In the Court of Appeal of Alberta

Citation: Montpetit v Alberta (Director of SafeRoads), 2025 ABCA 154

Date: 20250502
Docket: 2403-0037AC
Registry: Edmonton

Between:

Michael Montpetit

Appellant

- and -

Director of SafeRoads Alberta

Respondent

The Court:

The Honourable Justice Jack Watson
The Honourable Justice William T. de Wit
The Honourable Justice Kevin Feth

Memorandum of Judgment

Appeal from the Decision of
The Honourable Justice C.L. Arcand-Kootenay
Dated and filed the 23rd day of January, 2024
(2024 ABKB 42; Docket number 2203 04344)

Memorandum of Judgement

The Court:

Introduction

[1] On January 14, 2022 the appellant, Michael Montpetit, was issued a Notice of Administrative Penalty (NAP) for impaired driving pursuant to the *Traffic Safety Act*, RSA 2000, c T-6, ss 88.1(1)(a). On February 14, 2022, the SafeRoads Alberta Adjudicator denied his appeal and confirmed the NAP and penalties. The appellant appealed the Adjudicator's decision to the Court of King's Bench and on January 23, 2024, the reviewing justice dismissed his application for judicial review: *Montpetit v Director of SafeRoads Alberta*, 2024 ABKB 42.

[2] The two central questions raised in this appeal are whether a reviewing judge may consider a new issue on judicial review that was not raised before a SafeRoads adjudicator, and if so, whether the record and arguments presented to this judge provided a reasonable basis for exercising that discretion in favor of considering the new issue.

[3] The simple answer to the first question is that a judicial review judge retains the discretion to consider a new issue. While the general rule is that the discretion will only be exercised in exceptional circumstances, there is a no absolute bar to hearing and determining an issue that was not considered by an adjudicator: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-29, [2011] 3 SCR 654 (*Alberta Teachers'*). The discretion to hear (or decline to hear) a new issue for the first time on judicial review is concerned with whether "it would be inappropriate to do so" (at para 22).

[4] As for the second question, the appellant provided insufficient evidence or argument upon which the judicial review justice would reasonably exercise their discretion to hear the new issue proposed. The appeal must be dismissed.

Underlying Facts

[5] At the judicial review hearing, the appellant raised a new issue which had not been raised before the Adjudicator. The new issue concerned the possibility that certain standard provisions were missing from the appellant's NAP and that the omission of those provisions required the NAP to be cancelled. The appellant referred to the case of *Morin v Alberta (Director) of SafeRoads*, 2023 ABKB 200, and argued before the judicial review justice that *Morin* changed the law in a manner that was suggested to be "sufficiently proximate" to the issue raised before the Adjudicator about required information missing on the NAP.

[6] The reviewing justice found she could not hear the issue raised by *Morin* and in her reasons mirrored the wording in *Morin* stating at paragraph 65, "The law is clear that *an issue which was not raised on a review before an adjudicator cannot be raised on judicial review*, see *Isley v Alberta (Director of SafeRoads)*, 2022 ABQB 249, at para 68" (emphasis added).

[7] The reviewing justice did not directly address whether she was exercising her discretion to not consider the issue or whether she was following the literal statement of the law taken from *Morin*. However, we can resolve this appeal without addressing any uncertainty about the approach taken in the court below.

Can a new issue be raised on judicial review?

[8] To the extent various recent Court of King's Bench decisions, including this one, have stated or found that new issues not previously put before the adjudicator "cannot be raised" or that there is an inability to hear new issues in *SafeRoads* matters, this is incorrect. However, as none of these cases came before this Court on appeal, we have been unable to comment on this prohibitive language and reinforce the correct test – until now. Whether a new issue will be heard on judicial review is an exercise of discretion, but available only in exceptional circumstances.

[9] The *Alberta Teachers'* case set out the general approach that a reviewing justice should only consider matters raised before the adjudicator and only in exceptional circumstances will a reviewing justice consider issues not brought before the adjudicator. The Supreme Court of Canada stated that a court had a "discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so"; and further stated that "[g]enerally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal": paras 22-23. See, also, *Isley* at paragraph 64.

[10] *Isley* also repeated *Alberta Teachers'* list of rationales for the general rule not to exercise discretion to consider an issue not raised before the administrative decision-maker: 1) that the courts should not interfere with issues that were at first instance entrusted, legislatively, to administrative decision-makers; 2) especially where the administrative decision-maker has specialized functions or expertise; 3) where raising the issue for the first time on judicial review may unfairly prejudice the opposing party; 4) where there is not an adequate evidentiary record required to consider the issue (para 64). See also *Stopa v Alberta (Director of SafeRoads)*, 2024 ABKB 217 at paras 20-21. These rationales must be considered before a determination can be made as to whether a reviewing judge should consider an issue not raised before the adjudicator.

[11] There is a broad concern that considering additional grounds on judicial review is directly injurious to the nature of judicial review and administrative law generally. The objectives of the administrative process should be respected, including efficiency, timeliness, the application of specialized expertise, and finality. Judicial review is not "an interim step of a rolling dialogue" between the parties: *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 at para 73. It is neither an exercise in "rubber stamping" nor an opportunity for a do over but is guided

by a reasonableness review which is "meant to ensure that courts intervene in administrative matters only where truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 12-13. See also *UAlberta Pro-Life* where Watson JA at paragraphs 70-76 discusses the rationales for discouraging new arguments on judicial review and the concurring reasons of Crighton JA at paragraph 220 where she stated, "[T]he concerns about [arguing new grounds] are particularly acute in cases of judicial review where it is both difficult, if not impossible, to enlarge the record and to permit argument on new grounds would unfairly impact the [respondent's] ability to fairly and fully respond".

[12] In *Morin*, whether a new issue can be raised on judicial review that was not raised but could have been argued before the adjudicator was also at issue. In that case, the judicial reviewing justice stated exactly as the judicial review justice in this matter, "The law is clear that an issue which was not raised on a review before an adjudicator cannot be raised on judicial review: see *Isley v Alberta (Director of SafeRoads)*, 2022 ABQB 249, at para 68" (at para 65). (We note that *Morin* cited *Alberta Teachers'* but only on the standard of review.) The same finding on raising a new issue was also made in *Miller v Alberta (Director of SafeRoads)*, 2023 ABKB 494 at para 34 ("cannot be raised on judicial review: see *Isley* . . . at para 68"); *Tullis v Director of SafeRoads Alberta*, 2024 ABKB 163 at para 44 ("cannot be raised on judicial review"); *Weinkauf v Alberta (Director of SafeRoads)*, 2022 ABKB 752 at para 31 ("not possible to assert a claim . . . when that submission is not made at a review before an adjudicator"); *Carruthers v Alberta (Director of SafeRoads)*, 2024 ABKB 731 at para 58 (this "argument was not made before the Adjudicator and cannot be raised on judicial review"); *Gaca v Alberta (Director of SafeRoads)*, 2023 ABKB 546 at para 48 (this "was not a ground Gaca relied on before the Adjudicator (or in his Originating Application) and, therefore, it cannot be raised on judicial review"); and *Engel v Alberta (Director of SafeRoads)*, 2022 ABQB 377 at para 23 (as "this submission was not raised before the Adjudicator it should not have been raised on judicial review: *Isley* . . . at para 68").

[13] There is no absolute bar to hearing and determining new issues on judicial review. Whether a new issue will be heard is an exercise of discretion and generally is not exercised where the new issue could have been argued before the first-instance decision-maker. However, the exercise of discretion requires that the factors, set out in *Alberta Teachers'* and *Isley*, are to be considered. None of these factors is necessarily determinative. The party raising the new issue must adequately particularize the arguments about the merits of that issue so that the reviewing justice can properly consider these and any other relevant factors in determining the request to exercise their discretion.

Was it inappropriate to hear a new issue on judicial review?

[14] The respondent argues that the reviewing justice's reasons should not be read in isolation and the word "cannot" was not definitive of the reviewing justice's statement. When determining the meaning ascribed to the reasons of a judge, certain words should not be considered in isolation but must be considered in the context of the entire record of the proceedings including counsels'

submissions and arguments and the case law, always remembering that a judge is presumed to know the law.

[15] However, the word "cannot" is a definitive term in the context of the reviewing justice's statement and the reviewing justice's reasons do not indicate that she considered the factors required to exercise her discretion. Nonetheless, we are of the view that the appellant's written and oral submissions did not offer any argument supporting the exercise of discretion to consider the issue. Further, the merits of the reframed or new issue were not developed in any meaningful way. Not allowing the appellant to raise a new issue to be argued on review was the correct result.

[16] At the hearing before the Adjudicator, the appellant argued that the NAP he received did not comply with a statutory requirement, was therefore defective, and must be cancelled. Section 4(e)(ii) of the *SafeRoads Alberta Regulation*, Alta Reg 224/2020 (SAR) states that the grounds for an adjudicator to cancel a NAP include "that a notice of administrative penalty was not served on the recipient". The appellant argued before the Adjudicator that section 28(b) of the *Provincial Administrative Penalties Act*, SA 2020, c P-30.8, (PAPA) demanded of the NAP that "the provision of the enactment that the recipient is stated to have contravened is specified". He submitted that necessary information about the section he allegedly contravened was not shown to be present (allegedly not having been entered by the roadside police officer) and therefore he was not served with a proper NAP. On that basis, he contended that cancellation of the NAP was required. However, the Adjudicator found the NAP adequately set out that section 88.1 of the *Traffic Safety Act* had been contravened and that this detail complied with section 28(b). This finding was upheld by the reviewing justice.

[17] The appellant, on judicial review, also attempted to reframe the alleged contravention of section 4(e)(ii). He argued that the NAP did not contain the requirements set out in sections 10(a)(ii) and 10(a)(v) of the SAR. Section 10(a)(ii) requires "a statement indicating that there may be additional conditions for reinstatement of the recipient operator's license". Section 10(a)(v) requires "the website address for SafeRoads Alberta". In *Morin*, a chambers judge held that the adjudicator in that case reached an unreasonable decision by finding that section 28 of the PAPA made it unnecessary for the information in sections 10(a)(ii) and (v) to be in the NAP. Consequently, *Morin* suggests that the absence of those standard provisions in a NAP might dictate cancellation.

[18] During the review hearing the appellant's counsel conceded the new issue was not raised before the Adjudicator and submitted in oral argument:

> So the question of whether or not that is -- that could be re-opened or whether or not that is reasonably proximity to the central issue is -- is one in your hands. I don't know that I could add anything to that conversation, respectfully. But I'll answer -- answer your questions of that.

[19] As set out above, among the rationales for the general rule that a new issue will not be heard on judicial review if it was not raised before the adjudicator is because it may "unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue": *Alberta Teachers'* at para 26.

[20] Before us, the Director maintained that the appellant was trying to raise a new issue and that insufficient evidence was available on the record to properly consider the issue. In particular, the contents of the reverse side of the NAP were missing, as the Director's practice at the time of the administrative hearing was to not upload the reverse side for a hearing before an adjudicator. The question of prejudice was live because the Director was unable to refer to standard provisions on the reverse side which might be responsive to whether the two provisions were missing. While the appellant received a paper copy of the NAP at the roadside, he did not seek to put the entire document into evidence before the reviewing justice or this Court.

[21] The onus is on the appellant to justify the advancement of a new issue on judicial review by providing a proper evidentiary foundation and argument beyond merely expressing a desire to do so or pointing to a new but unrelated case that may touch on the proposed issue.

[22] In this appeal, despite the reviewing justice's incorrect statement that a new issue cannot be raised on judicial review, the question remains whether it was inappropriate to hear a new issue on judicial review. The record before this Court shows that there was simply insufficient evidence and argument advanced upon which the judicial review justice could have reasonably exercised their discretion to hear the new issue raised by the appellant. While there remains a discretion to hear new matters in exceptional circumstances, this matter does not meet that test. As a result, we need not comment further on the likely merit of the new issue had it been heard or the reasoning in *Morin* on which it relies.

Conclusion

[23] The appeal is dismissed.

Appeal heard on April 9, 2025

Memorandum filed at Edmonton, Alberta
this 2nd day of May, 2025

Watson J.A.

de Wit J.A.

Feth J.A.

Appearances:

A. Bieman
for the Appellant

A.M. Simmonds
H. Yamamoto
for the Respondent