Toronto Law Journal

Constitutional Principles & Ontario's *Crown Liability and Proceedings Act*[1]

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INTRODUCTION

On April 11, 2019, Ontario introduced its first budget under Premier Ford. Buried deep within is the *Crown Liability and Proceedings Act, 2019*, a bill promoted as updating how we, the people of Ontario, pursue civil claims against the Province. The Ontario envisioned by the Ford Government is one in which the Province faces scant liability in tort; indeed, as a recent CBC headline notes, the bill would make it essentially impossible to sue.[2] This is concerning to those of us who monitor the relationship between a government and its people.

The bill, if and when it is passed, will no doubt face constitutional challenge under the *Canadian Charter of Rights and Freedoms*. But this article reminds that there is, and needs to be, more to the conversation. I therefore ask the basic question of whether the bill comports with the constitutional principles of democracy and the rule of law. Sadly, my conclusion is that it does not. These principles are explored prior to scrutinizing the bill.

CONSTITUTIONAL PRINCIPLES

Canada is regarded as a bastion of political and legal stability in large part due to our constitutional structure. We do not have a single document called "the constitution"; rather, we have a patchwork of written texts and unwritten principles.

The Supreme Court of Canada discussed constitutional principles at length in *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217. For the Court, these principles "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based".[3] Constitutional principles are of vital importance: "it would be impossible to conceive of our constitutional structure without them" because they "dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."[4] The Court recognized that principles are of powerful normative force, are binding upon both courts and governments, and may place substantive legal obligations upon governments.[5]

The Court explored four principles in the Quebec secession reference: democracy, constitutionalism and the rule of law, federalism, and respect for minority rights. Although the Court found these principles operate symbiotically, democracy and the rule of law are particularly relevant here.

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[1] Thank you to Leah Sampson for assistance with this article.
[2] Lucas Powers, "Ontario PCs want to make it next to impossible to sue the government" CBC News (14 April 2019) online: CBC News <https://www.cbc.ca/news/canada/toronto/proceedings-against-the-crown-act-repeal-replace-pcs-1.5097205>
[3] *Reference Re Secession of Quebec*, [1998] S.C.R. 217 at para. 49.
[4] *Ibid.*, at para. 51.
[5] *Ibid.*, at para. 54.

We tend to think of democracy in minimal terms; *i.e.* some of us show up every few years to vote. But, for the Court, democracy is fundamentally concerned with a people's substantive goals and it "would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional values".[6] Indeed, as the Court notes, "A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live."[7]

A fundamental component of Canadian democracy is the dialogue between courts and governments.[8] The concept of dialogue views law as evolving through a process of conversations. When a legislature passes a law, it may be scrutinized by a court which, in turn, might require legislative changes on constitutional grounds. The legislature then has the option to make those changes or, in some cases, override the court decision by invoking the notwithstanding clause. Dialogue obviously occurs on a macro level and, I submit, also on a micro level through the legal and normative force of civil litigation.

On a macro level, it occurs when a court scrutinizes the constitutionality of a law. *R. v. Morgentaler*, [1988] 1 S.C.R. 30 is a good example. There, the Supreme Court invalidated the criminal prohibition of abortion but suspended its declaration to give the federal government time to fix the law. Canada did not address the issue, so the law became invalid. As *Morgentaler* illustrates, dialogue on a macro scale typically features issues that are of concern to an array of Canadians.

Dialogue on a micro scale is localized to the individual and concerns an individual's interaction with the state. We all interact with government in infinite ways and, when harm occurs, the affected individual may be able to obtain recourse through court. Litigation, then, is a function of democracy because it checks the government, and majority that elected it, neither of which have incentive to address legal issues particular to an individual.

The democratic principle dovetails with the rule of law; indeed, this is precisely what the Court meant when it said that constitutional principles operate in symbiosis. Perhaps expressed most succinctly in *Reference Re Manitoba Language Rights*, [1992] 1 S.C.R. 212, the rule of law means:

1. There is one law for all and it applies equally to governments and individuals.
2. The state must create and maintain an actual order of positive laws that preserve and embody the more general principles of a normative order.
3. The exercise of all public power must be rooted in the law such that the relationship between the state and individual must be regulated by law.

In *Reference Re Secession of Quebec*, the Supreme Court describes how government is limited by the rule of law: "Canadians have never accepted that ours is a system of simple majority

[6] *Ibid.*, at para. 67.
[7] *Ibid.*, at para 68.
[8] PW Hogg & AA Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75.

rule. Our principle of democracy … is richer."[9] Litigation, in short, is important to hold government accountable and ensure the broadest range of voices are considered in our dialogue.

CROWN LIABILITY AND PROCEEDINGS ACT, 2019

This bill stifles dialogue, particularly on a micro level, by making it so onerous and risky to pursue litigation against the Province that few will bother.

Sections 7(1) and (2) provide that the bill prevails over any law it conflicts with to the extent there is a conflict. There is an exception: if the other law provides greater protection against liability, that law prevails.

Section 11 extinguishes any tort claim against the crown for negligence in performing duties of a legislative nature as well as the making of policy and regulatory decisions provided these decisions are made in "good faith". These duties and decisions are defined broadly. A regulatory decision, for instance, includes whether a person has met an obligation under an act.

The good faith requirement serves a gatekeeping function. Section 17 of the bill creates a new procedure to determine good faith. No action can be brought against the crown without first obtaining leave of the court on motion. Before the motion occurs, the plaintiff must provide (a) an affidavit setting out all material facts s/he intends to rely upon in the claim and (b) an affidavit of documents disclosing all relevant documents in his/her possession. The crown may, but is not required, to serve a responding affidavit. The crown has a right to conduct an examination for discovery of the plaintiff before the motion, although the plaintiff may not examine a crown representative. When the motion finally occurs, the court must be satisfied that (a) the proceeding is being brought in good faith and (b) there is a reasonable possibility the case will be decided in the plaintiff's favour. In other words, the court essentially pre-judges the action — based on limited evidence and potentially no evidence from the Province — before a statement of claim is even filed.

The bill specifies that the parties are responsible for their own legal costs. This is another barrier to the plaintiff as the court is stripped of its broad discretion over costs. The presumption in Ontario is that the successful party is entitled to its costs. Courts use costs awards to compensate the successful party and, more importantly to the present conversation, deter unreasonable conduct. By eliminating its risk, the Province is able to take unreasonable positions simply to increase a plaintiff's costs and discourage actions. This will likely be an effective tactic, although the Province would never admit it.

Additional protections are available to the crown. All trials are by judge alone; there is no jury option. When the crown is a party, it is not required to provide any documents regardless of whether those documents are relevant. This may well impair the just resolution of cases.

The bill is a dramatic departure from the current rules of procedure for actions involving the crown. First, leave is not currently required. Second, affidavits of documents and examinations for discovery occur in the course of an action, not before commencement of the action. Third,

[9] *Reference Re Secession of Quebec*, *supra*, at para. 76.

the plaintiff has the right to examine a crown representative to completion prior to undergoing examination. Indeed, given that the entire purpose of the discovery process is to discover information, one wonders how a plaintiff is expected to provide a comprehensive affidavit of documents and statement of facts ahead of the action. Fourth, courts have wide discretion to award costs. And fifth, the bad faith requirement shifts focus from whether a recognized legal wrong occurred to the intent of the party who committed the wrong.

This shift in focus is particularly troubling. Many individuals who sue governments belong to classes that probably do not vote or have favour among a majority of voters. Prisoners are a good example. I have handled numerous cases in which the Province has failed to take reasonable steps to obtain or provide proper medical care. Sometimes the lack of funding is such that the provincial employee simply cannot arrange transport to hospital for several days. The bill would preclude civil liability against the crown, despite unreasonable delay, provided the employee acted in good faith. It is not difficult to see that this will allow the Province to dismantle some social programs and grossly underfund others at no risk.

As indicated above, the bill also inoculates the Province by vastly increasing the cost and risk of litigation. Many cases against the crown are brought on a contingency basis, meaning the plaintiff pays their lawyer a percentage if and when funds are obtained. Contingency arrangements serve an important access to justice function because, without such an arrangement, many plaintiffs (such as prisoners) cannot afford litigation.[10] The bill makes it too risky for many lawyers to pursue claims against the Province. It is reasonable to estimate a lawyer spending $20,000.00 worth of time and disbursements to prepare an affidavit of documents, attend at discovery, and prepare for and argue a motion to obtain leave to sue. If the court finds the crown acted in good faith, the lawyer has no compensation because, even if successful, the bill prevents the court from awarding costs. In other words, unless courts are going to greatly increase damage awards, lawyers now have to do significantly more work at significantly more risk to earn the same income. Many rational economic actors will find less onerous and risky ways to earn income.

While it is true that the bill does not, and cannot, circumscribe *Charter* claims, "constitutional torts" is a vastly undeveloped area of Canadian law. Indeed, it was only in 2010 that the Supreme Court of Canada definitively concluded that plaintiffs can obtain compensatory damages under the *Charter*.[11] These damages are only available as a last resort; *i.e.*, if tort damages are not available. If the bill withstands *Charter* scrutiny, I suspect we will see tort claims against government reframed as constitutional claims. The traditional indicia of negligence and its analysis will probably be bent into constitutional terms, leading to an expansion of constitutional protection. Here it is important to ask some basic questions: is the current tort system so broken that we need to reimagine it in constitutional terms? From a consequential perspective, is there any real difference or advantage to constitutionalizing these issues? I would suggest not on the basis that the system we have, while far from perfect,

[10] Not just inability to afford legal representation, but inability to finance it. Litigation is expensive. Expert reports, for instance, can cost thousands of dollars. Lawyers commonly pay these fees on a client's behalf and obtain reimbursement through proceeds of the litigation.
[11] *Vancouver (City) v. Ward*, 2010 SCC 27.

works well enough. I would further suggest that Canadian courts will not allow governments to shirk liability and will essentially constitutionalize negligence. Anyone who has observed our *Charter* jurisprudence to-date would bet on an expansion rather than limitation of protection.

In summary, the bill offends the democracy principle by essentially immunizing the government from civil liability. Suing a government for negligence has a valid and important democratic function: it is part of a dialogue between courts and legislatures. It allows unpopular populations to achieve socio-legal and political goals that cannot be achieved at the ballot box. Encouraging more reasonable medical care of prisoners through damage awards is a good example as the majority of Ontarians are probably not overwhelmingly concerned with this issue. Our democracy is richer than majority rule thanks in part to civil litigation.

It also offends the rule of law. By making government a privileged tier of defendant, the bill discriminates against plaintiffs and defendants alike. Plaintiffs who are harmed by government are worse off than plaintiffs who are harmed by private parties: it is far less onerous and risky to be injured by a private party and therefore these plaintiffs have greater access to justice. Private defendants are also discriminated against because a government defendant enjoys vastly superior protection. The bill therefore offends the pillars that there is one law for all and that legislation embodies the more general principles of a normative order.

CONCLUSION

The *Crown Liability and Proceedings Act* offends the constitutional principles of democracy and the rule of law by silencing often unpopular voices and privileging government over other defendants and plaintiffs. Principles are vital to our constitutional structure but sometimes forgotten about in legal argument. This article has therefore reminded lawyers of these principles in the hope of contributing to the invalidity of the bill.

Toronto Law Journal

The Methodology of Reasonableness Review in Administrative Law: *Hillier v. Canada*

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Introduction

The Federal Court of Appeal's recent administrative law decision in *Hillier v. Canada*[1] is both timely and telling. It is timely given the Supreme Court of Canada's pending reconsideration[2] of the nature and scope of judicial review of administrative action and, in particular, the standard of review test set out in *Dunsmuir*.[3] It is telling because, despite its avowed intention to provide a much-needed step-by-step methodology of reasonableness review, it unwittingly falls into the trap of "disguised correctness review" that it sets out to avoid. If nothing else, the Federal Court of Appeal's decision in *Hillier* throws into sharp relief just how daunting is the challenge of renovating *Dunsmuir* and judicial review. Indeed, *Hillier* unwittingly reveals the fundamental tension underlying reasonableness review of administrative action. Will the Supreme Court of Canada heed its lesson in time?

Factual and Statutory Background

Sue Hillier sought disability benefits under the *Canada Pension Plan*. The Minister of Employment and Social Development denied her claim, finding her disability insufficiently severe. Hillier contested the decision before the Social Security Tribunal, whose General Division affirmed the Minister's decision.

The Social Security Tribunal's Appeal Division granted Hillier's application for leave to appeal from the General Division's decision.[4] In hearing Hillier's appeal, however, the Appeal Division considered only some—*i.e.* two of eight—of the grounds for appeal advanced by Hillier, deciding at the leave stage that a number of the grounds were hopeless.[5] It is on this basis—the Appeal Division's decision to consider some but not all of the grounds for appeal advanced by Hillier—that Hillier applied to the Federal Court of Appeal for judicial review.[6] Hillier asked the Court to quash the Appeal Division's decision and remit the matter back to a different member of the Appeal Division on all of the grounds originally alleged by Hillier.[7]

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[1] *Hillier v. Canada (Attorney General),* 2019 FCA 44 (CanLII).
[2] See *Bell Canada, et al v. Attorney General of Canada* (SCC Case No 37896); *National Football League, et al v. Attorney General of Canada* (SCC Case No 37897); *Minister of Citizenship and Immigration v. Alexander Vavilov* (SCC Case No 37748).
[3] *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190.
[4] *S.H. v. Minister of Employment and Social Development,* 2018 SST 95 (Tribunal File No AD-16-1349) at para. 3 [*Appeal Division Decision*].
[5] *Ibid.*
[6] *Ibid.* at paras. 2-3.
[7] *Ibid.* at para. 3.

Hillier's application for judicial review turned on the interpretation given to section 58 of the *Employment and Social Development Act*, which provides as follows:

> **Grounds of appeal**
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> **58** (1) The only grounds of appeal are that
>
> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.
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> **Criteria**
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> (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.
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> **Decision**
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> (3) The Appeal Division must either grant or refuse leave to appeal.
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> **Reasons**
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> (4) The Appeal Division must give written reasons for its decision to grant or refuse leave and send copies to the appellant and any other party.
>
> **Leave granted**
>
> (5) If leave to appeal is granted, the application for leave to appeal becomes the notice of appeal and is deemed to have been filed on the day on which the application for leave to appeal was filed.[8]

Standard of Review: Reasonableness

Writing for a unanimous Court, Stratas J.A. concluded that the standard of review applicable to the Appeal Division's decision was reasonableness: "Section 58 sits in the *Department of Employment and Social Development Act*, a statute the Appeal Division frequently considers

[8] *Employment and Social Development Act*, S.C. 2005, c. 34, at s. 58.

and with which it is very familiar. In circumstances such as these, presumptively we are to review the Appeal Division's decision for reasonableness."[9]

Reasonableness Review: A Proposed Methodology

This brings Stratas J.A.—and the rest of us—to the crucial if sorely under-examined question of just what reasonableness review is, and how it is to be done. How does a reviewing court go about conducting reasonableness review of an administrative decision without simply substituting its own *de novo* determination of the matter in place of the administrative decision-maker's (known as the sin of "disguised correctness review")?

Before proceeding to discuss the reasonableness review methodology proposed by Stratas J.A. in *Hillier*, it is worth briefly recalling the Supreme Court of Canada's guidance in *Dunsmuir*. Upon framing the question as "[h]ow are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?",[10] the majority in *Dunsmuir* explained:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
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> The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? […] We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart,

[9] *Hillier*, *supra* note 1 at para. 12.
[10] *Dunsmuir*, *supra* note 3 at para. 46.

> ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).[11]

Dunsmuir otherwise provided neither rules nor steps nor *practical* guidance of any kind to reviewing courts about how to conduct reasonableness review. In a number of post-*Dunsmuir* decisions, the Supreme Court of Canada endeavored to further clarify the meaning of reasonableness review by explaining that reasonableness "takes its colour from the context"[12] of administrative action.

It is against this backdrop that Stratas J.A. proposes in *Hillier* a step-by-step methodology for reasonableness review of administrative action.[13] His proposed methodology includes the following four steps:

(1) conduct a "tentative examination" of the relevant statutory provisions;[14]

(2) ascertain the range—including the "margin of appreciation"—of interpretive options available to the administrative decision-maker;[15]

(3) assess whether the administrative decision-maker's statutory interpretation falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law";[16] and

(4) determine whether the administrative decision-maker's appreciation of the purposes, nuances, and ramifications of the applicable statutory provisions—by dint of the decision-maker's "daily, in-the-field work or genuine expertise"[17] is relevant and explained or otherwise evident.[18]

Application of Stratas J.A.'s Reasonableness Methodology

At step one, Stratas J.A. concludes—*tentatively*—that the words of the relevant provisions of the *Department of Employment and Social Development Act*, in particular those of section 58,

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[11] *Ibid.* at paras. 47-48.
[12] See *e.g. Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at para. 59; *Catalyst Paper Corp v. North Cowichan (District)*, [2012] 1 S.C.R. 5 at para. 18; *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770 at para. 22; and, as Stratas J.A. notes in *Hillier*, *supra* note 1 at para. 40, "many, many others."
[13] *Hillier, supra* note 1 at para. 13.
[14] *Ibid.* at para. 14.
[15] *Ibid.* at paras. 14-15.
[16] *Ibid.* at para. 16, citing *Dunsmuir, supra* note 3 at para. 47.
[17] *Hillier, supra* note 1 at para. 17.
[18] *Ibid.*

"*seem* precise and unequivocal. They *seem* to lead to *one acceptable and defensible result*. They support Ms. Hillier's position."[19]

So far, so tentative.

Stratas J.A. proceeds by observing that subsection 58(1) of the *Act* limits the grounds of appeal to (a) violations of natural justice and jurisdictional error, (b) an error of law, and (c) decisions based on erroneous findings of fact made in a perverse and capricious manner. For Stratas J.A., the "necessary *implication* here is that a ground not falling within these categories cannot be raised on appeal; only in these circumstances can the Appeal Division disregard a ground of appeal."[20]

Stratas J.A. further observes that subsection 56(1) of the *Act* provides that "[a]n appeal to the Appeal Division may only be brought if leave to appeal is granted."[21] From this Stratas J.A. (tentatively) concludes: "*Inferentially*, this reinforces the idea that the Appeal Division has not been given a general power to grant leave in part, *i.e.*, to consider only some of the grounds put to it."[22]

For Stratas J.A., notwithstanding his use of the interpretive tools of implication and inference, "the words of the legislative provision *seem* to be precise and unequivocal."[23] In his view, "unless an appeal has no merit at all, the Appeal Division should take on the appeal on all grounds provided that those grounds fall within the categories of subsection 58(1)."[24]

The difficulty with Stratas J.A.'s tentative-in-name-only interpretation of the relevant statutory provisions, leaving aside the obvious ambiguity of the *Act's* leave to appeal provisions requiring implication and inference, manifests itself at step two. Having arrived at a "tentative" determination that the interpretation of the *Act* yields but one defensible interpretation, as Stratas J.A. has here (and as reviewing courts virtually always do), how can a reviewing court proceed to meaningfully—let alone deferentially—ascertain the *range* of interpretive options available to the decision-maker?

Having worked himself into this all-too-familiar corner of judicial review, Stratas J.A. falls back on a judicial oxymoron introduced by the Supreme Court of Canada in *McLean v. British Columbia (Securities Commission)*.[25] According to Stratas J.A., the range of interpretive options

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[19] *Ibid.* at para. 19 [emphasis added].
[20] *Ibid.* at para. 22.
[21] *Department of Employment and Social Development Act, supra* note 8 at ss. 56(1).
[22] *Hillier, supra* note 1 at para. 23 [emphasis added].
[23] *Ibid.* at para. 24.
[24] *Ibid.* at para. 28.
[25] *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895 at para. 38.

available to administrative decision-maker such as the Social Security Tribunal Appeal Division can be narrow, "perhaps even *a range of one*."[26]

Unsurprisingly, and unavoidably, Stratas J.A. proceeds to find that the Social Security Tribunal Appeal Division's interpretation of its own *Act* to be outside his narrowly constructed "range of one" defensible result, and consequently unreasonable.[27]

How did the Court end up in this familiar yet unhelpful place, yet again, despite avowing to do just the opposite? The answer can be found in the judicial approach to statutory interpretation on judicial review. In other words, the judicial approach to statutory interpretation generally.

Once Stratas J.A. finally turns his attention to how the Appeal Division itself approached section 58 of its home statute, his reasons for decision already two-thirds complete, he offers the following assessment: "[The Appeal Division] did not follow the *accepted approach* to interpreting a legislative provision nor did it explain why it did not."[28] For Stratas J.A., "[o]ur focus must be the *authentic meaning* of the particular provision in issue, here section 58."[29]

So much for reasonableness review's *range* of acceptable options.

Stratas J.A. further observes of the Appeal Division that "[a]ll it did was to declare that '[it could not] see anything in the legislation…that prohibits the Appeal Division from limiting the scope of an appeal as it moves from consideration at the leave stage to consideration at the merits stage' (at para. 19)."[30] Nor, according to Stratas J.A., did the Appeal Division say anything "in detail" about the *Act's* purpose. "Instead, it expressed its own preference for 'hold[ing] full hearings only on issues of substance' (at para. 19)."[31]

This would be troubling, were it true. What is more troubling, however, is that it is not true. The Appeal Division's reasons for decision devote 16 paragraphs to its interpretation of section 58 of the *Act*, including a close and careful consideration of previous decisions of the Appeal Division, the Federal Court, and the Federal Court of Appeal interpreting section 58, decisions that Stratas J.A. inexplicably neither discusses nor even cites.[32]

In *Mette*, for example, the Federal Court of Appeal held that section 58 of the *Act* "does not require that individual grounds of appeal be dismissed."[33] In the not-unreasonable view of the

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[26] *Hillier, supra* note 1 at para. 15 [emphasis added].
[27] *Ibid.* at para. 40.
[28] *Ibid.* at para. 31 [emphasis added].
[29] *Ibid.* at para. 35 [emphasis added].
[30] *Ibid.* at para. 31.
[31] *Ibid.*
[32] See *e.g. Mette v. Canada (Attorney General),* 2016 FCA 276; *Maunder v. Minister of Employment and Social Development* (AD-15-1290); *S.F. v. Canada Employment Insurance Commission,* 2017 CanLII 1890; *M.C. v. Minister of Employment and Social Development,* 2016 SSTADIS 308; *Canada v. O'Keefe,* 2016 FC 503; *H.M. v. Minister of Employment and Social Development,* 2015 SSTAD 988; *Minister of Employment and Social Development v. S.D.,* 2016 CanLII 59173.
[33] *Mette, supra* note 32 at para. 15.

Appeal Division, if section 58 does not require individual grounds to be dismissed at leave, "it does not prevent such an action either."[34]

More troubling still, Stratas J.A. inexplicably neglects to mention—much less credit—the Appeal Division's reliance on the principles of natural justice and judicial economy, which are reflected, according to the Appeal Division, "in section 2 of the *Social Security Tribunal Regulations,* which states that they 'must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications."[35] This is entirely consistent with the Attorney General's submission on behalf of the Appeal Division that the *Act* as a whole is aimed at making the area of federal social security more efficient.[36]

Nor does Stratas J.A. attend to the Appeal Division's own eminently reasonable construction of the *Act* in respect of Hillier's claims. According to the Appeal Division:

> The standard for the leave to appeal stage is notably lower than the standard once leave has been granted. Therefore, if the ground has failed to meet a lower threshold of success at the leave to appeal stage, to re-examine the ground again at the appeal would be a waste of judicial resources. If the ground does not have a reasonable chance of success, then it certainly will not succeed on a balance of probabilities. Allowing an argument to be re-heard at the hearing will not change the outcome.[37]

Nonetheless, Stratas J.A. somehow decides that the Appeal Division "failed to analyze the text of section 58 in any meaningful way."[38]

So much for reasonableness review's "respectful attention to the reasons offered or which could be offered in support of a decision."[39]

Conclusion: It's Correctness All the Way Down!

In *Hillier* the Federal Court of Appeal intended to provide a methodology for conducting reasonableness review of administrative action. What *Hillier* unintentionally provides, however, is a demonstration of the unacknowledged and unresolved tension between statutory interpretation (as practiced by courts) and judicial review for reasonableness.

Statutory interpretation is about finding a statute's *best* interpretation, its *correct* interpretation. In *Rizzo & Rizzo Shoes Ltd (Re),* the Supreme Court of Canada's reliance on the *Interpretation Act* to explain the correct approach to statutory interpretation is instructive. Section 10 of the *Interpretation Act*, the Court explains in *Rizzo*, "provides that every Act 'shall be deemed to be remedial' and directs that every Act shall 'receive such fair, large and liberal

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[34] *Appeal Division Decision, supra* note 4 at para. 22.
[35] *Ibid.* at para. 25.
[36] *Hillier, supra* note 1 at para. 34.
[37] *Appeal Division Decision, supra* note 4 at para. 25.
[38] *Hillier, supra* note 1 at para. 31.
[39] *Dunsmuir, supra* note 11 at para. 48.

construction and interpretation as will *best ensure* the attainment of the object of the Act according to its *true* intent, meaning and spirit.'"[40]

This approach to interpreting and constructing statutes is wholly incompatible, however, with reasonableness review's stated objective of ascertaining a range of possible, acceptable statutory interpretations. It should not come as a surprise that reviewing courts virtually always arrive at the oxymoronic "range of one" reasonable interpretation. The sin of "disguised correctness review" thus fails to capture the greater lie of reasonableness review, and the true legacy of *Dunsmuir*: It's correctness review all the way down!

[40] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 S.C.R. 27 at para. 21, citing the *Interpretation Act*, R.S.O. 1980, c. 219 at s. 10 [emphasis added].

Toronto Law Journal

Weeding Out the Edible, Extracts and Topical Appeal

Jennifer Humphrey and Rick Moscone, Fogler, Rubinoff LLP[1]

Introduction

On December 20, 2018, Health Canada launched a 60-day public consultation on draft regulations to amend Schedule 4 (the "**Schedule**") to the *Cannabis Act* (the "**Act**") to include the following classes of cannabis that can be legally sold in Canada: "edible cannabis", "cannabis extracts" and "cannabis topicals". The draft regulations also propose that an Order be made to remove "cannabis oil", which is currently listed in Schedule 4 of the Act, from the Schedule six (6) months after the amended Regulations come into force. Following this 6-month transition period, cannabis oil would be subsumed under the new product classes.

The draft regulations also seek to address public health and safety risks associated with the new classes of cannabis, including its appeal to youth and the risks of accidental consumption, overconsumption and foodborne illness, among others.

Public Health and Safety

The proposed amendments to the legislation will put in place new manufacturing controls for the production of edible cannabis products to improve cleanliness and reduce the risk of food-borne illness. For example, the legislation proposes:

- that requirements pertaining to cleanliness of equipment used with cannabis or ingredients be expanded to also include conveyances, which refers to anything that is used within the licensed facility to transport cannabis or ingredients used in the production of cannabis products (*e.g.*, a forklift or hand lift) (requirement would apply to licensed cultivators and processors);
- a new ventilation requirement that provides clean air and removes unclear air that may have a negative impact on cannabis or ingredients (requirement would apply to both licensed cultivators and processors);
- an expansion of the sanitation requirements to explicitly require hand cleaning / sanitizing stations and lavatories in buildings where cannabis is produced (requirement would apply to licensed cultivators and processors);
- protective coverings for employee clothing and footwear (for licensed processors only);
- that licensed processors who produce edible cannabis or cannabis extracts would be required to prepare, retain, maintain and implement a written Preventive Control Plan

[1] This publication is intended for general information purposes only and should not be relied upon as legal advice.

("PCP") to identify and address, through effective control measures, any potential hazards that pose a risk to the production of these products;

- that all licensed processors would need to take steps to ensure that animals and pests are not able to enter into any building or part of a building where cannabis is being processed; and
- a requirement that any water, including ice or steam used in the production of a cannabis product, coming into contact with cannabis or an ingredient be potable, unless the water does not present a risk of contamination.

Packaging and Labelling

Part 7 of the Cannabis Regulations identifies the mandatory requirements that currently apply to the packaging and labelling of all marijuana products. The proposed regulations would expand on the information that is required for each product depending on its type.

Currently, Part 7 requires that packaging and labelling of all products include:

- a standardized cannabis symbol;
- health warning messages;
- the identification of THC and CBD content; and
- child-resistant packaging.

The proposed regulations would also restrict packaging for all classes of cannabis products from including any representation of a health benefit, as well as prohibit against any representation that associates a cannabis product, its package, or its labelling with an alcoholic beverage.

It is also proposed that an exception be made to allow the use of containers that contain metal (such as beverage cans) and that the exterior of a container in which a cannabis product package no longer need to have a matte finish.

Edible Cannabis (solid and beverage)

A cannabis edible includes products containing cannabis intended to be consumed in the same manner as food (*i.e.*, eaten or drunk). The proposed regulations seek to limit the amount of THC per package or container to 10 milligrams and will not permit any vitamins, minerals or alcohol to be added to products.

All edible cannabis products also would need to be shelf-stable (*i.e.*, not require refrigeration or freezing), and not contain any product that is considered to be unsafe or would cause the sale of a food regulated under the *Food and Drugs Act* ("**FDA**") to be unsaleable.

In addition to the current labeling requirements listed above, the draft regulations propose that edible cannabis products also include the following on their labels:

- a list of ingredients;

- the common name of the cannabis product;
- an indication of the source of an allergen or gluten, or that sulphites have been added to the product;
- a "best before date" if the product is expected to deteriorate over a period of ninety (90) days or less; and
- a cannabis-specific nutrition facts table ("**NFT**").

Further, any nutrient content representation that goes beyond those permitted on the list of ingredients and cannabis-specific NFT (including those that are currently permitted on food such as "**low fat**") or mention of additional vitamin or mineral content of the product is prohibited. There would also be a new requirement to use "food-grade packaging" for the immediate container of edible cannabis and for any wrappers.

Cannabis Extracts (ingested, inhaled or concentrated)

The cannabis extracts class in the proposed regulations will include products that are produced by using extraction processing methods or by synthesizing phytocannabinoids. As is the case for cannabis oil, the draft regulations would limit the amount of THC per package to 1,000 milligrams and there would be a limit of 10 milligrams of THC per discrete unit that is intended to be ingested or per use (such as in a capsule). Additionally, the proposed regulations seek to restrict any ingredients that include either nicotine or caffeine, as well as prohibits against any added vitamins or minerals. As well, to ensure consistency with the objective of limiting the appeal of marijuana products to children, no sugars, colours or sweeteners are permitted to be included in cannabis extracts.

In addition to the current packaging requirements discussed above, it is proposed that cannabis extract products will also be required to include the following on its packaging:

- a list of ingredients;
- the identity of the cannabis product in terms of its common name or function;
- a list of allergens; and
- the intended use of the product (*i.e.*, for "**vaping**").

The container of extracts will also require a design such that it could not be easily poured or drunk directly from the container.

Cannabis Topical

A cannabis topical is proposed to include products that use cannabis as an ingredient and which is intended to be used on external body surfaces (*i.e.*, skin, hair, and nails). The proposed regulations would limit the maximum amount of THC that can be dispensed per activation of a product at 10 milligrams, and permit a maximum of 1,000 milligrams per package.

In addition to the packaging requirements for all other marijuana products, it is proposed that the labelling for topical products include:

- a list of ingredients;
- intended use of the product (*i.e.*, "**apply to skin**");
- directions for use (but the content would not be prescribed); and
- the following warning statement: "**Do not swallow or apply internally to broken, irritated, or itching skin**".

Products also are not permitted to make any cosmetic benefit claim, such as "**reduces the appearance of wrinkles**" or "**soften skins**".

Conclusion

For further information please refer to the proposed regulations which was published in the Canada Gazette, Part I, on or about December 22, 2018.

The consultation period for the proposed regulations ended February 20, 2019.