Federal Court of Appeal  Cour d'appel fédérale

Date: 20190305

Docket: A-77-18

Citation: 2019 FCA 44

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
RENNIE J.A.

BETWEEN:

SUE HILLIER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on February 27, 2019.

Judgment delivered at Ottawa, Ontario, on March 5, 2019.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: GAUTHIER J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Ms. Hillier applies for judicial review of the decision dated January 31, 2018 of the Social Security Tribunal Appeal Division (file AD-16-1349). The Appeal Division dismissed her appeal from the General Division. The General Division denied her claim for disability benefits. It found that her disability was insufficiently severe.

[2] In her application for judicial review, Ms. Hillier does not directly challenge this part of the Appeal Division's decision. Instead, she challenges something more basic.

[3] The Appeal Division granted Ms. Hillier leave to appeal from the decision of the General Division under section 58 of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34. Ms. Hillier submits that once the Appeal Division granted her leave, the Appeal Division had to consider all of the grounds set out in her application for leave to appeal. But in this case the Appeal Division did not do that. It considered only some of the grounds Ms. Hillier advanced in her application for leave, not all of them. Ms. Hillier asks that this Court quash the decision of the Appeal Division and remit the matter for redetermination on all grounds.

A. The jurisdiction of this Court

[4] Questions of subject-matter jurisdiction—our ability even to enter upon the matter—should be decided right at the outset: *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at para. 39 and cases cited therein; *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 at paras. 7-10; *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R. (4th) 737 at para. 47. And there is such a question here. Both of the parties in this case happen to agree that this Court has jurisdiction on these facts. But their agreement cannot clothe this Court with jurisdiction: *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 218 at paras. 6-7; *Brooke v. Toronto Belt Line Railways Company* (1891), 21 O.R. 401 (H.C.); *C.N.R. v. Lewis*, [1930] Ex. C.R. 145, 4 D.L.R. 537.

[5] On judicial review, different decisions of the Appeal Division go to different courts. The Federal Court reviews leave decisions; this Court reviews decisions on the merits: paragraph 28(1)(*g*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. In this judicial review, is Ms. Hillier challenging the leave decision or the decision on the merits?

[6] To answer this, we are to determine the "real essence" and "essential character" of the judicial review before us: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50. We do this by examining the notice of application and related documents such as the memoranda of fact and law.

[7] I conclude that Ms. Hillier's judicial review challenges the Appeal Division's conduct of the appeal before it, specifically its failure to consider all of the grounds put to it. She alleges in her notice of application that the Appeal Division "does not have the authority to limit the scope of the appeal once the leave has been granted." Her memorandum of fact and law focuses on the same point. This is a merits-based challenge relating to the appeal itself, not a challenge to the leave-to-appeal decision. In no way does Ms. Hillier challenge the Appeal Division's decision to grant her leave to appeal: on that, she was successful. Thus, as a merit-based challenge to the Appeal Division's conduct of the appeal, Ms. Hillier's application for judicial review is properly before this Court under paragraph 28(1)(*g*) of the *Federal Courts Act*.

B. Standard of review

[8] In a judicial review, the first analytical step is to identify, with precision, the decision being reviewed and the purported authority for it: *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin LR (5th) 301 at para. 26; *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 87 Admin LR (5th) 175 at para. 36. Usually this is obvious and so judicial review courts need not write it up. In this case, it is less obvious.

[9] The Appeal Division decided not to consider some of the grounds raised in Ms. Hillier's application for leave to appeal to the Appeal Division. What was the purported authority for this decision?

[10] It was not some sort of inherent or plenary power. Administrative decision-makers, unlike courts, do not have such powers. Instead they have only the powers given to them expressly or impliedly by legislation: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 at para. 16; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609. One implied power most have is the ability to fashion procedures necessary to discharge their express legislative mandates, as long as they are consistent with the legislation and any requirements of fairness: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at p. 685 (an administrative decision-maker is "master of its own procedure"). The Appeal Division's decision to ignore some of the grounds raised in Ms. Hillier's notice of appeal—a decision not to determine certain subject-matters—was a substantive decision, not a procedural one.

[11] In my view, the Appeal Division's decision must have been made purportedly under section 58 of the *Department of Employment and Social Development Act*, the section dealing with the passage of matters from the General Division to the Appeal Division by way of leave. When deciding what grounds were before it on appeal, the Appeal Division must have adopted a view of this section; in other words, it must have interpreted it.

[12] Section 58 sits in the *Department of Employment and Social Development Act*, a statute the Appeal Division frequently considers and with which it is very familiar. In circumstances such as these, presumptively we are to review the Appeal Division's decision for reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 54. The parties do not suggest otherwise. Therefore, I shall conduct reasonableness review.

C. Reasonableness review

(1) Methodology

[13] At the outset, I wish to offer a methodology for reasonableness review of an administrative decision-maker's interpretation of legislation. My methodology is similar to that adopted in *Workplace Health, Safety and Compensation Commission v. Allen*, 2014 NLCA 42, 379 D.L.R. (4th) 271 and is consistent with decisions of this Court such as *Delios* and *Boogaard*, both above.

[14] I shall begin by conducting my own tentative examination of section 58. I do this not to create my own yardstick to measure the Appeal Division's decision. That would be correctness

review under the disguise of reasonableness review, an oft-criticized methodology some rightly describe as "disguised correctness": see, *e.g.*, D. Mullan, "The True Legacy of *Dunsmuir* — Disguised Correctness Review?" in P. Daly and L. Sirota (eds.), *A Decade of Dunsmuir* (Toronto: Thomson Reuters, 2018) at pp. 107-109; P. Daly: "Uncovering Disguised Correctness Review?" in *Administrative Law Matters* (blog) (online: https://www.administrativelawmatters.com/blog/2015/10/28); *Schmidt v. Canada (Attorney General)*, 2018 FCA 55 at para. 39, citing *Delios*, above at para. 28. Rather, I do this in order to appreciate the range of interpretive options that were available to the Appeal Division.

[15] Sometimes, especially in cases where the legislative wording is pretty clear, the reviewing court may conclude that the range of interpretive options is narrower, in some cases perhaps even a range of one: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at para. 38. Conversely, where the legislative wording admits of ambiguity or invites the administrative decision-maker to draw upon its specialization, expertise or policy understandings—for example, where the legislator has empowered an administrative decision-maker to decide something "in its sole discretion," "in the public interest," or "when reasonable"—the reviewing court may conclude that the range of interpretive options is wider. Central to this task is legislative interpretation, a task that, as we shall see, has its own methodology.

[16] Then, mindful of the range of interpretive options, we can assess whether the administrator's legislative interpretation was "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at para. 47. In doing this, we

must focus on the administrator's interpretation, noting what the administrator invokes in support of it and what the parties raise for or against it. Provided we maintain that analytical focus and remember that the legislator may have empowered the administrator to work within a range of interpretive options, we will be conducting reasonableness review, not disguised correctness review.

[17] Lastly, when conducting reasonableness review of an administrator's legislative interpretation, we must acknowledge that sometimes administrators pursuing their legislative mandates can be better placed than us to appreciate the purpose behind a legislative provision in all its nuances and ramifications—an appreciation they have acquired through dint of daily, in-the-field work or genuine expertise: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at p. 1336. Where that appreciation is relevant and is explained or evident, the case for leaving an administrative interpretation in place may gather some force.

(2) Examining section 58

[18] Following this methodology, I begin with my tentative examination of section 58. The accepted approach to interpreting a legislative provision is to examine its text, its context in the Act, and the purpose of the Act: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559. Where "the words of a provision are precise and unequivocal," the ordinary meaning of the words plays a dominant role in the interpretive process: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10.

[19] The words of the relevant provisions of the *Department of Employment and Social Development Act*—section 58 in particular—seem precise and unequivocal. They seem to lead to one acceptable and defensible result. They support Ms. Hillier's position.

[20] Section 58 is the key section. It sets out the powers of the Appeal Division when determining whether to grant leave to appeal and on what issues. However, to reiterate, the Appeal Division does not have any inherent or plenary powers. Thus, section 58 is also noteworthy for what powers it does not give the Appeal Division. Powers not expressly or impliedly granted by legislation are powers the Appeal Division does not have: see para. 10 above.

[21] The following features of section 58 suggest that once the Appeal Division grants leave to appeal, all grounds set out in the application for leave to appeal are live and before the Appeal Division:

- Subsection 58(2) provides that leave is refused only if the "appeal" has no reasonable chance of success. It does not speak of "grounds" or an individual "ground" having no reasonable chance of success. The thrust of the subsection is that leave may be refused only if the entire appeal has no reasonable chance of success.

- Subsection 58(3) provides that the Appeal Division "must either grant or refuse leave to appeal." It does not give the Appeal Division the power to grant leave to appeal in part.

- Subsection 58(5) provides that if leave to appeal is granted, the application for leave to appeal (with all of the stated grounds in it) becomes the notice of appeal. Nowhere has the Appeal Division been given the power to unilaterally amend an application for leave to appeal to delete grounds.

[22] The foregoing is qualified by subsection 58(1) which limits the grounds of appeal to certain categories: failure "to observe a principle of natural justice," exceedance or refusal of jurisdiction, committing errors of law, and making "an erroneous finding of fact…made in a perverse or capricious manner or without regard" for the evidence. The necessary implication here is that a ground not falling within these categories cannot be raised on appeal; only in these circumstances can the Appeal Division disregard a ground of appeal. Nowhere else is the Appeal Division empowered, expressly or by necessary implication, to strike or ignore grounds of appeal put to it.

[23] Also noteworthy is section 56. It provides that an appeal to the Appeal Division may be brought only if leave to appeal is granted. It does not provide that an appeal may be brought if leave to appeal is granted in part. Inferentially, this reinforces the idea that the Appeal Division has not been given a general power to grant leave in part, *i.e.*, to consider only some of the grounds of appeal put to it.

[24] Even where, as here, the words of the legislative provision seem to be precise and unequivocal, we still must examine legislative purpose and context: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at para. 48. This is to ensure that we are not mistaken in our understanding of the meaning of the legislative text. On occasion, words that, at first glance, seem clear, can admit of ambiguity after broader examination: *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 at para. 10; *Canada Trustco*, above at para. 47.

[25] The need to examine purpose and context, however, is not a licence to overlook legislative text that is genuinely clear and unambiguous. Nor can the purpose of the legislation be used to extend the meaning of a legislative provision beyond what its plain, unambiguous words will allow. These limits to the use of legislative purpose have been repeatedly emphasized by the Supreme Court and decisions of this Court. For example, in *Canada v. Cheema*, 2018 FCA 45 at paras. 74-75, this Court recently summarized the relevant jurisprudence and put the point this way:

> In [looking at text, context and purpose], we cannot "drive Parliament's language…higher than what genuine interpretation [of the section]—an examination of its text, context and purpose—can bear": *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, [2015] 4 F.C.R. 467 at para. 86, rev'd on another point 2016 SCC 29, [2016] 1 S.C.R. 770. While we might personally support the purpose behind the new housing rebate, we cannot allow that support to extend the rebate beyond the authentic meaning of the section: *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252 at paras. 46-52. Where the legislative language of a provision is precise, we cannot use its underlying purpose to "supplant" clear language or "to create an unexpressed exception to clear language": *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715 at para. 23.

On an earlier occasion, the Supreme Court put the same idea this way:

> In discussing [*Canada v. Antosko*, [1994] 2 S.C.R. 312, [1994] 2 C.T.C. 25], P. W. Hogg and J. E. Magee, while correctly acknowledging that the context and purpose of a statutory provision must always be considered, comment that "[i]t would introduce intolerable uncertainty into the *Income Tax Act* if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision": *Principles of Canadian Income Tax Law* (2nd ed. 1997), at pp. 475-76. This is not an endorsement of a literalist approach to statutory interpretation, but a recognition that… courts should be reluctant to embrace unexpressed notions of policy or principle in the guise of statutory interpretation.

(*65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, 179 D.L.R. (4th) 577 at para. 51.)

[26] Even worse is to posit our own policies—what personally seems to us to be fair and right or best for the public—and shape the legislation away from its authentic meaning. To do so is to amend the provision, something we cannot do. In *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252 at paras. 46-52, this Court put it this way:

> Legislative interpretation can be tricky. One must be on guard not to introduce extraneous considerations into the proper, objective analysis of the text, context and purpose of legislation.
>
> Personal evaluations of the moral conduct of the parties, good or bad, should play no role in the analysis. In the case before us, we have a cross-border traveller who falsely declared to a border services officer how much currency he was carrying. In cases like this, some might let their reaction to the facts skew their interpretation of the legislation. That would be wrong.
>
> Also wrong would be to permit personal policies or political preferences to play a part in our interpretation of the legislation: for example, to aim for a result we personally prefer, to fasten onto what we like and ignore what we don't, or to draw upon what we think is best for Canadian society. Common to these practices is an analytical focus on what we want the legislation to mean rather than on what the legislation authentically means.

> In our legal system, the starting point is that only elected legislators—not unelected judges—have the "exclusive" power to express their personal policies or political preferences in binding legislation: see the opening words of ss. 91 and 92 of the *Constitution Act*, 1867. These words enshrine a principle won four centuries ago at the cost of much bloodshed: for a recent restatement and discussion of the principle, see *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, [2017] 2 W.L.R. 583 at paras. 40-46. The only exception is where legislation expressly delegates the power to legislate: see *Hodge v. The Queen* (1883), 9 App. Cas. 117, 9 C.R.A.C. 13 (J.C.P.C.) (regulations made by delegatees) and *In Re Gray* (1918), 57 S.C.R. 150, 42 D.L.R. 1 (orders akin to legislation made by delegatees). But even then the delegation often must meet strict requirements of a constitutional nature: see, *e.g.*, *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, 165 D.L.R. (4th) 1, *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, 137 D.L.R. (4th) 449 and *Ontario Public School Boards' Assn. v. Ontario (Attorney General)* (1997), 151 D.L.R. (4th) 346 at pp. 362-365, 45 C.R.R. (2d) 341 at pp. 356-359 (Ont. Gen. Div.) (discussion of Henry VIII clauses).
>
> Absent a successful argument that legislation is inconsistent with the Constitution, judges—like everyone else—are bound by the legislation. They must take it as it is. They must not insert into it the meaning they want. They must discern and apply its authentic meaning, nothing else.

[27] In this case, the Act does not contain an express statement of legislative purpose. The best that can be done is to discern the legislative purpose from these provisions and related provisions in the Act.

[28] The provisions of section 58, cited above, show that unless an appeal has no merit at all, the Appeal Division should take the appeal on all grounds provided that those grounds fall within the categories of subsection 58(1). In this sense, section 58 can be seen, at least in part, as furthering access to justice by facilitating recourse by social security claimants—many of whom may be vulnerable, less empowered and challenged in some way—to a comprehensive second look by a second-level administrative review body, unless their case is completely hopeless.

[29] This is not to say that administrative efficiency, adjudicative economy and conservation of resources have no role in this administrative regime. Far from it. When leave to appeal is granted, the Appeal Division need not hold an oral hearing in every case: section 43 of the *Social Security Tribunal Regulations*, S.O.R./2013-60. And regardless of whether the hearing is oral or written, in its inquiries and deliberations the Appeal Division can devote more attention to the more meritorious grounds of appeal. Finally, the Appeal Division can sometimes dismiss a series of unmeritorious arguments by using a few words in its reasons. And if those words are carefully chosen, a reviewing court and the parties themselves will read them in light of the evidentiary record and will understand their import: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708. All of these good and legitimate practices help the Appeal Division to discharge its obligation to "conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit": *Regulations*, para. 3(1)(*a*).

(3) The Appeal Division's approach to section 58

[30] Given this legal landscape, how did the Appeal Division approach section 58?

[31] It did not follow the accepted approach to interpreting a legislative provision nor did it explain why it did not. In particular, it failed to analyze the text of section 58 in any meaningful way. All it did was to declare that "[it could not] see anything in the legislation…that prohibits the Appeal Division from limiting the scope of an appeal as it moves from consideration at the leave stage to consideration at the merits stage" (at para. 19). To the contrary, as explained above, what the text of section 58 says and what it does not say tells us a great deal. Finally, the

Appeal Division said nothing in detail about legislative purpose. Instead, it expressed its own preference for "hold[ing] full hearings only on issues of substance" (at para. 19).

[32] The Appeal Division added (at para. 22) that subsection 58(2) of the *Department of Employment and Social Development Act* does not prevent the Appeal Division from picking and choosing among the grounds and that if Parliament disagreed it should have put something in the legislation stopping the Appeal Division from doing this. In saying this, the Appeal Division seems to have assumed that its own freestanding personal preference—holding full hearings only on issues of substance—binds by default and the onus is somehow on Parliament to oust its preference by passing legislation. The Federal Court has said a similar thing in *Canada v. Tsagbey*, 2017 FC 356 at para. 58.

[33] This, of course, is the opposite of our fundamental orderings. Those we elect and, within legislative limits, their delegatees (*e.g.*, Ministers making regulations) alone may take their freestanding policy preferences and make them bind by passing legislation. Absent constitutional concern, those who apply legislation—from the most obscure administrative decision-makers to the judges on our highest court—must take the legislation as it is, applying it without fear or favour. Their freestanding policy preferences do not bind, nor can they make them bind by amending the legislation: *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, [2007] 3 S.C.R. 20 at para. 9.

(4) Other submissions on section 58

[34] The Attorney General submits that section 58, properly interpreted, does give the Appeal Division the power to pick and choose among grounds—to refuse leave on meritless grounds and grant leave on others. He supports this interpretation on the basis of administrative efficiency, adjudicative economy and conservation of scarce administrative resources. In support of this, he points to a statement during House of Commons debate to the effect that the Act as a whole was aimed at making the area of federal social security more efficient.

[35] This statement does not necessarily mean that every section in the Act is aimed at furthering efficiency. At best, it offers only a clue to the possible purpose of various provisions of the Act, including section 58. Our focus must be the authentic meaning of the particular provision in issue, here section 58, discerned by analyzing its text, context and purpose. Once we follow that methodology in this case—especially examining the clear, unambiguous text of section 58—we can see that it pursues a different, more limited purpose: see the analysis in paras. 18-29, above.

[36] The purposes behind section 58 put forward by the Attorney General—administrative efficiency, adjudicative economy, and conservation of scarce administrative resources—are policy preferences that, in the abstract, many might share. And, as it happens, certain efficiency-enhancing measures have been enacted elsewhere—see, *e.g.*, section 43 of the *Social Security Tribunal Regulations*. But, as explained above, in enacting section 58, Parliament has chosen to pursue a more limited purpose. We must take that as is; we have no business overriding

Parliament's choice because we think administrative efficiency, adjudicative economy and conservation of scarce administrative resources are good things.

[37] Citing *Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2 at p. 10 and section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, Ms. Hillier submits that benefits-conferring legislation or "social legislation" must be given a "liberal construction." Ms. Hillier's submission, stated at that level of generality, overshoots the mark.

[38] *Abrahams*, a judge-made rule, stands for the proposition that if courts are left in doubt about the authentic meaning of the legislation after using the interpretive tools at their disposal, they should resolve their doubt in favour of the benefits claimant. This similar to the judge-made rule that ambiguous legislation should be interpreted in accordance with Canada's international law commitments: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at para. 53. *Abrahams* and other judge-made rules do not empower judicial and administrative decision-makers to ignore or bend the authentic meaning of legislation discovered through the accepted approach to interpretation: *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34 at paras. 42-44. Absent constitutional objection, the authentic meaning of legislation must be applied: *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281 at para. 35; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269 at para. 50. The laws passed by legislators, not the rules made by judges, are supreme.

[39] To similar effect is the interpretive rule in section 12 of the *Interpretation Act*. It provides that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal

construction and interpretation as best ensures the attainment of its objects." Section 12 is not a licence for courts and administrative decision-makers to substitute a broad legislative purpose for one that is genuinely narrow or to construe legislative words strictly for strictness' sake—in either case, to bend the legislation away from its authentic meaning. Section 12 instructs courts and administrative decision-makers to interpret provisions to fulfil the purposes they serve, broad or narrow, no more, no less.

(5) Conclusion on reasonableness

[40] Sometimes reasonableness review plays out in a highly deferential way. Sometimes not. The intensity of reasonableness review varies or, as the Supreme Court puts it, reasonableness "takes its colour from the context": *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at para. 18; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 at para. 22; and many, many others. Overall, however, the intensity of reasonableness review does not matter in this case. Under any level of intensity of review, the Appeal Division's decision is unreasonable.

[41] It follows that the Appeal Division should have considered and determined all of the grounds raised by Ms. Hillier in her notice of application for leave to appeal as long as they fall within the categories in subsection 58(1) of the *Department of Employment and Social Development Act*.

D. Remedy

[42] Remedies on judicial review are discretionary: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 111 D.L.R. (4th) 1 (the discretion to grant or not grant remedies in procedural cases); *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 (the discretion to grant or not grant remedies for substantive defects). One ground for exercising one's discretion against granting a remedy is where the remedy would serve no useful purpose: *Robbins v. Canada (Attorney General)*, 2017 FCA 24; *Maple Lodge Farms v. Canada (C.F.I.A.)*, 2017 FCA 45, 411 D.L.R. (4th) 175. I queried counsel as to whether the grounds not considered by the Appeal Division had any prospect of success. Having heard counsel, and bearing in mind cases like *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326 at p. 361 that suggest that the discretion not to remit to the administrative decision-maker should be exercised only in clear cases, I would decline to exercise my discretion in that way.

[43] I also queried counsel on whether this was a case for severance: sending the matter back to the Appeal Division only on the grounds it did not consider, rather than sending the matter back on all grounds. The case law is clear that caution must be exercised when considering severance: see, e.g., *Canadian Pacific Ltd. v. B.M.W.E.* (1989), 98 N.R. 133 (F.C.A.). I am not persuaded that severance in this case is warranted. Counsel agree. The grounds raised by Ms. Hillier may well interrelate and so it is best that the Appeal Division hear them all together. In order to permit them all to be heard afresh, I would order that they be remitted to a different member of the Appeal Division.

E. Postscript

[44] Above, I mentioned para. 28(1)(*g*) of the *Federal Courts Act*. In fact, there are two paras. 28(1)(*g*) in the Act, one concerning applications to this Court from certain decisions of the Governor in Council and the other concerning applications certain decisions of the Appeal Division of the Social Security Tribunal. Both paras. 28(1)(*g*) were added at the same time: *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c. 19, ss. 110 and 272(2).

[45] Under the Miscellaneous Statute Law Amendment Program, the Department of Justice "correct[s] anomalies, inconsistencies, outdated terminology or errors in federal statutes" by proposing statutory amendments that are "not…controversial", "[do] not involve the spending of public funds" and "[do] not prejudicially affect the rights of persons." Two rounds of corrections under the Program have failed to correct this anomaly in the *Federal Courts Act*: *Miscellaneous Statute Law Amendment Act, 2014*, S.C. 2015, c. 3; *Miscellaneous Statute Law Amendment Act, 2017*, S.C. 2017, c. 26. Soon after this anomaly arose, Parliament amended one of the two paras. 28(1)(*g*), describing the paragraph it was amending with unusual particularity, thus confirming its awareness of this anomaly: *Economic Action Plan 2013 Act, No. 2*, S.C. 2013, c. 40, s. 236(1)(*d*). In the six years since, Parliament has done nothing to correct it. Perhaps this might soon be addressed.

F. Proposed disposition

[46] The parties have agreed there shall be no costs. As a result, I would allow Ms. Hillier's application without costs, set aside the decision of the Appeal Division and remit the matter to a different member of the Appeal Division to determine all issues raised in Ms. Hillier's notice of application for leave to appeal that fall within subsection 58(1) of the *Department of Employment and Social Development Act*.

"David Stratas"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-77-18
AN APPLICATION FOR JUDICIAL REVIEW OF THE SOCIAL SECURITY TRIBUNAL APPEAL DIVISION DECISION, DATED JANUARY 31, 2018, TRIBUNAL FILE NUMBER: AD-16-1349	
STYLE OF CAUSE:	SUE HILLIER v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 27, 2019
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	GAUTHIER J.A. RENNIE J.A.
DATED:	MARCH 5, 2019

APPEARANCES:

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