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The COVID-19 Pandemic and the Doctrine of Frustration of Contract

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Introduction

This article examines whether litigants in Ontario have generally been successful in claiming that the COVID-19 pandemic and associated lockdowns have frustrated their contracts such that they are entitled to relief from their contractual obligations under the doctrine of frustration of contract. Spoiler alert: they have not.

The doctrine of frustration of contract applies where an unforeseeable, supervening event occurs that radically alters the nature of the obligations set out in a contract.

At first blush, an unprecedented global pandemic that has caused widespread disruption to businesses in Ontario may seem like precisely the type of supervening event that is contemplated by this doctrine. However, recent cases in which parties claim that the pandemic has frustrated their contracts underscore that the doctrine of frustration continues to apply in only rare circumstances and courts will generally hold parties to their bargains.

The doctrine of frustration of contract

The doctrine of frustration of contract was developed as a response to the rigid common-law rule that required performance of a contract, or liability in damages, even if performance became impossible, regardless of the reason.[1]

The modern doctrine of frustration was clarified by the Supreme Court of Canada in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58. As the Court explained, "[f]rustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes 'a thing radically different from that which was undertaken by the contract.'"[2]

Courts will intervene to relieve the parties of their bargain where a supervening event has occurred without the fault of either party. The supervening event must alter the nature of the contractual obligations "to such an extent that to compel performance despite the new and changed circumstances would be to order the appellant to do something radically different from what the parties agreed to under the […] contract."[3]

Frustration of contract is notoriously difficult to establish, and courts have limited its application to a very narrow set of circumstances. However, there is good reason for its limited

[1] *Capital Quality Homes Ltd. v Colwyn Construction Ltd.* (1976), 9 OR (2d) 617, 61 DLR (3d) 385.
[2] *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 SCR 943 at para 53.
[3] *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 SCR 943 at para 55.

application. The doctrine clashes with the fundamental principle of contract law that parties should be held to the bargains that they make. Frustration is a compromise of that fundamental principle, and it aims to respect the allocation of risk negotiated by the parties to the contract. Only in very limited circumstances, where "the occurrence of the unexpected event is so much outside the range of risks that the agreement allocates – so fundamental a piece of the framework within which the bargain was struck has dropped out – that the values favouring enforcement are outweighed."[4]

Recent cases invoking the pandemic as a frustrating event

A review of several cases in which litigants have claimed that the COVID-19 pandemic frustrated their contracts demonstrates that this doctrine remains one of limited application.

In *Fsc (Annex) Limited Partnership v Adi 64 Prince Arthur L.P,*[5] Forgestone and Adi were partners in a joint venture in a luxury condominium development project. Adi agreed to purchase Forgestone's interest in the development on January 9, 2020, with a closing date of April 8, 2020.

On March 25, 2020, Adi advised that it would not be able to close on April 8, 2020 due to the "unforeseeable" circumstances caused by the COVID-19 pandemic. In response, Forgestone brought an application for specific performance. Adi argued that the agreement to purchase Forgestone's interest had been frustrated by the unforeseeable economic downturn caused by the pandemic that made obtaining financing for the purchase impossible.

Koehnen J. disagreed for two reasons. First, the obligation to purchase was not conditional on the ability to obtain financing. Adi had not made any considerable efforts to obtain financing in the three months between agreeing to purchase Forgestone's interest and the government of Ontario's declaration of a state of emergency on March 17, 2020. Second, "[w]hile it may be that we have not experienced a pandemic of this proportion in our lifetimes, restrictions on the availability of credit are not uncommon."[6] It would have been "entirely unfair to let Adi exercise the purchase option and then let it claim frustration when it could not obtain financing as a result of an economic downturn," which is "an inherent risk in any purchase agreement".[7]

In *RBC v. 974585 Canada Corp. et al.*[8] and *Bank of Montreal v. 2643612 Ontario Ltd.*,[9] two debt recovery actions, the pandemic and accompanying lockdowns were held not to have frustrated the lending agreements at issue. McCarthy J. held in *RBC* that there was nothing about the pandemic and lockdowns that radically altered the fundamental nature of the lending agreement.[10] Moreover, there was no evidence that the pandemic caused the debtor's default.

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[4] S.M. Waddams, *The Law of* Contracts, 4th ed. (Toronto: Canada Law Book Inc.) at para 365.
[5] 2020 ONSC 5055.
[6] *FSC (Annex) Limited Partnership v ADI 64 Prince Arthur L.P.*, 2020 ONSC 5055 at para 25.
[7] *FSC (Annex) Limited Partnership v ADI 64 Prince Arthur L.P.*, 2020 ONSC 5055 at para 27.
[8] 2021 ONSC 2908.
[9] 2021 ONSC 4401.
[10] *RBC v 974585 Canada Corp. et al.*, 2021 ONSC 2908 at para 19.

The business was in dire financial straights before the pandemic began. Likewise, Vermette J. held in *Bank of Montreal* that the pandemic and lockdowns did not render the obligations in the loan agreement at issue, which were simply to make specific payments on specified dates, something "radically different" from what the parties agreed to.[11]

The decision in *Sub-Prime Mortgage Corporation v. Kaweesa*[12] demonstrates that the COVID-19 pandemic cannot be used as a "trump card" without evidence regarding the specific impact on the obligations in the contract that are said to be impossible to perform. In *Kaweesa*, the plaintiffs brought a motion to enforce a settlement agreement in respect of a mortgage enforcement action. The defendants argued that the settlement agreement, which provided for a payment by the defendants to the plaintiffs in exchange for an assignment or discharge of their mortgages, had been frustrated by the pandemic and lockdowns. Stinson J. disagreed. The ongoing pandemic and lockdown did not radically alter the obligations in the settlement agreement, which was merely an agreement to pay a specified sum on a specified date, in exchange for specific actions by the plaintiffs. Moreover, the "supposed supervening event – the pandemic – was contemplated by the parties at the time of contracting, since it was ongoing then…but the parties deliberately chose not to provide for it in their contract."[13] Frustration therefore could not apply.

Mew J. arrived at the same conclusion in the commercial leasing context. In *Braebury Development Corporation v. Gap (Canada) Inc.*,[14] a landlord brought a summary judgment motion against a tenant, Gap Canada, seeking to recover arrears of rent for April to September 2020. Gap Canada claimed the purpose of the lease was frustrated by the pandemic and public health restrictions that caused Gap Canada to shut down its store at the premises. Mew J. granted the landlord's summary judgment motion. A force majeure clause in the lease excused performance of certain obligations where the party was hindered by "restrictive governmental laws or regulations" beyond the party's control, but it did not excuse the tenant from prompt payment of rent. As such, the clause did not apply.

Frustration did not apply to excuse the non-payment of rent either. Gap Canada was not required to operate its store under the lease's terms, so its inability to do so did not "radically alter" the obligations in the lease. Finally, the events covered by the force majeure clause were contemplated by the parties at the time the contract was made and therefore could not be said to be unforeseeable.

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[11] *Bank of Montreal v. 2643612 Ontario Ltd.*, 2021 ONSC 4401 at para 17.
[12] 2021 ONSC 739.
[13] *Sub-Prime Mortgage Corporation v. Kaweesa*, 2021 ONSC 739 at para 29, affirmed *Sub-Prime Mortgage Corporation v. Kaweesa*, 2021 ONCA 215 at para 26.
[14] 2021 ONSC 6210.

Conclusion

It is impossible to say that the COVID-19 pandemic would never be considered a frustrating event. Each case necessarily involves the fact-specific task of contractual interpretation and the fact-specific determination of the impact of the event on the obligations in the contract at issue.

However, the recent cases confirm that not even an unprecedented global health crisis will cause the courts to deviate from the fundamental principle that parties should be held to their bargains. Where parties have voluntarily allocated risk between themselves in a contract, the court will be reticent to intervene, particularly where the pandemic merely makes the contract more difficult or expensive, as opposed to impossible, to perform.

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OFNLP and the Scope of "Surrounding Circumstances" in Contract Interpretation

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One of the Honourable Mahmud Jamal's last decisions as a justice of the Court of Appeal for Ontario was *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*[1]—a case involving the interpretation of a contract in the context of a *sui generis* relationship between the government and First Nations. In *OFNLP*, the Court of Appeal considered an arbitration panel's use of evidence of pre-contractual negotiations as an aid to interpret the financing agreement at issue.

As a historical rule, drafts and discussions involved in reaching a written contract are not relevant to the contractual interpretation exercise.[2] However, in the eight years since the Supreme Court of Canada did away with the historical approach to interpreting contracts in *Sattva Capital Corp v Creston Moly Corp*,[3] courts have grappled with the question of whether pre-contractual negotiations may be considered as part of the relevant "surrounding circumstances" when interpreting a contract.

Some have relied on the *OFNLP* decision to suggest that it is appropriate in all cases for triers of fact to look to the pre-contractual negotiations between parties to interpret an agreement. We suggest that the precedential value of the *OFNLP* decision is more limited.[4]

Background

In 2008, the Province of Ontario and the Ontario Lottery and Gaming Corporation ("OLG") entered into a Gaming Revenue Sharing and Financial Agreement ("GRSFA") with a limited partnership of 132 of the First Nations in Ontario (the "First Nations Partnership"), which entitled the First Nations Partnership to a defined annual share of the revenue generated from gaming carried on in Ontario.[5] Specifically, the GRSFA provided that the First Nations Partnership would receive 1.7% of Gross Revenue based on three revenue sources: (1) gaming revenue from lotteries, slots, and table games from operations conducted and managed by OLG; (2) revenues from non-gaming activities ancillary to those operations; and (3) the retail value

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[1] *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, 2021 ONCA 592 [***OFNLP ONCA***].

[2] This is known as the common law parol evidence rule. See *Indian Molybdenum Ltd v The King*, [1951] 3 DLR 497 (SCC) at 503, which is referred to as binding authority in *Wesbell Networks Inc v Bell Canada*, 2015 ONCA 33 at para 13.

[3] *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 [***Sattva***].

[4] Please note that discussions about the standard of review and honour of the Crown doctrines are beyond the scope of this paper.

[5] Arbitration Reasons for Decision dated March 27, 2019 [***Arbitration Decision***] at paras 1-2, 8.

of accommodation, food and beverage services, and other services provided to gaming patrons on a complimentary basis to encourage them to visit and stay at the gaming sites.[6]

A few years later and without notice to the First Nations Partnership, OLG outsourced its non-gaming amenities to private operators as part of a "modernization" process and stopped paying two of the three types of revenue under the GRSFA.[7] OLG and Ontario argued that the GRSFA did not entitle the First Nations Partnership to revenues that neither Ontario nor OLG received.[8] The First Nations Partnership commenced arbitration.

The Arbitration Decision

The arbitration lasted ten days and resulted in a 385-paragraph award in which the majority of the panel ruled that Ontario and OLG breached the GRSFA. Modernization did not relieve them of their payment obligation to share 1.7% of the three revenue sources that existed when they signed the GRSFA in 2008.[9]

The dissenting panel member described Ontario and OLG's unilateral changes to the operation of the GRSFA as "breathtaking in the age of reconciliation",[10] but held that the First Nations Partnership had no right to share in revenues that OLG did not receive. He also found that the majority's interpretation relied on inadmissible evidence of the parties' negotiations.

At the arbitration, the parties led evidence about (i) their history of litigation over revenue sharing, (ii) their shared objective of locking-in three identified revenue streams to ensure stable, predictable, long-term funds for First Nations' communities, and (iii) Ontario's commitment not to convert revenues received to the final account of the Province into revenues that were not.[11]

Notably, the GRSFA negotiations had two phases: the Peterson phase and the Bryant phase. The panel majority considered evidence from both, including: a Term Sheet signed by the negotiating teams that set out a base definition for "Gross Revenue", an Agreement in Principle that outlined the three agreed-upon revenue components, correspondence between the First Nations Partnership and Ontario representatives, correspondence between Chief Toulouse and Minister Bryant, contemporaneous handwritten notes from others involved about the components of Gross Revenue, and affidavit evidence from Minister Bryant about what was said in the final month to build trust between the First Nations Partnership and Ontario.

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[6] Arbitration Decision at para 3.
[7] Arbitration Decision at para 4.
[8] Arbitration Decision at para 114.
[9] Arbitration Decision at para 258.
[10] Arbitration Decision at para 365.
[11] *OFNLP ONCA* at para 64.

At the final meeting, Minister Bryant made the following statement:

> Over 25 years this is a projected $3 billion agreement. It doesn't change, no matter who the Premier is, no matter who the Minister of Aboriginal Affairs is, no matter what colour the Government is…this is an agreement and it provides stability of revenue for 25 years…[I]n the commercial agreement, the old one, there wasn't the respect in that agreement that is deserved in a Nation-to-Nation relationship. So this is an important agreement as well because it's a clear indication, as clear an indication from the Government, not in words, but in deeds and in rights and in dollars, as to our commitment to a new relationship based upon respect and autonomy.[12]

The panel majority held that evidence from the Peterson phase was evidence of the shared understanding of the parties of the components of Gross Revenue that they agreed to in the Agreement in Principle. It was not evidence of negotiations seeking to reach agreement nor evidence of the subjective intention of either party.[13] While the Bryant phase evidence did consist of discussions that took place during the final negotiations of the GRSFA, the panel deemed this admissible as objective evidence of the shared understanding of already settled contract language.[14]

The ONSC Decision

On appeal to the Superior Court of Justice,[15] Ontario and OLG argued that the panel majority erred in admitting and considering extrinsic evidence when interpreting the GRSFA.

The late Justice Hainey rejected this argument, holding that the "witnesses were not relied upon by the majority for what their subjective intention was but rather their evidence was relied upon by the majority to establish the statements made to each other during the negotiations of the GRSFA and their mutual understanding based upon those statements".[16] The shared understanding of the parties is admissible as part of the surrounding circumstances.[17]

The ONCA Decision

Among other issues, Ontario and OLG argued at the Court of Appeal that the appeal judge erred in law by failing to apply the entire agreement clause under section 1.10 of the GRSFA and by

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[12] Arbitration Decision at para 52.
[13] Arbitration Decision at para 179.
[14] Arbitration Decision at para 189.
[15] *Ontario First Nations (2008) Limited Partnership v Ontario Lottery And Gaming Corporation*, 2020 ONSC 1516 [***OFNLP ONSC***]
[16] *OFNLP ONSC* at para 98.
[17] *OFNLP ONSC* at para 96. See also *Canada (Attorney General) v Fontaine*, 2017 SCC 47.

failing to correct the panel majority's decision to admit extrinsic evidence that overwhelmed the words of the GRSFA.[18]

The Court of Appeal rejected this submission by using principles of contractual interpretation laid out in *Sattva*, and more recently, *Corner Brook (City) v Bailey*:[19]

- An entire agreement clause alone does not prevent a court from considering admissible evidence of the surrounding circumstances at the time of contract formation because the surrounding circumstances are relevant in interpreting a contract.[20]

- The nature of the evidence that may be considered as part of the surrounding circumstances will vary from case to case, but should include only "objective evidence of the background facts at the time of the execution of the contract". This is a question of fact.[21]

- The purpose of considering the surrounding circumstances is not to add to, contradict, or vary the terms of the agreement but rather use them as an interpretive aid to determine the meaning of the words in dispute. The surrounding circumstances should never be allowed to overwhelm the words of the agreement.[22]

The Court of Appeal saw no error in how the surrounding circumstances were considered in this matter. The circumstances helped to place the GRSFA "in its proper setting and understand the genesis of the transaction, the background, and the context".[23]

Takeaway

OFNLP teaches that evidence of the factual matrix may include evidence of the parties' negotiations and correspondence at the time they executed a contract. Relevant background and context are often essential to understand contractual language.[24] However, *OFNLP*—decided by three members of the Court of Appeal as opposed to the usual five when it is asked to decline to follow a precedential decision—does not purport to change the law regarding the presumptive inadmissibility of pre-contractual negotiations.

The arbitration panel majority was explicit in its reasons that it was not using the extrinsic evidence of the negotiations of the GRSFA as parol evidence, but rather to identify the parties' shared objective understanding when they agreed to specific contractual terms. It was clearly attuned to the inadmissibility of evidence of a party's subjective intention.

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[18] *OFNLP ONCA* at para 44.
[19] *Corner Brook (City) v Bailey*, 2021 SCC 29 [***Corner Brook***].
[20] *OFNLP ONCA* at para 62; *Sattva* at para 47. See also *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157.
[21] *OFNLP ONCA* at para 46; *Sattva* at para 58.
[22] *OFNLP ONCA* at para 62; *Sattva* at para 57.
[23] *OFNLP ONCA* at para 64.
[24] *OFNLP ONCA* at para 62.

The Supreme Court has acknowledged this tension between the modern approach to contractual interpretation directed by *Sattva*, and the traditional rule that evidence of negotiations is inadmissible when interpreting a contract, but opted to leave the question of "whether, and if so, in what circumstances, negotiations will be admissible in interpreting a contract" for another day.[25]

At the very least, *OFNLP* presents advocates with an example of such a circumstance. It may also mark further erosion of the parol evidence rule. What is clear on the state of the law at present, however, is that extrinsic evidence can only be used to help understand the parties' objective mutual intentions and background facts leading to an agreement so long as such evidence is not used to overwhelm the words of the agreement or to create a new agreement.

[25] *Corner Brook* at paras 56-57.

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"There is no Afterlife for Administrative Monetary Penalties after Bankruptcy"

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A securities broker may be alleged to have defrauded investors by making false statements regarding the use of their funds, and by using invested funds for improper purposes.[1] In the regulatory context, the securities broker may face restrictions on professional activities or an administrative monetary penalty ("AMP") of not more than a $1 million for each failure to comply.

Following the imposition of a significant AMP, the same securities broker may think that she was fortunate that she was not prosecuted for fraud under the *Criminal Code*. She may also take some solace in the thought that the AMP, unlike a criminal fine in relation to fraudulent conduct, would not survive a pending bankruptcy. This would enable her to get on her feet again. Regulators may take a different view, and will likely argue that extinguishing the AMP would undermine the deterrent effect of the penalty imposed. If the penalty does not survive bankruptcy, the person in contravention of the law need only declare bankruptcy to avoid the consequences of their bad conduct.[2]

a. Overview

The question of AMPs in the afterlife of bankruptcy was addressed by the Alberta Court of Appeal in late 2021 in the decision in *Alberta Securities Commission v. Hennig*.[3] The Court held that AMPs for contraventions of securities laws related to misrepresentations are extinguished by a bankruptcy. The Court of Appeal majority (Watson and Khullar JJA) held that exceptions to the release of liabilities under s. 178(1) of the *Bankruptcy and Insolvency Act* ("BIA") "should be construed narrowly and applied only in clear cases."[4]

There are policy implications of the finding that there is no afterlife for AMPs, unlike criminal fines for fraudulent conduct, after a bankruptcy. From a policy perspective, if regulators choose to pursue the AMP route in relation to fraud or other potentially criminal conduct instead of laying criminal or regulatory charges, they risk not being able to collect the AMP.

b. Facts in *Hennig*

The details of the *Hennig* decision offer insight into the comparison of AMPs to criminal offences. A panel of the Alberta Securities Commission ("ASC") imposed on Mr Hennig a

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[1] *Meharchand (Re)*, 2019 ONSEC 7, 42 O.S.C.B. 1135, 2019 CarswellOnt 1504 (Ont. Securities Comm.)
[2] *Alberta Securities Commission v. Hennig* [2021] A.J. No. 1667 | 2021 ABCA 411 at para 100 [*Hennig*].
[3] *Ibid.*
[4] *Ibid* at para 25.

permanent ban from serving as a director and/or officer of any issuer; a 20-year cease trade and denial of exemptions order; and required payment of an administrative penalty of $400,000 and hearing costs of $175,000.

The administrative penalty arose from the findings of a panel of the ASC that Hennig was responsible for misrepresentations in the financial statements of a public company of which he was a director and officer. Hennig was alleged to have obtained financial benefits as a result of non-disclosure of material facts. It was claimed that he participated in market manipulation that resulted in artificial prices for another company, and that he made ongoing misrepresentations to Commission staff, all contrary to the public interest. After 38 hearing days and testimony from 24 witnesses, an ASC Panel concluded that Mr Hennig had contravened Alberta securities laws or acted contrary to the public interest or both. Specific findings of fact included that financial statements that were not prepared in accordance with Canadian generally accepted accounting principles ("GAAP") contained misrepresentations and that Hennig made misrepresentations to staff.

An important point, with respect to the potential precedent set by this case, is that at "no time did the ASC specifically allege that Mr Hennig or the other respondents engaged in fraud. Section 93(1) of the Securities Act creates a statutory prohibition of fraud, and counsel for the ASC confirmed during the hearing of this appeal that the ASC could have alleged that Mr Hennig breached this provision at the relevant time."[5]

The decision of the Commission was filed and certified by the Court of Queen's Bench and thus had the same force and effect as if it were a judgment of the Court of Queen's Bench pursuant to s. 200 of the *Securities Act*.

An application by the ASC sought a declaration that the administrative penalty levied against Hennig survived his discharge as a bankrupt pursuant to ss. 178(1)(a), (d) and (e) of the *BIA*.[6] The application was granted at first instance and then reversed on appeal. Accordingly, the debt was released upon discharge.

c. Bankruptcy and Insolvency Act

As a basic principle, a bankrupt is released from all claims provable in bankruptcy by an order of discharge: s. 178(2) of the *BIA*. However, s. 178(1) of the BIA sets out eight classes of exceptions to that rule. Relevant to the application in *Hennig* were ss. 178(1)(a), (d) and (e) of the BIA, which provide that an order of discharge does not release the bankrupt from:

> (a) any fine, penalty, restitution order or other order similar in nature imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

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[5] *Ibid* at para 34.
[6] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

(b) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity; or

(c) any debt or liability arising from obtaining property or services by false pretenses or fraudulent misrepresentation.

The importance of the *Hennig* decision is underscored by the observation by the Alberta Court of Appeal that whether an administrative penalty and costs order imposed by a securities commission and registered as a judgment with a superior court can survive discharge of a bankrupt debtor has not been addressed by a Canadian appellate court until now.

Within the context of the *BIA* there are two general goals: to provide for the equitable distribution of a bankrupt's assets among creditors and to facilitate a bankrupt's financial rehabilitation. The purpose of s. 178 has been described as giving the debtor "a fresh start and enabling the debtor to become a contributing and useful member of the community, including the business community".[7]

d. Fines and penalties imposed by a Court in respect of an offence

Section 178(1) a) of the *BIA* provides that an order of discharge does not release the bankrupt from "any fine, penalty, restitution order or other order similar in nature imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail". The Court in *Hennig* comments that exempting criminal fines and penalties from the ordinary operation of bankruptcy proceedings is justified because "as a matter of principle, criminal courts should not be subjected to the control of the civil courts."[8]

The Alberta Court of Appeal reviews the jurisprudence concerning the characterization of AMPs as being neither remedial nor punitive, but preventative: "First, the administrative penalty is neither remedial nor punitive, but preventative: *Cartaway Resources Corp (Re),* 2004 SCC 26 at paras 55, 60."[9] Accordingly, the ASC did not impose the administrative penalty and the costs order to punish Mr Hennig but to prevent future misconduct, nor did it impose them in criminal or quasi-criminal proceedings.

The Court notes that the ASC could have referred the matter to the Crown to lay charges against Mr Hennig for the offence of contravening securities laws under s 194 of the *Securities Act* - a quasi-criminal proceeding - but it chose not to. Instead, it took the regulatory path.

The reference in section 178(1)(a) to any fine, penalty, restitution order or other order similar in nature imposed by a ***court in respect of an offence*** reminds the reader that an offence

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[7] *Hennig, supra* note 2, at para 16.
[8] *Ibid* at para 49.
[9] *Ibid* at para 50.

would have been proved beyond a reasonable doubt. Moreover, any type of offence qualifies under this section.

e. Debts or liabilities arising out of fraud or fraudulent misrepresentation

Sections 178(1) (d) and (e) do not refer to offences. By distinction, they must apply to something else, such as a civil court finding of fraud in a fiduciary capacity or finding of fraudulent misrepresentation. Subsections (d) and (e) do not specify the mechanism or vehicle for a finding in relation to fraudulent conduct. The Court of Appeal in *Hennig* points out that debts imposed by provincial regulatory bodies are not specifically identified in s. 178(1).[10]

In a finding under ss. 178(1) (d) and (e), in the absence of an offence, arguably the balance of probabilities standard applies. Even though fraud is involved, this does not mean that there is a higher "clear and compelling standard" of proof, as this standard has been subsumed within the balance of probabilities standard unless legislation specifies otherwise.[11]

The comparison between ss. 178(1)(a) and (d) and (e) thus create some inconsistency with respect to the standard of proof required. While section (a) refers to offences that must be by definition proven beyond a reasonable doubt (or at least the *actus reus* in regulatory offences) sections (d) and (e) refer to fraudulent conduct, but the inference is that it need only be proven on the balance of probabilities standard.

If the finding of an administrative tribunal would qualify under ss. 178 (1) (d) and (e), it must be remembered that such a finding would be made with lower procedural protections than those in a court, including different standards for the receipt of evidence. There may also be a constitutional division of powers issue. It might be asked, how can a provincially appointed administrative tribunal make an order that is binding under federal legislation such as the *BIA*? (This does not of course impact federal Tribunals such as the Competition Tribunal).

f. Three issues under section 178(1)(e)

The Court of Appeal in *Hennig* reviewed the potential application of s. 178(1)(e) of the *BIA* which provides that an order of discharge does not release the bankrupt from "any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim."

The Court set out three issues involved in the s.178(1)(e) analysis:

(1) Did Mr Hennig make fraudulent statements for the purpose of s. 178(1)(e)?

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[10] *Ibid* at para 72.

[11] Todd Archibald and Kenneth Jull, "Clear and Convincing Evidence Cannot Reside in the House of Balance or Probabilities: A Scientific Approach" (2021) 51 *The Advocates Quarterly* 315.

(2) What kind of link is required between the debt and the fraud? Is that link made out in this case?

(3) Given that property must be transferred as a result of the fraudulent statement, must it be transferred by the creditor relying on s. 178(1)(e)? Was there a relevant transfer here?

The Court addressed these issues in turn.

(A) **Did Mr Hennig make fraudulent statements?**

The ASC acknowledged during the oral hearing of the appeal that at the relevant time, it had the ability to allege fraud against Mr Hennig but chose not to do so. The majority in Hennig observed that "It is also clear that the ASC is prepared to allege fraud where it thinks it is appropriate: *Alberta Securities Commission v Brost, 2008* ABCA 326." Given that the ASC Panel made no express findings of fraud against Hennig, the majority in *Hennig* somewhat caustically commented: "Almost two decades after the impugned conduct the ASC is claiming Mr Hennig made fraudulent statements, when it never chose to do so before."[12]

The majority concluded that the ASC could not bring itself within the first element of s. 178(1)(e) and does not get the benefit of the exemption. That conclusion in effect ended the matter. The Court goes on, however, in obiter, to answer the next two questions as posed. This is fertile ground for precedent, as the question hangs out there: if staff had alleged fraud and the Securities Commission had found that false pretenses or fraudulent misrepresentation had occurred, would the AMP then survive a bankruptcy?

The Court was clear in shaping the obiter debate: "For ease of exposition, and contrary to the finding in the section above, the following section assumes that the first requirement of s 178(1)(e) was met and Mr Hennig did indeed make fraudulent statements."

(B) **What kind of link is required between the debt and the fraudulent behaviour? Is that link made out in this case?**

The majority found that in addition, the ASC could not meet the second element of s. 178(1)(e)[13] that there must be a "link" between the debt or liability and the fraudulent statement. That link was broken or not tenable in the *Hennig* case because the Securities Commission imposed the AMP only after the impugned conduct had already occurred:

To conclude, the proper interpretive approach to s. 178(1)(e), the policy underlying it and the bulk of the decided cases support the view that the debt is sufficiently linked to the fraud only if the debtor made the fraudulent statements to the creditor who is relying on s. 178(1)(e). A regulatory body imposing an administrative penalty for conduct contrary to the public interest

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[12] *Hennig, supra* note 2, at para 71.
[13] *Ibid* at para 75.

will rarely be able to establish such a link, as typically it only becomes involved after the impugned conduct has already occurred.[14]

The test set out in the above passage sets the bar very high: a regulatory body imposing an administrative penalty for conduct contrary to the public interest "will rarely be able to establish such a link."[15] This high bar leaves the door ajar only slightly, and the Court does not specify what those rare circumstances might be.

The Court in *Hennig* then set a second high bar: the required link between the fraudulent statement and the debt is established only if the debtor makes the fraudulent statement to the creditor relying upon s. 178(1)(e).[16] The Ontario Court of Appeal cited the decision in *Hennig* in relation to this required link, but stated that it was not necessary to consider which view is correct. This case did not involve a regulator.[17]

The majority also dismantled any potential link to misrepresentations made by Hennig and the AMP, as the AMP was based on the underlying misconduct in the market:

> In my view, the fact that Hennig lied to ASC staff does not establish the required link between the fraudulent statements and the ASC's debt. Reading the ASC Panel's decisions realistically, the ASC's debt against Mr Hennig is not based on Mr Hennig's lies to ASC staff. It is based on Mr Hennig's misleading statements in the capital markets and other market wrongdoing.[18]

Perhaps this leaves to another door being open just slightly. If in the future a Securities Commission based its AMP on misrepresentations made to the Commission, as a separate head of liability, this might potentially satisfy that link.

(C) Who must transfer property as a result of the fraudulent statement? Was there a relevant transfer here?

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[14] *Ibid* at para 93.
[15] *Ibid* at para 93.
[16] *Ibid* at paras 78, 90-93.
[17] *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.* [2021] O.J. No. 7199 | 2021 ONCA 925. Justice Zarnett states in footnote 5: "There is a view that even for the false pretences branch of s. 178(1)(e), the deceitful statement must have been made to the creditor: see *Alberta Securities Commission v. Hennig, 2021 ABCA 411*, at paras. 90-93. It is not necessary to consider which view is correct. The appellant presented his case on the basis that false pretences could include a deceitful statement to a third party, as did the respondent who does not point to any false statements made to it." In *Shaver-Kudell* the Court held that although the liability arose from morally unacceptable conduct of the appellant, that is insufficient to fit it within the exception in s. 178(1)(e) of the BIA. No matter how reprehensible telling falsehoods on examination for discovery may be, it does not turn a debt or liability into one resulting from obtaining property or services by deceitful statements.(paragraph 22). Although lying on examination for discovery reflects on whether the appellant was honest, it is not the type of false statement that satisfies s. 178(1)(e), which requires a deceitful statement by which the debtor obtained property or services, causing the debt or liability of the creditor to arise.(paragraph 44).
[18] *Hennig, supra* note 2, at para 96.

The final element of s 178(1)(e) relates to the transfer of property. It is clear from the language of s 178(1)(e) that the debt must result from "obtaining property" by false pretences or fraudulent misrepresentation.

The majority of the Court ruled that it was unnecessary to address this issue because the conclusions to this point established that neither 178(1)(a) nor (e) applied to the ASC's debt. Since the parties' submissions did not cover this topic in detail, the Court adopted the wiser course to leave its determination to another appeal where it would make a difference to the outcome.

Pentelechuk JA concurred in the result. She agreed with the majority's holding that s 178(1)(a) was not engaged by the ASC's administrative penalty. She disagreed with the majority's holding that the ASC had not established fraud by Mr. Hennig within the contemplation of s 178(1)(e), however, she agreed with the majority's holding that s 178(1)(e) was not engaged because the ASC was not itself victimized by Mr. Hennig.

g. Policy implications

The Alberta Court of Appeal went beyond basic statutory interpretation and grappled with the policy implications of AMPs not having an afterlife after bankruptcy:

> The ASC argued that a potential negative impact of allowing the appeal would be to undermine the deterrent effect of an administrative penalty imposed on those who breach securities law. If the penalty does not survive bankruptcy, Mr Hennig, or anyone in his position, need only declare bankruptcy to avoid the consequences of their bad conduct.[19]

The majority of the Court of Appeal articulates two responses to this concern:

> First, the ASC has many remedial options available to it under the Securities Act, and as in this case, the administrative penalty was only one of the sanctions imposed. The other non-monetary sanctions survive bankruptcy. There is a permanent ban on Mr Hennig serving as a director and/or officer of any issuer, and a 20-year cease trading in or purchasing any securities or exchange contracts and denial of using any exemption order.
>
> Second, finding that a bankrupt debtor contravened securities legislation and acted contrary to the public interest usually entails morally bad conduct by the debtor. And as has been discussed above, alone that is not enough to bring the debt within s 178(1)(e). It seems that what the ASC is seeking is a general exemption from release upon discharge for the administrative penalties imposed by a securities regulator. This would create a new category of exemption under s 178(1) which falls within the purview of Parliament, not this Court.

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[19] *Ibid* at para 100.

> The ASC's debt is neither "a fine, penalty, restitution order or other order similar in nature ... imposed by a court in respect of an offence" (s 178(1)(a)) nor a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" (s 178(1)(e)). Accordingly, it was released when Mr Hennig was discharged from bankruptcy.[20]

Pentelechuk JA concurred in the result. She agreed with the majority's holding that s 178(1)(a) was not engaged by the ASC's administrative penalty. She disagreed with the majority's holding that the ASC had not established fraud by Mr. Hennig within the contemplation of s 178(1)(e), however, she agreed with the majority's holding that s 178(1)(e) was not engaged because the ASC was not itself victimized by Mr. Hennig.

In summary the decision in *Hennig* clarifies four main points:

1. the exceptions to the release of liabilities under s 178(1) of the BIA should be construed narrowly and applied only in clear cases;

2. a fine or penalty is only likely to engage s 178(1)(a) if it is imposed in a criminal or quasi-criminal proceeding;

3. section 178(1)(e) applies to liabilities owing to creditors who are directly victimized by the bankrupt debtor's fraudulent statements. There may be a narrow opening to argue in future cases that a regulator can establish such a link. Moreover, if in the future, a regulator based its AMP on misrepresentations made to the regulator, as a separate head of liability, this might potentially satisfy that link.

4. an administrative penalty for conduct against the public interest is unlikely to survive a bankrupt's discharge under s 178(1)(e).[21]

h. Jurisprudence

The lower court decision in *Hennig* was followed by the British Columbia Supreme Court in *Poonian (Re)*.[22] The magnitude of the losses in *Poonian* were significant. The clients lost $7,102,902. The Commission ordered administrative penalties and issued disgorgement orders against the bankrupts, with the result that they owed it $19,095,362. The trustee in bankruptcy reported that their proven liability was $25,184,693. The court engaged in statutory interpretation with the following purposive analysis:

> Third, given the purpose of s 178(1)--to avoid rewarding dishonest behaviour--there is no principled basis to refuse to exempt debts imposed after a hearing before an administrative tribunal such as the Commission Panel. As discussed in the next section,

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[20] *Ibid* at paras 101-103.

[21] Alberta Court of Appeal Overturns Finding that Administrative Penalty Survives Bankruptcy Steven Leitl, Aaron Stephenson and Preston Brasch January 13, 2022 https://www.securitieslitigation.blog/2022/01/alberta-court-of-appeal-overturns-finding-that-administrative-penalty-survives-bankruptcy/

[22] *Poonian (Re)*, 2021 BCSC 555, [2021] B.C.J. No. 609, leave to appeal granted, [2021] B.C.J. No. 1219 [*Poonian*].

> a debt arising from a judgment may be exempted regardless of the strict cause of action in the original pleading: a court will consider whether the bankrupt seeking exemption was an honest but unfortunate debtor, or, rather, fell into liability through reprehensible behaviour. A debt, based in reprehensible behavior, imposed by an administrative body statutorily entrusted to make findings and impose penalties and to which courts grant deference, should be treated equally in our administrative state to a debt arising from a judgment.[23]

The same purposive approach was applied with respect to s. 178(1)(e):

> This returns us to the purpose and essence of s. 178(1) generally, and s. 178(1)(e) specifically. The Court is satisfied that the Poonians' actions were morally unacceptable and harmful to society, such that they should not be rewarded with a release of those debts through the statutory discharge under the BIA. Their orchestrated market manipulation and knowing exploitation of vulnerable investors, with corrosion of public confidence in the securities markets, all evidence the deceit lying at the heart of s. 178(1)(e).[24]

The court in *Poonian* agreed with the Commission that market manipulation (particularly in the form of the multi-party elaborate scheme, involving disguise and aliases) is, at its core, a fraudulent misrepresentation and false pretense. An interesting note is the observation that in order to establish "false pretenses" under this section, the behaviour need not satisfy the *Criminal Code* definition nor satisfy the test for the tort of deceit, which is consistent with the administrative nature of the proceedings.[25]

Of relevance to the status of the AMP proceedings, the Poonians argued that they were not afforded procedural fairness and were denied natural justice before the Commission in the liability and sanctions hearings. Given that the parties in those administrative proceedings were the same parties before the Court in *Poonian*, the doctrines of issue estoppel and *res judicata* applied.

Leave to appeal was granted in *Poonian* and the British Columbia Court of Appeal has yet to weigh in.

i. Recommendations for Reform

The Court in *Hennig* characterized the position taken by the ASC as seeking a general exemption from release upon discharge for the administrative penalties imposed by a securities regulator. The Court observed that this would create a new category of exemption under s. 178(1), which falls within the purview of Parliament, not this Court.

From a reform perspective, the question arises as to whether Parliament ought to consider amending s. 178 to explicitly refer to AMPS such that they would live on in the afterlife after

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[23] *Ibid* at para 92.
[24] *Ibid* at para 112.
[25] *Ibid* at paras 105-106.

bankruptcy in the same way that fines from offences do. We would recommend against this type of amendment for all the reasons that AMPs are different from offences.

AMPs are decided with lower procedural protections than those in a court, including different standards for receipt of evidence. AMPs vary widely in type, nature, seriousness, and administrative processes.

If regulators want penalties to survive bankruptcy, the better vehicle would be to rely on existing regulatory offences or Criminal Code offences that would be prosecuted in a Court, where the actus reus at least is proven beyond a reasonable doubt. The fines obtained in these forums presently live on in the afterlife of bankruptcy under section 178 of the BIA as it now exists. The criminal and regulatory route ensures that those who commit fraud cannot simply declare bankruptcy to avoid the consequences of their bad conduct. This approach would be consistent with a restorative justice pyramid.

Toronto Law Journal

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

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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.

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[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:

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[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;"

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[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.

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[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

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[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.***

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[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.

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[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.

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[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.

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[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.