the lack of structure in the NYHL's decision-making process, calling their focus on court-like procedures "misplaced". In a situation like this one, as long as the applicant knows the reasons for the decision and had an opportunity to be heard, the requirements of procedural fairness would be met.

COMMENTARY: This decision pushes against the current of recent cases in which courts have asserted judicial review jurisdiction over decisions of amateur sports organisations and other non-statutory bodies and unincorporated decisions.[18] Some may argue that the trend had gone too far and will see this case as a welcome course-correction. However, it is problematic – not necessarily because of the outcome, but because some of the court's comments are inconsistent with appellate authority and the doctrine that has been developed in the case law on the scope of judicial review.

For one, the Court seems to suggest that judicial review is available only in respect of decisions that "emanate from the government" either through an exercise of a statutory power or a statutory power of decision. However, leading appellate authorities – *Setia* and *Air Canada v Toronto Port Authority*[19] – are not that strict. Rather, they call for a weighing of all factors; a statutory nexus may be relevant but is not required. The Court in *Milgren* appears to base its view on the fact that s 2(1)2 gives the Divisional Court power to grant relief in "proceedings by way of an action for a declaration or for an injunction, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power." However, the scope of judicial review has not been accepted as being so narrow[20] and the reference to "a statutory power" in s 2(1)2 is commonly understood as distinguishing declarations and injunctions from their private law applications – *not* as confining judicial review remedies to statutory powers or statutory powers of decision. Indeed, if that were the limit of judicial review, it would not be available in respect of exercises of prerogative power – reach that has long been accepted and that was confirmed by the Ontario Court of Appeal in *Black v Canada (Prime Minister)* in 2001: "the expanding scope of judicial review and of Crown liability make it no longer tenable to hold that the exercise of a prerogative power is insulated from judicial review merely because it is a prerogative and not a statutory power … the controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter, not its source."[21]

The Court appears to have decided the jurisdiction question primarily, if not exclusively, on the basis that the NYHL is not a statutory body. In so doing, it did not consider the list of

[18] See for example *Islington Rangers Soccer League v Toronto Soccer Assn*, 2017 ONSC 6229; *Capelli v Hamilton Wentworth (Catholic School Board)*, 2017 ONSC 5442 (Div Ct); and others.

[19] 2011 FCA 347.

[20] See the comments of Favreau J in *Capelli*, *supra*, at para 54.

[21] 2001 CanLII 8537 (ONCA) at para 47.

factors set out in *Setia* that should be use to determine whether a decision is sufficiently "public" to attract judicial review. Had those factors been applied, the Court likely would have arrived at the same conclusion, but in a manner that is more consistent with the prevailing jurisprudence. As it is, the decision injects uncertainty as to the proper approach to reviewability determinations that will need to be resolved in the future – perhaps when the Supreme Court releases its decision in the appeal from *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*.[22]

Adequacy of reasons and reasonableness review: *Barker v Ontario (Information and Privacy Commissioner)*, 2017 ONSC 7564 (Div Ct)

FACTS: B is the former Medical Officer of Health and Chief Executive Officer of Algoma Public Health ("APH"). APH had retained KPMG to conduct an investigation in which B agreed to be interviewed by KPMG and was given assurances of confidentiality.

After KPMG completed its report, APH received a request under the *Municipal Freedom of Information and Protection of Privacy Act*[23] ("*MFIPPA*" or the "Act") from an online news service for disclosure of the report. B was given notice of the request and invited to make submissions. Barker objected to the disclosure of the report under s 14 of the Act, which exempts personal information from disclosure.

APH granted access to the report in its entirety on the basis of s 16 of *MFIPPA*, which permits the disclosure of personal information where a "compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption".

B appealed to the Commissioner, who upheld APH's decision to disclose the entire report. The Commissioner found that a "substantial part" of the report contained personal information identifying Barker and one other individual, and that its disclosure would constitute an unjustified invasion of privacy. However, he held that there was a compelling public interest in its disclosure pursuant to s 16 of the Act. The Commissioner did not identify the specific portions of the report that constituted personal information given his finding that the public interest override applied. The Commissioner also rejected B's reconsideration request. B applied for judicial review.

DECISION: Application granted. The decision was quashed, and the matter was remitted to the Commissioner for a fresh decision.

The Court framed the issue as a challenge to the sufficiency of the Commissioner's reasons, and held that the reasons must be read together with the record and outcome to determine whether the result falls within a range of reasonable outcomes.[24]

The Court highlighted the requirement under *MFIPPA* that the decision-marker consider each piece of personal information to determine whether the presumptions regarding non-disclosure applied. The Court also noted that the s 16 override is rarely used.

It is not the role of the Court to undertake a detailed analysis of the information in the report, decide independently what portions of the report are personal information, and then assess the reasonableness of the Commissioner's application of s 16. This would amount to the Court conducting its own assessment of what was

[22] 2016 ABCA 255.
[23] RSO c M.56.
[24] See *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

exempted under s 14. The Court did not know what the Commissioner's decision was on that issue, which was a prerequisite to the application of s 16. Determining the information to which s 14 applies was part of the mandatory statutory decision-making process. Given that the Commissioner did not explain how he undertook this step in his reasons, the Court was unable to conclude the Commissioner's decisions fell within a range of reasonable outcomes.

COMMENTARY: This case will be useful for institutions subject to *MFIPPA*, but it also provides guidance on the adequacy of reasons more generally.

Reasons serve the goal of demonstrating justification, transparency, and intelligibility. But a decision maker's duty to give reasons is highly contextual, and will depend on the legislative scheme. *MFIPPA* is a complex statute that contains a number of building blocks a decision maker must stack in their analysis. First, they must determine whether the records contain personal information as defined under s 2 of the *Act*. Second, the decision-maker must decide if an exemption to disclosure under s 14(1) applies. Part of this analysis involves determining whether the disclosure would constitute "an unjustified invasion of personal privacy". Subsections 14(2), (3), and (4) then list the factors and presumptions at play for a decision maker to answer that question. Only after deciding these points can the decision maker determine whether s 16 applies to override the non-disclosure of the personal information at issue. As the Court stated at para. 51: "[t]hese very specific provisions demonstrate the need for the decision-maker to consider each piece of personal information and determine if any one of the presumptions or other provisions apply to it."

This decision makes it clear that it will be insufficient for a decision maker to go directly to s. 16 in her reasons. The building blocks of the analysis must be set out in a manner that allows for meaningful judicial review. The reviewing court must be able to look to each step the decision-maker took to assess whether that step was reasonable. Particularly given the rare application of s 16 in *MFIPPA* cases, it is critical to specifically identify the personal information at issue to allow the court to meaningfully consider the competing interests at stake.

Although it was decided prior to the Supreme Court's decision in *Delta Air Lines Inc v Lukacs*, (discussed above), the court's reasons in *Barker* are consistent with the Supreme Court's approach in that case. While a reviewing court may supplement the reasons of an administrative decision maker, it cannot ignore or replace the reasons actually provided. Fatal to the Commissioner's position in *Barker*, there were no reasons on a critical issue that the reviewing court could supplant, ignore, or replace.

Prematurity and 'true questions of jurisdiction': *French v Township of Springwater*, 2018 ONSC 94 (Div Ct)

FACTS: F is the Mayor of the Township of Springwater. The case arose out of the election campaign finance regulation scheme in the Ontario *Municipal Elections Act, 1996*[25] (the "*MEA*"). Under that scheme, each municipality has a Compliance Audit Committee ("CAC") to oversee complaints about election campaigns. After the 2014 municipal election, a member of the public complained under the *MEA* to the CAC for Springwater. The CAC appointed Grant Thornton LLP as auditors to inquire into F's campaign finances. Grant Thornton prepared a report akin to a standard-form corporate audit report. They did not perform a "forensic audit"; they did not go beyond the material provided by F and the complainant, and did not interview

[25] SO 1996, c 32.

third parties, although they had the power under the *MEA* to do so.

In the *MEA* scheme, once the audit report is presented to the CAC, the CAC decides whether to commence legal proceedings against the candidate. In this case, when Grant Thornton presented its report to the CAC, the CAC decided to appoint another auditor to perform a forensic audit. Before the second auditor started its work, F applied for judicial review of the CAC's decision to appoint a new auditor.

DECISION: Application dismissed.

At the Divisional Court hearing, the panel had asked the parties to address the doctrine of prematurity, which they had not addressed themselves. The application was premature because the decision to appoint the second auditor was interlocutory; the proceedings before the CAC were not over, as the CAC still had to receive and consider the report of the second auditor.

F argued that the application was not premature because there is a recognized exception from the prematurity doctrine where the decision under review is a "true question of jurisdiction", and the issue of whether the CAC can request a second audit is such a question. The Divisional Court disagreed: identifying a true question of jurisdiction is not sufficient to avoid the prematurity doctrine, and, in any event, this was not a true question of jurisdiction.

First, the Divisional Court held that the prematurity doctrine can still be applied even where the interlocutory decision under review addresses a true question of jurisdiction. The Court retains discretion to refuse relief.

Second, the question is not truly jurisdictional. Such questions are very rare, if they exist at all. There is no issue here of competing jurisdiction between two tribunals. The CAC was interpreting its own statute and considering whether it had the authority to order a second audit on the grounds that the first one was unsatisfactory. According to the Supreme Court's decision in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*,[26] that is presumptively not a true question of jurisdiction.

Further, F had an alternative avenue of relief: an automatic right of appeal from the Committee's decision to appoint the second auditor (under s 88.33(9) of the *MEA*). This is another discretionary bar to judicial review.

Finally, the Court held that it would be contrary to the interests of justice to exercise its discretion to hear the application. The CAC performs a vital role under the *MEA*; given the timeline of election cycles, timeliness in its processes is important and this purpose would be frustrated if recourse could be had to the courts from interlocutory decisions.

COMMENTARY: This decision reminds us that judicial review is a discretionary remedy and that courts can apply bars to relief such as prematurity on their own motion, without their having been raised by a party.

Counsel should always ask themselves whether the decision under review is in any way interlocutory or otherwise premature. However courts do sometimes review interlocutory decisions where there are compelling reasons to do so. In exceptional cases, courts have intervened before the end of the administrative process where the interlocutory decision has determined a particular issue, or where the ongoing proceeding would result in an unfair hearing or a breach of natural justice (*e.g.* because of bias as in *Rutigliano v Commissioner*, OPP,[27] or where the investigation was fundamentally flawed as in *Stamatis v Children's Aid Society of Toronto*[28]).

[26] 2011 SCC 61.
[27] 2011 ONSC 98.
[28] 2017 ONSC 7056.

However, other applications involving similar circumstances have been rejected as premature, with little guidance or explanation as to what amounts to "exceptional circumstances" warranting a departure from the prematurity doctrine. Before launching a judicial review application, counsel are well advised to carefully consider whether the decision under review could be considered premature and what arguments could be made to avoid application of the prematurity doctrine. ⚖

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