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PRACTICE AND PROCEDURE BEFORE ADMINISTRATIVE TRIBUNALS
Robert W. Macaulay, James L.H. Sprague, Lorne Sossin
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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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AUTHOR'S NOTE

As groups seek to push the boundaries of legal accountability over government action (and inaction), principles of justiciability have come under greater scrutiny. These principles concern whether a matter is appropriate for judicial determination. In two cases included in this Release, which each involve constitutional challenges, different aspects of justiciability has come under the spotlight. In *Alberta Union of Public Employees v. Her Majesty the Queen (Alberta)*, 2021 ABCA 416, 2021 CarswellAlta 3138 (Alta. C.A.) (AUPE), the Alberta Court of Appeal examines the principle of "ripeness" for judicial review of new legislation to respond to COVID-19, while in *Environnement Jeunesse c. Procurer general du Canada*, 2021 QCCA 1871, 2021 CarswellQue 18893 (C.A. Que.), the Quebec Court of Appeal considers the scope of a constitutional challenge to the government's lack of sufficient action to address climate change and whether it expands too far into the realm of political or policy determinations.

In *AUPE*, the Alberta Court of Appeal heard an appeal based on the standing of a party to challenge the constitutionality of a statute based only on "hypothetical scenarios" and without a factual matrix established by the evidentiary record. As the Court explained, "The foundational issue in this appeal is the standing of the respondents to challenge the constitutionality of a statute, specifically where the challenge is based only on "hypothetical scenarios", without a factual platform established by evidence."

The appeal involved an attempt to challenge the constitutionality of the *Critical Infrastructure Defence Act*, SA 2020, c. C-32.7, which came into force on June 17, 2020. The challenge was launched days later, although the union applicants were not the object of any action or proceedings under this statute. The applicants proposed to argue, however, that the legislation violated their rights under the *Canadian Charter of Rights and Freedoms* and the Alberta *Bill of Rights*, and that it encroached on federal jurisdiction. The Alberta Court of Appeal allowed the government's appeal and held that the challenge was not ripe for adjudication, and therefore that the union bringing the challenge did not meet the test for discretionary public interest standing.

In *Environnement Jeunesse c. Procurer general du Canada*, 2021 QCCA 1871, 2021 CarswellQue 18893 (C.A. Que.), the Quebec Court of Appeal found a broadly framed constitutional challenge by an NGO representing young persons against the federal government was not justiciable. The NGO brought this class action in 2018 alleging the Canadian government is infringing on a generation's *Charter* rights as its carbon reduction targets are insufficiently ambitious and it lacks a plan to achieve carbon reduction goals that would counter climate change. The NGO sought $100 per member in the class, for a total of $340 million, to be invested in measures to counter climate change. In 2019, the Quebec Superior Court struck the claim. The Court of Appeal dismissed the NGO's appeal.

The Court of Appeal focused on the difficulty with judicially reviewing government inaction. In particular, the review of legislative power and whether it is appropriate for the legislature to act are in principle beyond the scope of

the judiciary's power. The Court held that international commitments and agreements do not permit domestic enforcement unless incorporated into domestic law – a decision left to Parliament and not to the courts. Moreover, according to the Court, the mere existence of an international obligation does not support the conclusion that there is a principle of fundamental justice justifying the interference of the judiciary pursuant to s. 7 of the *Charter*.

For these reasons, the Court of Appeal found that the judge at first instance erred in concluding that the action was justiciable. As the facts alleged could not, in the Court's view, give rise to the conclusions sought, the criteria set out in art. 575(2) of the *Code of Civil Procedure* (CQLR, c. C-25.01) was not met, resulting in the dismissal of the action.

Both these appellate decisions illustrate the ways in which justiciability remains a significant hurdle for claimants, and reiterate the reasons why courts remain reluctant to enter into policy-making realms, or allow a legal process to be used to advance political goals.

This release features developments in several areas of administrative law.

In *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 CSC 32, 2021 SCC 32, 2021 CarswellNat 2815, 2021 CarswellNat 2816, EYB 2021-398441, 185 C.P.R. (4th) 1, 460 D.L.R. (4th) 414 (S.C.C.), the Copyright Board's approval of a tariff proposed by a collective society (Access Copyright) against a user (York University) was challenged. After considering the legislative history and purpose of the *Copyright Act*, the Supreme Court found that the tariff should be quashed. The Court declined to issue declaratory relief affirming York's guideline relating to "fair dealing" of copyright material for educational purposes.

In *Prince Albert Right to Life Association v. Prince Albert (City)*, 2020 SKCA 96, 2020 CarswellSask 390, 88 Admin. L.R. (6th) 136, 5 M.P.L.R. (6th) 20, [2020] 10 W.W.R. 603 (Sask. C.A.), the Saskatchewan Court of Appeal considered an appeal from a decision of the Court of Queen's Bench Chambers judge dismissing an application for judicial review on grounds of mootness. The appeal considered a decision of the City of Prince Albert not to permit a pro-life interest group to fly a right-to-life flag using a city flagpole. The decision followed the adoption by the City of a new policy entitled the Flag Protocol Policy. The Court of Appeal upheld the Chambers judge's decision on mootness and dismissed the appeal.

In *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2021 BCCA 295, 2021 CarswellBC 2357, 88 Admin. L.R. (6th) 49, 53 B.C.L.R. (6th) 287, [2021] 11 W.W.R. 611 (B.C. C.A.), The B.C. Court of Appeal considered a dispute between the B.C. Provincial Court judges and the B.C. government. At issue were the recommendations of the 2016 judicial compensation commission. The government departed from two of the recommendations relating to Provincial Court judges. The Chambers Judge held that the government's decision did not meet the standard of rationality required on judicial review. The B.C. Court of Appeal allowed the government's appeal, and found that the government had justified its response to the commission and met the required standard of rationality.

In *Harvey v. Saskatchewan Legal Aid Commission*, 2020 SKCA 110, 2020 CarswellSask 438, 88 Admin. L.R. (6th) 107, 454 D.L.R. (4th) 96 (Sask. C.A.),

the Court of Appeal heard an appeal from a decision of the Queen's Bench, dismissing application for judicial review of Saskatchewan Legal Aid Commission's decision not to appoint a lawyer to a panel under the *Legal Aid Act*, SS 1983, c L-9.1. The Court of Appeal allowed the appeal, concluding that, based on the limits of its statutory authority, the Commission had no lawful reason to remove the lawyer's name from the legal aid panel.

In *Harkat v. Canada (Attorney General)*, 2021 FCA 209, 2021 CarswellNat 4835 (F.C.A.), Mr. Harkat applicant sought to appeal a Federal Court decision denying a motion seeking an order to have the federal government pay his legal fees. Mr. Harket had been found inadmissible to Canada on national security grounds, and appeals of that decision were dismissed. He was in the process of challenging his deportation to Algeria and allegations that he had breached conditions of his release from custody at the time the motion was decided. For the Federal Court of Appeal, McTavish J.A. held that as the appeal is from an interlocutory order, and where no questions of general importance had been certified arising from a decision under the *Immigration and Refugee Protection Act*, the Court lacked jurisdiction to consider the appeal.

In *Canada (Attorney General) v. Iris Technologies Inc.*, 2021 FCA 223, 2021 CarswellNat 5128 (F.C.A.), the Federal Court of Appeal considered the distinction between when judicial reviews from ministerial discretion go to the Federal Court, and when such matters go to Tax Court. In this case, the applicant filed a notice of application for judicial review of the decision of the Minister of National Revenue refusing its application for a payment under the Canada Emergency Wage Subsidy (CEWS), an element of the Government of Canada's response to COVID-19. The Minister moved to strike the application for judicial review. The Prothonotary dismissed the motion. The Federal Court upheld this decision. The Federal Court of Appeal allowed an appeal from this decision, holding that the minister's decision could only be challenged in the Tax Court.

In *Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner)*, 2020 BCCA 221, 2020 CarswellBC 1845, 87 Admin. L.R. (6th) 174, 39 B.C.L.R. (6th) 87, [2021] 4 W.W.R. 249 (B.C. C.A.), the B.C. Court of Appeal emphasized the discretionary nature of determinations regarding prematurity. The case involved a disciplinary proceeding under the *Police Act*, R.S.B.C. 1996, c. 367 in which the Police Complaints Commissioner ordered a public hearing. A chambers judge quashed that decision on judicial review, finding it was an abuse of process given the delay involved, and unreasonable for the Commissioner to order at that stage of the proceedings. The B.C. Court of Appeal disagreed with the chambers judge that the delay involved amounted to an abuse of process, allowed the appeal from this decision and restored the notice of public hearing.

Finally, in *Mudie v. Canada (Attorney General)*, 2021 FCA 239, 2021 CarswellNat 5626 (F.C.A.), the Federal Court of Appeal held that a judicial review of a decision relating to the denial of an old age pension was moot, as the decision already had been accepted for a reconsideration by Service Canada.

L.S.

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