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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

	)	Counsel:
	)	
KRISTA SMITH,	)	
	)	Michael D. Zacharias
applicant,	)	for the applicant
	)	
-and-	)	
	)	Tom Dobson
THE APPEAL COMMISSION,	)	for the Director of Victim Services
	)	
respondent.	)	
	)	
	)	JUDGMENT DELIVERED:
	)	June 25, 2021

REMPEL, J.

Background

[1] ***The Victims' Bill of Rights***, C.C.S.M. c. V55 (the "***Act***"), is social welfare legislation designed to provide information, services and financial benefits to victims of crime in Manitoba. The financial benefits described under the ***Act*** include compensation for prescription drug expenses incurred by victims that are related to the crimes committed against them.

[2] The applicant, Krista Smith ("Ms. Smith"), is the victim of a horrific crime. There is no dispute about the fact that Ms. Smith suffers from Post-Traumatic Stress Disorder ("PTSD") as a result of the violent crime she endured. Ms. Smith was prescribed medicinal cannabis by her physicians to treat her symptoms of PTSD. The focus of this dispute is whether Ms. Smith can receive compensation for the cost of her prescriptions for medical cannabis.

Framing the Dispute

[3] The director of the compensation program administered under the ***Act*** (the "Director") denied the application Ms. Smith made for coverage of her prescription for medical cannabis. After Ms. Smith filed a request for reconsideration, the Director denied her claim a second time.

[4] Ms. Smith then availed herself of a right to appeal under s. 60(1) of the ***Act***. The respondent (the "Commission") is the statutory body designated to preside over the appeals from the decisions of the Director described in this particular section of the ***Act***. The Commission is a specialist tribunal created under s. 60.2(1) of ***The Workers Compensation Act***, C.C.S.M. c. W200, to deal with a vast array of claims, financial or otherwise, arising from injury or disease. On appeal, the Commission has the statutory power to confirm, vary or rescind the decision of the Director.

[5] In 2018, the Commission issued a written decision unfavourable to Ms. Smith and as required by s. 66 of the ***Act***, the Commission included a notice in its decision informing Ms. Smith of her right to appeal the decision of the Commission under s. 67 of the ***Act***. That particular section of the ***Act*** reads as follows:

> **Appeal to Queen's Bench**
>
> **67(1)**
>
> A person who receives notice under section 66 may, within 30 days, appeal the decision of the appeal board to the Court of Queen's Bench.
>
> **Grounds for appeal**
>
> **67(2)**
>
> An appeal may be taken only on a question of law or jurisdiction.

[6] Counsel for Ms. Smith was candid in admitting that Ms. Smith has no interest in proceeding with her statutory right of appeal under the narrow confines of s. 67(2) of the ***Act*** that limit appeals from the Commission only to questions of law or jurisdiction. Instead, Ms. Smith wishes to proceed with a review of the decision of the Commission based on the standard of reasonableness.

[7] The position of Ms. Smith is that her constitutional right to judicial review on the reasonableness standard is not precluded by the legislative scheme for appeals circumscribed by the ***Act*** and this court has the concurrent jurisdiction to conduct a judicial review "on the merits" of the Commission's decision before her statutory right of appeal is exhausted.

[8] The Director frames its opposition to this application in stark terms and submits Ms. Smith cannot challenge an administrative decision while remaining willfully blind to an appeal process that the legislature has set out within a tightly confined statutory framework. Since Ms. Smith has not exhausted her right to appeal the decision to this court as provided in the ***Act***, the Director maintains I should refuse my discretion to engage in a judicial review. Failing to do so would invite anyone who is unhappy with a decision rendered by the Commission to ignore not only the appeal process set out in the

Act, but also the limits established by the legislature as to what kinds of appeals can be brought before this court under the statutory framework the ***Act*** provides.

Relief Sought

[9] Ms. Smith argues that the decision of the Commission cannot survive a review on the standard of reasonableness and that it should be set aside. Thereafter, Ms. Smith takes the position the matter should be remitted to a differently constituted panel of the Commission for reconsideration under specific directions from this court confirming that the ***Act*** makes the cost of medical cannabis compensable to all victims of crime, including Ms. Smith in particular.

Decision

[10] I am dismissing the application. My reasons follow.

Design of the Legislative Framework

[11] Sections 59 to 67 of the ***Act*** provide for a comprehensive process that details the decision making process the Director must follow and how appeals to the Commission follow from those decisions. Appeals to this court are also outlined in these sections. I am attaching these sections of the ***Act*** as Schedule A to these reasons for ease of reference.

[12] The design choice of the legislature, as reflected in these sections, delegates decisions about compensation to non-judicial decision makers (the Director and the Commission) and then imposes strict limitations on this court with respect to the kinds of appeals that can be heard from those administrative decisions.

First Principles – Judicial Review when a Statutory Appeal Mechanism is Explicitly Provided

[13] In ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65 (CanLII), the Supreme Court of Canada speaks to the "presumption" that reasonableness is the applicable standard on judicial review, but like all presumptions it is rebuttable (paras. 23-26.) However, ***Vavilov*** also makes it clear that before consideration is given to the application of the presumption of reasonableness or its rebuttal, the reviewing court must be alive to the nature of any confines placed on appeals by the applicable legislation. At paragraph 23 of ***Vavilov***, the Supreme Court of Canada writes:

> A. *Presumption That Reasonableness Is the Applicable Standard*
>
> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[14] The balancing act between judicial restraint in the face of a statutory appeal mechanism and protecting the right of judicial review set out in s. 96 of ***The Constitution Act, 1867*** (UK) 30 & 31 Victoria, c 3, is described in the following way in ***Vavilov***:

> (2) Statutory Appeal Mechanisms
>
> [36] We have reaffirmed that, to the extent possible, the standard of review analysis requires courts to give effect to the legislature's institutional design choices to delegate authority through statute. In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision. Just as a legislature may, within constitutional limits, insulate

> administrative decisions from judicial interference, it may also choose to establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery": *Seneca College of Applied Arts and Technology v. Bhadauria*, 1981 CanLII 29 (SCC), [1981] 2 S.C.R. 181, at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court. This intention should be given effect. As noted by the intervener Attorney General of Quebec in its factum, [TRANSLATION] "[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place": para. 2.

[15] In ***Manitoba Government and General Employees' Union v. The Minister of Finance for the Government***, 2021 MBCA 36 (CanLII), the Manitoba Court of Appeal neatly summarizes the applicable standard of review in cases where an appeal mechanism is explicitly provided as follows:

> [20] In *Vavilov*, the majority of the Supreme Court of Canada set out certain categories of judicial review. If there is a legislated standard of review, then that is the standard to be applied by the reviewing court. If the matter is a statutory appeal, then the appellate standards of review apply.
>
> [21] However, where those two circumstances are not present, the Supreme Court concluded that reasonableness is the presumptive standard of review whenever a court conducts a judicial review of the merits of an administrative decision unless one of three exceptions is present (see paras 10, 16, 25). Where the matter is a constitutional question, a general question of law of central importance to the legal system as a whole or a question related to the jurisdictional boundaries between two or more administrative bodies, then the reasonableness presumption is displaced, and the correctness standard applies.

[16] I am alive to the fact that the legislature's institutional design choices that circumscribe a statutory right of appeal under the ***Act*** do not necessarily preclude a judicial review on the reasonableness standard. ***Vavilov*** does not shut the door completely to judicial review on a standard other than the one provided by legislation,

but the opening in this doorway is a very narrow one. The key paragraph of ***Vavilov*** confirming this reads:

> [52] Third, we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal. But any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.

Analysis

[17] I do not accept the argument advanced on behalf of Ms. Smith that para. 52 of ***Vavilov*** confirms that a reviewing court, empowered with a particular appellate standard by legislation, also has concurrent jurisdiction to conduct a reasonableness review on every single decision delegated to administrative decision makers. To give effect to this argument would require the appellate court to not only ignore the legislated appellate standard, but also the design of the compensation program created by the legislature.

[18] In her Notice of Application Ms. Smith pays lip service to the statutory appeal mechanism set out in s. 67 of the ***Act*** and characterizes numerous grounds of appeal as errors of law. The alleged errors of law identified by Ms. Smith are in substance questions of fact, or, at best, questions of mixed fact and law. (See paras. 11-19 of ***Richmond Six Limited et al. v. The Assessor for the City of Winnipeg et al.***, 2009 MBCA 58 (CanLII).)

[19] Ms. Smith is deliberately turning her back on the explicit terms of the appeal mechanism circumscribed by the ***Act*** and attempting to challenge the Commission's decision by way of a judicial review on the standard of reasonableness. I am satisfied that the narrow confines for an appeal provided by s. 67(2) of the ***Act*** gives Ms. Smith no room to manoeuver out of the path of the legislated standard of review towards a judicial review based on the standard of reasonableness. The appeal mechanism in s. 67 of the ***Act*** applies to all written notices of decision issued by the Commission under s. 66, including the one received by Ms. Smith. The only kind of appeal open to Ms. Smith under the ***Act*** is one based on errors of law or jurisdiction.

[20] The very narrow opening in the doorway for any possible reasonableness review, set out in para. 52 of ***Vavilov***, is not wide enough to accommodate the argument Ms. Smith is advancing on these facts. I am satisfied that the language of the ***Act***, on the facts before me, insulates the decision of the Commission from any other form of review. The statutory scheme clearly precludes appeals on questions of fact or mixed fact and law.

[21] The language in the ***Act*** cannot be tortured in a way that allows individuals with an explicit statutory right of appeal to simply ignore that right when they conclude that they cannot succeed on the appellate standard provided by the legislature. Ms. Smith is seeking a remedy via judicial review that is clearly prohibited by the ***Act***. Allowing Ms. Smith to proceed with an application for judicial review on the reasonableness standard would sanction an end-run around statutory limits on appeals from decisions of the Commission.

[22] The floodgates argument advanced by the Director is compelling. I am satisfied that allowing a judicial review on the reasonableness standard would undermine the finality of administrative proceedings envisioned by the legislature. Any person receiving a written decision of the Commission under s. 66 of the ***Act*** could simply let the time for appeal pass and then bring an application for judicial review on the reasonableness standard at a time of their choosing.

[23] That kind of tactical maneuvering is contrary to the objects stated in the ***Act***, which seek to provide an accessible, timely and cost-effective mechanism to resolve matters concerning compensation decisions. If Ms. Smith should succeed in this case, there would never be any reason for an applicant to abide by statutory timelines and proceed by way of an appeal under the appellate standard prescribed by the ***Act***.

[24] The dangers of premature judicial intervention in an administrative process were most recently considered in this court by Toews, J. in ***Group Westco Inc. v. Manitoba Chicken Producers et al.***, 2021 MBQB 135 (CanLII). In ***Westco***, Toews, J. quoted at length from the Manitoba Court of Appeal decision in ***Thielmann v. The Association of Professional Engineers and Geoscientists of the Province of Manitoba***, 2020 MBCA 8 (CanLII). At para. 24 of ***Thielmann,*** the Manitoba Court of Appeal writes:

> [24] In the past decade, there has been a significant shift away from early judicial intervention in the work of a tribunal. The general rule with respect to prematurity is that "absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted" (*Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at para 31). Moreover, the exceptional circumstances exception is exceptionally narrow and the threshold for intervention is exceptionally high (*ibid* at para 33).

[25] In ***Thielmann***, at para. 25, the Court of Appeal expresses four concerns arising from premature judicial intervention in an administrative process, that are gleaned from the Supreme Court of Canada decision in ***Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)***, 2012 SCC 10 (CanLII), [2012] 1 SCR 364. Those concerns are that:

a) The reviewing court will be deprived of a fulsome record where the statutory appeal does not proceed before the administrative decision maker;

b) proceeding by judicial review could alter the applicable standard of review;

c) proceeding by judicial review encourages an inefficient multiplicity of proceedings; and

d) proceeding by judicial review may compromise carefully crafted legislative regimes by short-circuiting decision-making roles.

[26] The last three concerns cited above all come into play on the facts in this case.

[27] Under the existing appeal mechanism, Ms. Smith would have been required to identify a question of law or jurisdiction and the applicable standard of review would have been correctness. By abandoning the appeal mechanism, Ms. Smith has inserted the reasonableness standard into the equation, which is clearly contrary to the legislative design, which provides for appeal to this court on questions of law or jurisdiction only.

[28] Apart from undermining the legislative design of the compensation program under the ***Act***, which delegates decision-making authority as to questions of fact to the Commission alone, the tactical approach taken by Ms. Smith would open the floodgates to reasonableness reviews on demand by any aggrieved applicant. This would place a

significant strain on judicial resources, which the legislated scheme is clearly seeking to protect.

[29] The true nature of the application filed by Ms. Smith boils down to a disagreement over a finding of fact by the Commission. This is not an appropriate ground for an appeal to this court under s. 67(2) of the ***Act***. To give effect to the arguments advanced by Ms. Smith would mean the statutory appeal mechanism set out in the ***Act*** is meaningless and it would nullify the legislature's clear intent to limit appeals to this court from decisions rendered by the Commission only on questions of law or jurisdiction. The plain language of the ***Act***, in my view, clearly precludes a reasonableness review in these circumstances.

[30] The principles of statutory interpretation guiding my reading of the ***Act*** are confirmed by the Manitoba Court of Appeal in ***Boles v Director, River East/Transcona***, 2019 MBCA 65 (CanLII), at para. 23:

> [23] As previously indicated, the parties agree on the approach to be taken when interpreting a provision in a statute. The applicable principles include the following:
>
> - Section 6 of *The Interpretation Act* mandates that, "Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects."
>
> - The modern approach to statutory interpretation requires that, "the words of an Act are to be read 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" (*Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21, quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87; see also *Manitoba Housing v Amyotte et al*, 2014 MBCA 54 at paras 50-52).

- The entire context of a provision must be considered before determining whether it is reasonably capable of multiple interpretations. Ambiguity results only "where a statutory provision is subject to differing, but equally plausible, interpretations" (*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 62; see also para 29).

- When interpreting legislation, *Charter* values are considered only where there is a "genuine ambiguity" (*ibid* at para 62).

- Any ambiguities in social welfare legislation "should be resolved in favour of the claimant" (*Finlay v Canada (Minister of Finance)*, 1993 CanLII 129 (SCC), [1993] 1 SCR 1080 at 1114, quoting *Abrahams v Attorney General of Canada*, 1983 CanLII 17 (SCC), [1983] 1 SCR 2 at 10).

Discretion to Refuse Judicial Review

[31] Even if I am wrong in my analysis as noted above, I would exercise my discretion to deny judicial review. Rule 68 of the ***Court of Queen's Bench Rules***, Man. Reg. 553/88 ("***Queen's Bench Rules***") provides judges with a broad discretion on judicial review. In exercising its discretion under Queen's Bench Rule 68, the court may refuse to hear a judicial review application based on "discretionary bars to judicial review". These grounds were summarized by Sara Blake in *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis Canada Inc., 2017), at pp. 258-259:

> C. DISCRETION
>
> [9.48] On judicial review there is no right to a remedy even if all the necessary criteria are met. A court may choose not to grant a remedy to an applicant who is otherwise entitled. Superior courts have discretion when exercising their power of judicial review. The typical grounds upon which the discretion to refuse a remedy is exercised are described below.
>
> [9.49] A common thread is a judicial expectation that a party will fairly exhaust all statutory and administrative processes and, at the end, will not ask the court for review unless a judicial remedy may serve a practical need. …
>
> (See ***Saskatoon (City) v. Wal-Mart Canada Corp.***, 2019 SKCA 3 (CanLII), at para. 34.)

[32] As noted by Sara Blake in the above-noted book, there are a number of typical bars to judicial review, including the existence of an adequate alternate remedy and prematurity. Separate and apart from alternate remedies and prematurity is the overarching question cited by the Supreme Court of Canada in ***Strickland v. Canada (Attorney General)***, 2015 SCC 37 (CanLII), [2015] 2 SCR 713, at para. 44:

> [44] …
>
> … whether the application for relief is appropriately respectful of the statutory framework within which that application is taken and the normal processes provided by that framework and the common law for challenging administrative action. …
>
> [Emphasis in original]

[33] Simply put, Ms. Smith has not exhausted the prescribed administrative process. Ms. Smith initiated an appeal in this court, but has in essence abandoned that appeal in favour of a judicial review. The appropriate legal route for her to take is the statutory right of appeal provided by the ***Act***. The course of action Ms. Smith has chosen is not appropriately respectful of the statutory framework and normal processes provided by that framework.

Conclusion

[34] For all of these reasons I am dismissing the application. Ms. Smith has elected not to proceed with her right of appeal under the legislated standard of review, which limits appeals to questions of law or jurisdiction only. Ms. Smith does not have the option to avoid this legislated appeal standard designed by the ***Act*** and demand a review on the reasonableness standard instead. In these circumstances, I do not have jurisdiction to

engage in a review on the reasonableness standard and even if I did, I would not exercise my discretion to grant it as Ms. Smith has not exhausted her right of appeal.

[35] Counsel may speak to costs if they cannot agree.

REMPEL J.

Schedule A

The Victims' Bill of Rights, C.C.S.M. c. V55

Director to give written notice of decisions

59(1) The director must give written notice

(a) to the applicant of a decision made under section 52 respecting an application for compensation; and

(b) to a person receiving compensation, of a decision affecting the nature or amount of compensation payable to the person.

Notice to include information on reconsideration

59(2) A notice given under subsection (1) shall include information on the right to request a reconsideration under subsection (3).

Right to request reconsideration

59(3) A person who receives notice under subsection (1) and is not satisfied with the decision of the director may, within 60 days after receiving the notice, request that the director reconsider the matter and may, for that purpose, provide additional information to the director.

Director to give written notice of reconsideration

59(4) After reconsidering a matter, including any additional information provided by the person requesting the reconsideration, the director shall give written notice of his or her decision to the person and shall include in the notice information on the right to appeal under section 60.

S.M. 2000, c. 33, s. 7.

Right to appeal decision made on reconsideration

60(1) A person who receives a notice under subsection 59(4) (reconsideration) may appeal the decision to the appeal board within 30 days after receiving the notice.

Extension of time

60(2) The appeal board may extend the time for appeal if it is satisfied that the person appealing has a reasonable excuse for failing to appeal within the time referred to in subsection (1).

S.M. 2000, c. 33, s. 7.

L.G. in C. may appoint or designate appeal body

61 The Lieutenant Governor in Council may designate a board or other body established under another Act of the Legislature, or appoint a board under section 62, to hear appeals made under subsection 60(1).

S.M. 2000, c. 33, s. 7.

Appointment of Compensation Appeal Board

62 The Lieutenant Governor in Council may appoint a board of not more than five members to be known as the Compensation Appeal Board, and may make regulations respecting the board and its operation, including the following:

(a) the composition of the board, including the term of its members and the designation of a chairperson from among the members;

(b) practice and procedure, including quorum and the conduct of hearings.

S.M. 2000, c. 33, s. 7.

Remuneration and expenses of board members

63 Members of the appeal board may be paid remuneration, and may receive reasonable travelling and living expenses while away from their ordinary places of residence in the course of their duties as members of the board, at rates prescribed by regulation.

S.M. 2000, c. 33, s. 7.

Director party to appeal

63.1 The director is a party to an appeal and is entitled to be heard, through counsel or otherwise, at the appeal hearing.

S.M. 2010, c. 45, s. 10.

Powers of appeal board

64(1) The appeal board may confirm, vary or rescind the decision of the director.

Powers of inquiry

64(2) For the purpose of this Act, each member of the appeal board has the powers of a commissioner under Part V of *The Manitoba Evidence Act*.

S.M. 2000, c. 33, s. 7.

Appeal board may request assistance of experts

65 The appeal board may

(a) request persons with special technical knowledge to advise the board on matters relevant to an appeal; and

(b) require an appellant to undergo a medical examination by a physician named or approved by the board.

S.M. 2000, c. 33, s. 7.

Appeal board to give written notice of decision

66 The appeal board shall as soon as practicable give written notice of its decision, and reasons for the decision, to the appellant and shall include in the notice information on the right to appeal under section 67.

S.M. 2000, c. 33, s. 7.

Appeal to Queen's Bench

67(1) A person who receives notice under section 66 may, within 30 days, appeal the decision of the appeal board to the Court of Queen's Bench.

Grounds for appeal

67(2) An appeal may be taken only on a question of law or jurisdiction.

S.M. 2000, c. 33, s. 7.