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PRACTICE AND PROCEDURE BEFORE ADMINISTRATIVE TRIBUNALS

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AUTHOR'S NOTE

Two cases discussed in this Release raise one of the most vexing puzzles in administrative law—how to hold decision-makers accountable for decisions which wrongly confer a benefit on another person. The availability of judicial review generally requires that someone who is adversely affected by a decision take the initiative to challenge it. But what if the decision positively affects a party. As the party benefiting from a decision would have no reason to challenge it, such decisions appear at first glance to lie outside the realm of accountability through judicial review. However, a positive decision is just as capable of being unreasonable or unfair as a negative one from the perspective of other interested parties. Do those other interested parties have standing to challenge decisions said to confer benefits unreasonably or improperly? That is the question taken in up in *Ontario Health Coalition v. Ontario (Minister of Long-Term Care)*, 2025 CarswellOnt 2031, 2025 ONSC 1217 (Ont. Div. Ct.) and *Democracy Watch v. Ontario (Integrity Commissioner)*, 2025 CarswellOnt 2405, 2025 ONCA 153 (Ont. C.A.). In both cases, courts have emphasized the hurdles such third parties must overcome in order to raise such a challenge.

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In the *Ontario Health Coalition v. Ontario (Minister of Long-Term Care)*, 2025 CarswellOnt 2031, 2025 ONSC 1217, the Ontario Divisional Court dismissed a judicial review application challenging the decision of the Minister of Long-Term Care (the "Minister") to approve funding and undertake to issue a licence for a new 320 bed long-term care home in Pickering, Ontario. The Minister determined that it was in the public interest to increase the number of long-term care beds in Pickering pursuant to the *Fixing Long-Term Care Act, 2021*, S.O. 2021, c. 39, Schedule 1 (the "FLTCA"). The applicants argued that the Minister's decision was unreasonable and not made in a manner that complied with the FLTCA. They further contend that they have been denied natural justice and a fair opportunity to participate in the approvals process or have their concerns taken into account. The Court first considered a challenge to the standing of the applicants to bring the judicial review application and concluded the applicants lacked the requisite standing.

The Divisional Court explained the balance to be struck in such cases in the following terms,

> [59] There are, however, real limits to who may bring an application in court, and limits to who may participate as an intervenor. "The law of standing is designed to balance access to courts with the preservation of judicial resources, and to ensure that proper parties are before the court to argue matters" *Ontario Place Protectors v. HMK in Right of Ontario*, 2024 ONSC 4194, at para. 16. As the Supreme Court of Canada held, "It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a (sic) well-meaning organizations pursuing their own particular cases...": *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 116 (SCC), [1992] 1 S.C.R. 236, at 252.

In *Democracy Watch v. Ontario (Integrity Commissioner)*, 2025 CarswellOnt 2405, 2025 ONCA 153, the Ontario Court of Appeal confirmed that Democracy Watch lacked standing to challenge certain decisions of the Ontario Integrity Commissioner addressing the activities of lobbyists under the *Lobbyists Registration Act*. The Court found this statutory scheme did not leave room for other interested parties to impugn decisions which found no impropriety with specific lobbyists subject to the Act. Accordingly, as the motion judge had found, the Court of Appeal affirmed that the proposed judicial review did not raise a justiciable issue and was not a reasonable and effective way to bring the matter before the court pursuant to the *Downtown Eastside* framework for public interest standing.

While the *Downtown Eastside*framework undoubtedly has expanded the availability of public interest standing generally on matters of public importance, these cases show the limits of this framework for parties wishing to challenge specific decisions conferring benefits on others

This Release also includes a variety of updates on important new administrative law decisions, including:

In *Vento Motorcycles, Inc. v. Mexico*, 2025 CarswellOnt 1113, 2025 ONCA 82, the Ontario Court of Appeal had an opportunity to clarify the impact of a finding of bias in the context of arbitration. The appeal involved a tribunal established under Chapter 11 of the North American Free Trade Agreement ("NAFTA") to adjudicate a claim by Vento against Mexico. Three arbitrators were appointed to the Tribunal, each of whom provided declarations of their independence and impartiality. The arbitration took place in November of 2019 and the Tribunal issued its award on July 6, 2020. The Tribunal held, unanimously, that Mexico did not breach its obligations under NAFTA and dismissed Vento's claim. Subsequently, Vento learned that Mexican officials had been communicating with the Mexican nominee to the Tribunal during the arbitration. Those same officials were responsible for the appointment of the Mexican nominee on future arbitration trade panels. The application judge hearing Vento's application for judicial review of the arbitral decision found that the Mexican nominees's conduct during the arbitration gave rise to a reasonable apprehension of bias. Nevertheless, she refused to set aside the Tribunal's award. In her view, the apprehension of bias did not undermine the reliability of the Tribunal's award, nor did it result in real unfairness or practical injustice. The application judge exercised her discretion not to set aside the award. The Court of Appeal allowed the appeal from this decision, holding that the application judge erred in failing to set aside the decision having found a reasonable apprehension of bias on the part of one of the members.

In *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 CarswellSask 56, 2025 CarswellSask 57, 2025 SCC 4, 2025 CSC 4, 2025 A.C.W.S. 40, 34 Admin. L.R. (7th) 167, 500 D.L.R. (4th) 279 (S.C.C.), the Supreme Court considered the intersection of Crown-Indigenous litigation and the abuse of process doctrine relating to multiplicity of proceedings. The aspect of the litigation which reached the Supreme Court involved Saskatchewan granting uranium exploration permits to NexGen Energy Ltd. within territory over which Métis Nation – Saskatchewan (MNS) asserted Aboriginal title and rights. MNS brought an originating application seeking a declaration that Saskatchewan breached its duty to consult by failing to consult MNS about the impact of the exploration permits with respect to title and commercial harvesting rights. Saskatchewan then brought a motion to strike portions of MNS's application, based on abuse of process. The chambers judge concluded that it would constitute an abuse of process for MNS to proceed with its originating application in the original form; he struck parts of the application. The Court of Appeal overturned the chambers judge's decision; it held there was no abuse of process. The Supreme Court dismissed Saskatchewan's appeal.

In *Best Buy Canada Ltd. v. Canada (Border Services Agency)*, 2025 CarswellNat 588, 2025 FCA 45, the Federal Court of Appeal considered and dismissed both a judicial review and appeal from a decision of the Canadian International Trade Tribunal classifying wine coolers for tariff purposes. Best Buy argued that Tribunal erred in law by following *Danby Products Limited v. Canada (Border Services Agency)*, 2021 FCA 82, leave dismissed on January 20, 2022 (S.C.C. No. 39755). The Court rejected this argument and dismissed the appeal. The Court also addressed why judicial reviews proceeding alongside statutory appeals will be rare.

In *Conifex Timber Inc. v. British Columbia (Lieutenant Governor in Council)*, 2025 CarswellBC 475, 2025 BCCA 62, the B.C. Court of Appeal applied the

framework developed by the Supreme Court in Auer to uphold a regulation involving electricity in the context of cryptocurrency mining operations. The dispute involved Conifex Timber Inc., is a forestry and power company, seeking to diversify its operations by developing high-performance computing facilities in northern British Columbia. Conifex submitted electrical service applications for a number of its proposed facilities to the British Columbia Hydro and Power Authority. While two of Conifex's applications were under consideration, the Lieutenant Governor in Council (Cabinet/LGIC) issued Order in Council No. 692 (the "OIC") under s. 3 of the Utilities Commission Act, R.S.B.C. 1996, c. 473 (the "UCA") directing the British Columbia Utilities Commission (the "Utilities Commission") to relieve B.C. Hydro of its obligation to provide electrical service to new cryptocurrency mining operations for a period of 18 months. Conifex challenged the validity of the OIC by way of a petition for judicial review, which was dismissed by a judge of the Supreme Court. Conifex appealed, arguing that the Cabinet's decision to issue the OIC was unlawful because it failed to respect the limits of Cabinet's regulation-making authority under s. 3 of the UCA. The Court of Appeal rejected this argument, upholding the OIC as reasonable pursuant to the Auer framework.