Toronto Law Journal

Judicial Review and Administrative Law Reform: *Safe Food Matters Inc v. Canada (Attorney General)*

Jason MacLean, Faculty of Law, University of New Brunswick, and School of Environment and Sustainability, University of Saskatchewan

We will also affirm the need to develop and strengthen a culture of justification in administrative decision making.[1]

… reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers.[2]

In *Safe Food Matters Inc v Canada (Attorney General),*[3] the Federal Court of Appeal reviewed the Pest Management Regulatory Agency's ("PMRA") refusal to establish an independent review panel to consider public objections to PMRA's re-registration of a potentially harmful pesticide. The Court quashed PMRA's decision and remitted the matter back to PMRA for reconsideration in accordance with the Court's guidance.[4] The Court effectively tells PMRA how to interpret PMRA's own enabling statute, the *Pest Control Products Act*.[5]

Safe Food Matters is an important and instructive application of the Supreme Court of Canada's approach to substantive judicial review as set out in *Vavilov*.[6] *Safe Food Matters* applies Vavilovian reasonableness review to a highly discretionary administrative decision in a public-interest statutory context.

More importantly, *Safe Food Matters* illustrates both the potential and the limitations of judicial review of administrative decision-making as a means of *improving* administrative decision-making. Notwithstanding the Supreme Court's decision in *Vavilov,* these considerations do not turn on whether the standard of review is reasonableness or correctness, which remain largely one and the same.

---

[1] *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at 2. On this point Justices Abella and Karakatsanis in their joint concurring reasons appear to agree – weakly – with the majority about the diagnosis of the problem but disagree – strongly – about the proper cure: "Any perceived shortcomings in administrative decision making are not solved by permitting *de novo* review of every legal decision by a court and, as a result, adding to the delay and cost of obtaining a final decision. The solution lies instead in ensuring the proper qualifications and training of administrative decision-makers. Like courts, administrative actors are fully capable of, and responsible for, improving the quality of their own decision-making processes, thereby strengthening access to justice in the administrative justice system" (para 283).

[2] *Ibid* at 75. Compare this to the view expressed by Justices Abella and Karakatsanis in their joint concurring reasons: "The majority's reasons are an encomium for correctness and a eulogy for deference" (para 201).

[3] *Safe Food Matters Inc v Canada (Attorney General),* 2022 FCA 19.

[4] *Ibid* at para 12.

[5] *Pest Control Products Act,* SC 2002, c 28. See *Safe Food Matters, supra* note 3 at 64-67.

[6] *Vavilov, supra* note 1.

Because the matters discussed below tend toward the technical, it may assist the reader if I briefly summarize my conclusions here. First, courts should finally dispense with the disingenuous notion that there is more than one way to read a statute; there is only one, the modern approach to statutory interpretation. Second, courts should not second-guess administrative decisionmakers' *applications* of their enabling statutes where their statutory interpretations are sound and their specific applications of those interpretations display administrative expertise and experience. Third, courts should look beyond the four corners of statutes to consider how administrative decisionmakers actually exercise their powers, and courts should not look away from the real-world pathologies of concentrated economic power and regulatory capture that undermine administrative action in the public interest.

I. Two Sets of Background Facts: Real-World, and Judicial

A. The Real-World Facts of Regulatory Capture

Monsanto is more powerful than the government.[7]

To see the potential and the limitations of judicial review to improve administrative decision-making illustrated by this case, you first have to understand its real-world context, which the Federal Court of Appeal completely ignores.

In 2017 PMRA decides to renew the registration of formulated glyphosate (*e.g.*, Monsanto's Roundup product is a glyphosate-based herbicide) for an additional 15 years. It does so at the request of Monsanto, the world's largest manufacturer of glyphosate-based products; indeed, in 2017 Monsanto specifically asks PMRA to authorize higher levels of glyphosate-based products in the foods consumed by Canadians.[8] Safe Food Matters – an environmental nongovernmental organization – responds by filing a notice of objection under the *Pest Control Products Act* along with eight other organizations. The purpose of the Act and the primary mandate of PMRA in administering the Act is to protect Canadians and the environment from the harms of chemical products including glyphosate-based herbicides like Monsanto's Roundup.

Safe Food Matters objects to the pre-harvest agricultural use of glyphosate-based products on cereal and legume crops, arguing that it raises the risk of unsafe crop contamination.[9] Notably, the International Agency for Research on Cancer warns that glyphosate-based products likely cause cancer in experimental animals.[10] Safe Food Matters specifically objects to PMRA's registration of glyphosate-based products on the following grounds:

---

[7] Thomas Gerbet, "'Monsanto est plus puissante que le gouvernement,' dit le minister de l'Agriculture," Radio Canada (22 October 2015), online: https://ici.radio-canada.ca/nouvelle/745694/monsanto-pesticides-quebec-paradis-heurtel.

[8] Mary Lou McDonald, "Pest regulatory agency needs to up its game," *National Observer* (17 February 2022), online: https://www.nationalobserver.com/2022/02/17/opinion/pest-regulatory-agency-needs-its-game.

[9] *Ibid.*

[10] For an overview and confirmatory reanalysis of this warning, see Christopher J Portier, "A comprehensive analysis of the animal carcinogenicity data for glyphosate from chronic exposure rodent carcinogenicity studies" (2020) 19 Environmental Health 18.

- When used pre-harvest, glyphosate-based products accumulate in crops via "translocation;"

- Glyphosate-based products will remain present in indeterminate crops like lentils and chickpeas;

- PMRA's dietary consumption data is incomplete and inadequate because it is from the mid-1990s and is based on what Americans were eating, not Canadians; and

- Canadians are now eating far greater quantities of legumes (*e.g.*, hummus).[11]

PMRA dismisses the objections without offering any reasoned explanation for its decision.[12] PMRA claims that in reviewing Safe Food Matters' and other organizations' objections it had 20 scientists review the objections, but PMRA refuses to identify the scientists or disclose their qualifications.[13]

Now, if this strikes you as a weak and risky regulatory approach (and it should), PMRA's registration renewal of glyphosate-based products is even worse. When Monsanto requests PMRA to authorize higher levels of glyphosate-based products in Canada's food supply, PMRA grants Monsanto's request without notifying the relevant ministers charged with oversight of PMRA. Following the objections of Safe Food Matters and others, PMRA's decision is paused,[14] and it remains paused at this writing.

In the interim, PMRA acknowledges that it relies heavily on industry studies for decision-making, including studies that are part of the notorious "Monsanto papers."[15]

In response, the federal government announces $42 million in funding for PMRA to "strengthen its human and environmental health and safety oversight and protection" as part of PMRA's "Transformation Agenda."[16] The substance and the scope of PMRA's "Transformation Agenda" are striking, and include:

1. "improved transparency;"

2. "increased use of real-world data and independent advice;"

---

[11] McDonald, *supra* note 8.
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.* See also Environmental Defence, "Media Backgrounder: Health Canada's re-evaluation of glyphosate and the Monsanto Papers," (November 2018), online: https://ecojustice.ca/wp-content/uploads/2018/11/FINAL_Monsanto-Papers-background.pdf?x89810; Danny Hakim, "Monsanto Emails Raise Issue of Influencing Research on Roundup Weed Killer," *The New York Times* (1 August 2017), online: https://www.nytimes.com/2017/08/01/business/monsantos-sway-over-research-is-seen-in-disclosed-emails.html.
[16] *Ibid.* See also Government of Canada, "Government of Canada pauses decision on Glyphosate as it strengthens the capacity and transparency of review process for pesticides," (4 August 2021), online: https://www.canada.ca/en/health-canada/news/2021/08/government-of-canada-pauses-decision-on-glyphosate-as-it-strengthens-the-capacity-and-transparency-of-review-process-for-pesticides.html.

3. "strengthened human health and environmental protection through modernized pesticide business processes;" and

4. "targeted review of the *Pest Control Products Act*."[17]

Yet the federal government has not yet committed to providing PMRA with funding sufficient to enable PMRA's staff scientists to conduct their own systematic reviews of the scientific literature and stay abreast on ongoing developments.[18] PMRA is contemplating establishing a Scientific Advisory Committee to assist PMRA and bring PMRA in line with other international pesticide regulatory bodies like the US Environmental Protection Agency and the European Food Safety Authority. But both of those agencies rely almost exclusively on industry-supplied data and expertise.[19]

Unless and until the federal government makes fundamental – and truly *transformational* – changes to PMRA's budget, analytic capacity, and agency culture, PMRA will continue to bear the hallmarks of "regulatory capture," whereby the public interest in effective pest control regulation is redirected toward the special vested interests of the pesticide industry itself.[20]

These are the real-world facts underlying Safe Food Matters' application for judicial review of PMRA's refusal to appoint an independent scientific review committee to review Safe Food Matters' objections. These facts play no role in the Court of Appeal's review of PMRA's decision.

---

[17] Government of Canada, "How we are transforming the Pest Management Regulatory Agency," (21 March 2022), online: https://www.canada.ca/en/health-canada/news/2021/08/government-of-canada-pauses-decision-on-glyphosate-as-it-strengthens-the-capacity-and-transparency-of-review-process-for-pesticides.html.

[18] McDonald, *supra* note 8.

[19] See e.g. Portier, *supra* note 10. See also Charles M Benbrook, "How did the US EPA and IARC reach diametrically opposed conclusions on the genotoxicity of glyphosate-based herbicides?" (2019) 31:2 Environmental Sciences Europe; Christopher J Portier et al, "Differences in the carcinogenic evaluation of glyphosate between the International Agency for Research on Cancer (IARC) and the European Food Safety Authority (EFSA)" (2016) 70:8 Journal of Epidemiology and Community Health 741.

[20] For a discussion of the concept of regulatory capture and its application to Canadian environmental law more generally, see Jason MacLean, "Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture" (2016) 29 Journal of Environmental Law & Practice 111; Jason MacLean, "Regulatory Capture and the Role of Academics in Public Policymaking: Lessons from Canada's Environmental Regulatory Review Process" (2019) 52:2 UBC Law Review 479; Jason MacLean, "Chapter 1: Energy and Climate: Capturing the Imagination of Canada's Climate Policy" in Bruce Campbell, ed, *Corporate Rules: The Real World of Business Regulation in Canada – How Government Regulators Are Failing the Public Interest* (Toronto: James Lorimer & Company Ltd., Publishers, 2022).

B. Judicial Review Facts

> *I have concluded that the PMRA decision is unreasonable because it lacks any interpretation of the Act and Regulations.*[21]

Safe Food Matters next applies to the Federal Court for judicial review of PMRA's refusal to establish an independent scientific review panel to review its objections to PMRA's re-registration of glyphosate-based products. The Federal Court *dismisses* Safe Food Matters' application.[22] Safe Food Matters appeals from the Federal Court's dismissal to the Federal Court of Appeal.

Absent any interpretation by PMRA of the *Pest Control Products Act*, the Federal Court of Appeal interprets the purpose of the legislation and its supporting regulations. The Federal Court of Appeal finds that the purpose of the Act is to protect Canadians and the environment. The Act achieves this public-interest purpose by (1) requiring a science-based approach to the evaluation of risks posed by pest control products; (2) mandating periodic re-evaluations of registered products (*e.g.,* Monsanto's Roundup product); and (3) inviting public participation in the Act's regulatory scheme.[23]

Moreover, the Federal Court of Appeal observes that PMRA's discretion in administering the *Pest Control Products Act* is further constrained by two mandatory regulatory factors. Specifically, section 3 of the *Review Panel Regulations*[24] requires the Minister of Health to consider the following factors when deciding whether to establish an independent scientific review panel: (1) whether a public objection raises a "scientifically founded doubt" about the evaluations on which PMRA's decision is based, and (2) whether the advice of independent scientific experts would assist in assessing the public objection.[25]

The Federal Court of Appeal finds that the "PMRA decision falls short of these fundamental requirements."[26] The Court explains that in making its decision, PMRA failed to:

- justify its decision by interpreting its enabling statute, including the statute's primary purpose, "being the prevention of unacceptable risks to individuals and the environment from use of pest control products;"

- "explain the scientific approach it must take in evaluating the health and environmental risks of a pest control product and in determining whether those risks are acceptable as outlined in subsection 19(2) of the Act;" and

---

[21] *Safe Food Matters, supra* note 3 at 62.
[22] *Ibid* at para 11. See also *McDonald v Canada (Attorney General),* 2020 FC 242.
[23] *Ibid* at para 48.
[24] *Review Panel Regulations,* SOR/2008-22.
[25] *Ibid* at section 3.
[26] *Safe Food Matters, supra* note 3 at para 50.

- explain the term "scientifically founded doubt," and answer "the question of whether the advice of expert scientists would assist in addressing the subject matter of the objection, as it was required to do under subsection 3(b) of the Regulations."[27]

The Court also finds that no such interpretation by PMRA is evident from the record in the case. Rather, the record discloses only a "smattering" of references to "concerns," "scientifically founded doubt[s]," and "scientific grounds."[28] The Court finds that "[f]rom the reasons offered in light of the record, we simply do not know *why* a review panel might not assist in this case in considering whether the re-evaluation decision should be confirmed, reversed or varied in some way."[29]

The Federal Court of Appeal concludes that PMRA's failures to explain these factors and interpret its enabling legislation are critical, and sufficient to render PMRA's decision unreasonable.[30]

II. Judicial Review's Narrow Preoccupation with Statutory Interpretation

The Federal Court of Appeal rests its review of PMRA's regulatory inaction solely on what it sees as PMRA's failure to interpret its enabling legislation. In what should otherwise appear to be a strange lack of logical consistency, but which is the norm in judicial review both pre- and post-*Vavilov,* Federal Court of Appeal makes the following two statements, one right after the other:

> I wish to add a word or two on the Federal Court's interpretation of the term "scientifically founded doubt". I agree with the parties, including the interveners, that the Federal Court erred when it provided its own interpretation of this term. ***How this term is to be interpreted is the job of PMRA, not the Federal Court***. The Federal Court is the reviewing court, not the merits-decider.[31]

In the very next paragraph, the Federal Court of Appeal says this:

> As this represents the first time that this Court is reviewing a decision of the PMRA, it may be useful to provide ***some guidance*** to the PMRA when it goes about its redetermination. This is particularly important, given the number of years that have passed since the re-evaluation decision was made public. Further, ***it would be unfortunate for the redetermination decision to come back to the Federal Court, and possibly this Court, for a review on substantive unreasonableness.***

---

[27] *Ibid* at paras 51-53.
[28] *Ibid* at para 59.
[29] *Ibid* at para 58 [emphasis original]. Of course, the "real-world facts" set out above go a long way toward explaining exactly why PMRA made this decision, but those facts find no place in the Court's analysis. I will address this point below.
[30] *Ibid* at paras 54, 62.
[31] *Ibid* at para 63 [emphasis added].

> This guidance may avoid a possible "endless merry-go-round of judicial reviews and subsequent reconsiderations".[32]

The Federal Court of Appeal provides the following "guidance," suggesting that PMRA have regard to:

- The specific text, context and purpose of the preamble of the Act;
- The definition of "health risk" and "acceptable risks" in subsections 2(1) and 2(2) of the Act;
- The primary objective of the Act set out in subsection 4(1) of the Act;
- The meaning of "a scientifically based approach" when PMRA undertakes a re-evaluation of a pest control product as set out in subsection 19(2) of the Act;
- PMRA's role and tasks when it reviews a notice of objection under subsection 35(3) of the Act;
- The specific purpose of a review panel in relation to PMRA's role when PMRA receives a notice of objection under 35(1) of the Act;
- The specific threshold to be met when assessing a "scientifically founded doubt" based on the factors under section 3 of the Regulations; and
- The criteria used to determine whether the advice of independent scientists would assist in assessing the notice of objection under section 3 of the Regulations.[33]

The Federal Court of Appeal hastens to qualify its guidance to PMRA by adding that it is not "proposing any particular outcome on the merits of the matters before the PMRA."[34] It is hard to imagine, however, that PMRA has much choice about how it interprets its enabling legislation. It *is* possible to imagine, however, that the matter need not end there, and that PMRA might, should it ever get the resources it needs to properly fulfil its mandate, reach a defensible decision on the merits based on its *application* of its court-guided statutory interpretation to a given set of administrative facts and policy priorities. I briefly explore this possibility in the concluding section below.

---

[32] *Ibid* at para 64 [emphasis added].
[33] *Ibid* at para 65.
[34] *Ibid* at 67.

Conclusion: Judicial Review Helps but Mostly Hinders Administrative Law Reform

The Court's interpretive guidance to PMRA raises three important points about the role of judicial review in enhancing the quality of administrative decision-making.

First, and perhaps *least* significant, is that this form of "guidance" belies the Supreme Court of Canada's assertion in *Vavilov* that "[a]dministrative decisionmakers are not required to engage in a formalistic statutory interpretation exercise in every case."[35] In *Vavilov,* the Court reviewed the statutory interpretation of the Canadian Registrar of Citizenship, and found it not merely unreasonable but so wanting that it substituted its own interpretation without remitting the matter back for reconsideration. While it did so very politely, that is simply not deference.

Here, the Federal Court of Appeal's interpretative guidance essentially mirrors the modern judicial approach to statutory interpretation, and affords almost no room for PMRA to rely "on considerations that a court would not have thought to employ but that actually enrich and elevate the *interpretative* exercise."[36]

Secondly, perhaps this is for the best. The Federal Court of Appeal's rather straitjacketed guidance likely reflects the Court's unspoken awareness of the real-world regulatory-capture facts underlying PMRA's regulatory inaction – the fact that PMRA has been captured by the very companies like Monsanto that it is otherwise supposed to police in the public interest.

More generally, the time has come to abandon the vague suggestion of the Supreme Court of Canada and the Federal Court of Appeal that there are multiple methods of interpreting statutes. The modern approach to statutory interpretation has proven effective at determining the single best interpretation of one or more provisions – no matter how vague and elusive – in relation to the overall context and purpose of a statute.

The modern approach to statutory interpretation, moreover, is not especially formalistic or legalistic. Administrative decisionmakers can readily be trained to read the words of an Act "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[37] Just as we are all taught in school not to judge a book by its cover alone.

Holding administrative decisionmakers to this straightforward and intuitive method of interpreting their enabling statutes would help hold them accountable and identify where there are internal administrative problems and pathologies that need to be addressed squarely, expressly, and systemically, beyond judicial review itself.

---

[35] *Vavilov, supra* note 1 at para 119.
[36] *Ibid* [emphasis added].
[37] *Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 SCR 27 at para 21, quoting Elmer Drieger, *Construction of Statutes,* 2nd edition (1983) at 87.

Moreover, reviewing courts can still afford administrative decisionmakers ample room to exercise their on-the-ground experience by deferring to administrative decisionmakers' specific *applications* of their statutory interpretations to varying sets of administrative facts on a case-by-case basis. In this way, reviewing courts can enhance the accountability of administrative decisionmakers without imposing their own generally inexpert and inexperienced views about how administrative decisionmakers should actually exercise their powers. It is in the *application* of statutes to given sets of administrative facts and polycentric policy considerations where administrative decisionmakers have a comparative advantage over courts, provided those administrative bodies are functioning properly and independently in the first place.

Thirdly, and most importantly, judicial review that oversteps its institutional role is likely to hinder rather than support administrative law reform. This is because reviewing courts tend to ignore – and are generally ill-equipped to assess – how statutory mandates are actually administered. As Rod Macdonald long-ago observed with unique clarity and force, courts "carefully examine the words of the statute book – looking at how the powers of certain decision makers are phrased and categorizing diverse administrative processes. But they do no explore how these powers are actually exercised."[38] Moreover, reviewing courts tend to be narrowly preoccupied with correcting specific statutory "errors" in particular cases; they are neither inclined nor especially well-suited to address and improve the *systemic* exercise of administrative powers.[39] While reviewing courts must respect and work within the separation of powers, reviewing courts can nevertheless enhance the exercise of administrative decision-making by discussing the broader lessons of their specific rulings.[40]

Or, as in the case at bar, how administrative powers are *not exercised*. The Federal Court of Appeal's interpretative guidance to PMRA is at best a somewhat helpful accountability checklist. But the Court's guidance will not assist the transformation of PMRA. It will not magically provide the capacity, competence, and culture that PMRA sorely lacks, but which PMRA needs, to administer the *Pest Control Products Act* in the public interest. Reviewing courts can assist administrative law reform by acknowledging these limits, as well as their own.

---

[38] Roderick A Macdonald, "Call-Centre Government: For the Rule of Law, Press #" (2005) 55 University of Toronto Law Journal 449 at 474.
[39] *Ibid* at 494.
[40] A recent post-*Vavilov* case in point is *Bastien v University of Toronto,* 2021 ONSC 4854 (Div Ct) at paras 51-55.