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Judicial Review of Administrative Law Gets Real: *Ali v Peel (Regional Municipality)*

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The Ontario Court of Appeal's recent decision in *Ali v Peel (Regional Municipality)*[1] is of interest to administrative lawyers for two reasons, one of which is familiar, the other new. On the one hand, the application of deference in this case appears to be the all-too-familiar deference to the administrative body's final decision, rather than the administrative body's *decision-making*. But on the other hand, the Court of Appeal's recognition of the importance and legitimacy of real-world context and facts signals a positive, and potentially transformative, avenue for administrative law.

Background Facts and Statutory Scheme

The appellant, Mumtaz Ahmed Ali, applied to the Regional Municipality of Peel (the "Region") for special priority status on the waitlist for subsidized — rent-geared-to-income — housing in Peel. Before making her application, Ms. Ali had worked as a live-in caregiver after emigrating to Canada in 2015. Ms. Ali lived with her employer and his family, providing care to her employer's mother. But during the course of her employment, Ms. Ali was subjected to abusive, controlling behaviour by her employer and his wife. In short order, her employer forced her to leave the home, and Ms. Ali moved into a shelter for abused women.

While at the shelter, Ms. Ali applied to the Region for subsidized housing, and further requested special priority status on the waiting list on the basis that she had been abused by her former employer. In her application to the Region, Ms. Ali also noted that she was making a claim against her former employer for wrongful dismissal and unpaid wages.

The Region is designated as a service manager under O. Reg. 367/11, Sched. 2, made under the *Housing Services Act, 2011*. Section 47(1) of the Act directs the service manager to establish "a system for selecting households from those waiting for rent-geared-to-income assistance in the housing projects in the service manager's service area." Section 47(2) provides that the system must include, *inter alia*, "priority rules for households waiting for rent-geared-to-income assistance." Under s. 48(1), the service manager is to determine priority status, per s. 48(2), in accordance with prescribed provincial priority rules.

At the time of Ms. Ali's application, "abuse" was a requirement for special priority status, and the definition of abuse included, but was not limited to, "controlling behaviour." The key regulation on which Ms. Ali's application turned was the prescribed list of people who can be considered abusers, and that list included a "person on whom the individual is emotionally,

[1] 2023 ONCA 41.

physically or financially dependent."[2] This includes situations where the application was made within three months of the person no longer living with the abuser.

Ms. Ali appeared to meet all of these criteria. But the Region disagreed.

The Region's Administrative Decision

While the Region found that Ms. Ali met the criteria for rent-geared-to-income housing, the Region denied her request to be placed on the expedited special priority waiting list. By way of a letter to Ms. Ali, the Region stated that she did not merit special priority status because she was "not in a relationship with the alleged abuser" and because the "abuser was identified as [her] employer."[3]

Ms. Ali requested an internal administrative appeal of the decision. Her appeal was denied by a Housing Programs Manager with the Region because Ms. Ali was in a "business relationship," not a "family relationship" with her abuser.[4]

The Divisional Court's Decision

The Divisional Court found that the Region's decision was reasonable and dismissed Ms. Ali's application for judicial review. The Divisional Court explained that it was reasonable for the Region to interpret the regulations in such a way that special priority for victims of abuse does not extend to employment relationships given the history and purpose of special priority status. The Divisional Court — *not the Region*, a point I will return to below — further explained that the original focus of the program was to help abused women to escape domestic violence. The Divisional Court added that the Region's role is to allocate scarce resources among people with competing interests:

> Here, the issue is where the applicant will stand on a waitlist. This requires the decision-maker to balance the competing interests of others on the waitlist, who are not before the court, and raises public policy issues about rationing scarce resources. This decision accords with the purposes ***and public realities*** of the housing priority scheme, which enables applicants whose safety is at risk to separate permanently from their abuser as soon as possible.[5]

Finally, the Divisional Court explained that the financial dependence in the context of an employment relationship ends with the end of the employment relationship.

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[2] *Ibid* at para 32 [emphasis in original].
[3] *Ibid* at para 14.
[4] *Ibid* at para 15.
[5] *Ibid* at para 18 [emphasis added].

The Court of Appeal's Decision

(a) Deference Displaced

Importantly, the Court begins its analysis by rehearsing its role in an appeal from the Divisional Court on judicial review. The Court of Appeal is to conduct a *de novo* review of the administrative decision-maker's — the Region's — decision by stepping into the shoes of the Divisional Court to make sure the Divisional Court applied the appropriate standard of review — here, reasonableness — correctly.[6] As the Court further explained, citing *Vavilov,* the Court of Appeal's focus must be "on the decision actually made by the decision maker, including both the decision maker's reasoning and the outcome."[7]

After reviewing the statutory scheme, the Court of Appeal turns to the Region's decision, and its rationale. The former is clear; the latter, less so. The Court notes that "it is evident"[8] that the Region rejected Ms. Ali's request for special priority status not only because she was not in a family relationship with her abuser, but also because she was in an employment relationship with him. As the Court adds, "[t]his is evident from the original August 4, 2016 letter from the Region[.]"[9]

Contrast the Court of Appeal's use of "evident" above with its latter — and sole — reference to the Region's *rationale*: "As the Region explained in its appeal decision, '[s]pecial priority is only given under very limited circumstances.'"[10] That is helpful, but hardly definitive.

Most of the Court of Appeal's *de novo* review of the administrative decision is actually a review of the Divisional Court's efforts to rationalize, rather than review, the Region's final decision, the administrative outcome.

For example, Ms. Ali argued that the Region's conclusion that the abuse ended when her employment relationship ended ignored the provision — section 54(2) — allowing victims of abuse to apply for special priority status up to three months after they leave an abusive household. This is a reasonable claim calling for an administrative rationale, but as the Court of Appeal notes, "this provision was not specifically addressed by the Region or the Divisional Court."[11] The Court of Appeal immediately proceeds to fill this gap by providing its own reasonable interpretation of the purpose of the three-month window, contrary to its stated role on an appeal from a Divisional Court judicial review.

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[6] *Ibid* at para 23.
[7] *Ibid* at para 25, citing *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at para 83.
[8] *Ibid* at para 37.
[9] *Ibid* at para 37.
[10] *Ibid* at para 40.
[11] *Ibid* at para 43.

To cite another example, Ms. Ali argued that the *Housing Services Act, 2011* is remedial, and the Region must accordingly interpret "financially dependent" broadly, not narrowly. The Court of Appeal, however, disagreed, citing the reasoning, not of the Region, but of the Divisional Court on behalf of the Region: "In this context, as held by the Divisional Court, the Region must allocate scarce resources amongst competing interests."[12]

A further example: Ms. Ali argued that the scarcity of subsidized housing should not affect how the Region interprets and applies the criteria for special priority housing. Once again, the Court of Appeal cites the Divisional Court's rationale: "In this case, as noted by the Divisional Court, the Region's decision 'accords with the purposes and ***public realities*** of the housing priority scheme, which enables applicants whose safety is at risk to separate permanently from their abuser as soon as possible.'"[13]

I will return to the Court of Appeal's crucial point about "practical realities" in a moment. Before doing so, however, it is important to note that Ms. Ali argued — unsurprisingly, given the foregoing account — before the Court of Appeal that the Divisional Court "improperly amplified the Region's decision by providing a rationale that the Region itself did not provide."[14] The Court of Appeal rejects Ms. Ali's argument, but the Court's review summarized above offers strong evidence in support of her argument.

Indeed, the Court of Appeal appears to be aware of this tension, if unable or unwilling to avoid it. The Court once again cites *Vavilov*, this time for the proposition that "the reasons of an administrative decision maker do not have to be perfect and they must also be understood in the context in which they were made."[15]

This is a useful corrective to the notorious problem of "disguised correctness review" of courts, but its application here sets the bar far too low for administrative decision-makers.

The Court of Appeal explains that the Region draws on its expertise and on the legislative context in which it operates when administering the waitlist for subsidized housing. But according to the Court of Appeal, the Region "does not have to spell out the scope of that context in every decision."[16]

Why not? Would that not materially enhance the Region's decision-making? After all, the Divisional Court managed to do so on the Region's behalf in just a few concise paragraphs. Bear in mind that most administrative matters will not, and *should not*, be reviewed by courts. Indeed, the very point of *Vavilov* is "to develop and strengthen a culture of justification in

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[12] *Ibid* at para 44.
[13] *Ibid* at para 45 [emphasis added].
[14] *Ibid* at para 47.
[15] *Ibid* at para 49, citing *Vavilov, supra* note 7 at para 91.
[16] *Ibid* at para 50.

administrative decision making."[17] The opposite of "perfect" reasons ought not be no reasons at all. Here, deference is displaced; real respect is holding an administrative body to account and demanding that it do its job properly, not stepping in and doing a key part of its job for it.

The urgent public policy objective of strengthening administrative decision-making is undermined, however, when courts supply their own reasonable justifications for final administrative decisions they happen to agree with. That is exactly what the Divisional Court did in this case. As the Court of Appeal itself explains,

> the Divisional Court gave legislative and factual context to the Region's reasons for denying Ms. Ali's request. For example, the Divisional Court referred to the number of people on the waitlist, ***a fact that would have been known to the Region***. Also, the Divisional Court explained that the Region had to make a decision in the context of competition for scarce resources, which, again, was ***part of the factual and legislative context that would have been self-evident to the Region***.[18]

The better remedy in this case would have been for the Court of Appeal to remand the matter back to the Region for reconsideration, with the aid of the Court's legislative guidance.[19]

This recommendation finds further support in the Supreme Court's rationale for establishing reasonableness — including judicial deference — as the default standard of review in administrative law. The Supreme Court's rationale for doing so does not stem from administrative expertise. Rather, it stems from the legislative choice — and the practical necessity — to allow administrative decision-makers to have the final word on administrative matters. Reviewing courts undermine both legislative intent and administrative efficiency when they substitute their own reasoning, however reasonable and compelling, as in the case at bar.[20]

(b) Practical Realities

Notwithstanding these reservations about the Court of Appeal's displaced and misapplied judicial deference to administrative bodies, its recognition of the adjudicative importance and

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[17] *Vavilov, supra* note 7 at para 2.
[18] *Ali v Peel*, *supra* note 1 at para 51 [emphasis added].
[19] See *e.g.* the decision of the Federal Court of Appeal in *Safe Food Matters v Canada (Attorney General)*, 2022 FCA 19. For a commentary on that decision appearing in these pages, see Jason MacLean, "Judicial Review and Administrative Law Reform: *Safe Food Matters Inc v. Canada (Attorney General),*" *Toronto Law Journal* (April 2022).
[20] In Stockwoods' commentary on the Court of Appeal's decision in its *Administrative & Regulatory Law Case Review*, they rightly note that "[d]epending on how it is applied moving forward, the Court of Appeal's decision could be viewed as a slight reopening of the door that *Vavilov* attempted to close in terms of allowing reviewing courts to uphold decisions based on facts or reasoning not contained in the [administrative body's] reasons." See Stockwoods, *Administrative & Regulatory Law Case Review,* Issue No. 35, March 2023 at 7. In full fairness to the Court of Appeal, Stockwoods also points out (at 6) that the Court of Appeal found that the applicant's interpretation of the regulatory scheme was also reasonable, and that it would have been open to the Region to accept it, making the Court's decision a clear — and, I would add, extremely rare — application of the administrative law principle that an administrative body may choose between two or more reasonable interpretations of a statute or a regulation.

legitimacy of facts known and self-evident to administrative decision-makers is potentially transformative. Judicial review of administrative law is, by design, a highly constrained species of adjudication. Subject to limited exceptions, the evidentiary record is limited to facts that were before the administrative decision-maker when it made its decision, and under this regime, administrative bodies often have a strong incentive to interpret that standard as narrowly as possible.[21] As a result, the real-world facts and context — the public and practical realities — of administrative decision-making are often entirely excluded from the evidentiary record on judicial review.[22]

Following the Court of Appeal's decision in this case, applicants for judicial review and administrative bodies can now reasonably seek to adduce a broader array of facts to support their arguments, be they for or against an impugned decision.

A brief example will illustrate the potential of the Court of Appeal's decision to expand and enhance the judicial review of administrative decision-making. Consider the pending application for judicial review made by the environmental organization Safe Food Matters, which requested the Pest Management Regulatory Authority (PMRA) to appoint an independent review panel under its controlling statute to review PMRA's authorization of the controversial pesticide glyphosate. In its application for judicial review, Safe Food Matters seeks to broaden the traditionally narrow factual context of judicial review by making the following illustrative claims:

> 103. The Minister must be attentive to and consider the presence of factors that are suggestive to an informed member of the public that the Minister's ability to fulfil the statutory function would be enhanced by receiving recommendations from an independent panel. These might include:
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> - A regulated entity that maintains significant control or influence over the evidence or information used by PMRA to render the decision to be reviewed;
> - A relative lack of diversity of information sources;
> - A regulated entity or sector that that has a long-term relationship with PMRA leading up to the decision to be reviewed;
> - The presence of staff secondments or transition of staff between PMRA and the regulated entity or its agents;
> - Any influence of the regulated entity on PMRA funding or finances;
> - Relative scientific expertise as between PMRA and the regulated entity or sector;
> - Imbalance of resources as between PMRA and the regulated entity or sector;
> - Past or present substantive irregularities in decisions involving

[21] The case at bar is an exception to the general rule.
[22] MacLean, *supra* note 19, in which I distinguish between "real-world" facts and "judicial review facts."

> the regulated entity (such as administrative delay or lack of transparency or public consultation in decision-making);
> - Administrative or institutional capacity limitations or concerns currently identified or under consideration.
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> 104. In determining whether scientific advice independent of PMRA would assist in fulfilling his or her statutory mandate, the Minister must have regard to considerations involving bureaucratic infirmity, lethargy, incapacity or inadequacy of any type on the part of the PMRA, including consideration of regulatory capture. In this context, this assessment would involve looking at the relationship between Monsanto (including its agents) and PMRA, and whether a reasonable person would have a basis to believe, in the whole of the context, that the advice of independent expert scientists of the type set out in s.4 of the *Regulations* would "assist" the Minister.[23]

Independent of the outcome of this judicial review, the consideration of the foregoing contextual factors, whatever their specific factual contents may be, would go a long way toward taking proper account of the public and practical realities of administrative decision-making. Depending on future courts' willingness to follow the largely positive precedent set by the Court of Appeal, *Ali v Peel* may help transform administrative law.

[23] *Safe Food Matters Inc. v Attorney General of Canada and Minister of Health,* Amended Notice of Application, Court File No. T-2292-22 (Federal Court) at paras 103-104. Disclosure: I have been retained as an expert witness by Safe Food Matters' legal counsel in this matter.