Court of King's Bench of Alberta

Citation: Perry v Alberta (Seniors, Community and Social Services), 2025 ABKB 68

Date: 20250206
Docket: 2203 18731
Registry: Edmonton

2025 ABKB 68 (CanLII)

Between:

Curtis Perry, by His Personal Representatives, Legal Representatives and Trustees, Catherine Perry and Richard Perry

Applicants

- and -

His Majesty the King in Right of Alberta, As Represented by the Minister of Seniors, Community and Social Services

Respondent

Reasons for Decision
of the
Honourable Justice James T. Neilson

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[1] The Applicants, Richard and Catherine Perry (the "Perrys") are the parents of Curtis Perry, an individual with a developmental disability who is entitled to services under the ***Persons with Developmental Disabilities Services Act*** (the "*Act*"), RSA 2000, c P-9.5.

[2] This is an application for judicial review involving a decision relating to the Perrys' Family Managed Services Agency ("FMS Perry") affecting various aspects of a Family Managed Services Agreement ("FMSA"). The Perrys applied by Originating Notice for judicial review of the decision of the Persons with Developmental Disabilities Appeal Panel (the "Appeal Panel") that was issued on May 31st, 2022. The Appeal Panel is established pursuant to s 15 of the

Persons with Developmental Disabilities Services Act (the "*PDD Act*") and the *Persons with Developmental Disabilities Regulation* (the "*PDD Reg.*").

I. Procedural History

[3] The PDD Policy Manual states, as a general policy, that immediate family members are not entitled to be hired in a paid role to formally provide care under an FMSA. However, the Perrys had received an exemption to this policy in every prior year in which FMS Perry was operating. This exemption was given to ensure that Curtis was able to receive care, in an economically viable manor, when regular staff either failed to show or could not be secured.

[4] Since 2013, services to Curtis have been provided under various FMSA's, the most recent dated June 3rd, 2016, which contemplated a one-year term between June 1st, 2016, and May 31st, 2017 (the "2016 FMSA").

[5] The Perrys objected to certain conditions proposed by the Persons with Developmental Disabilities Services, Edmonton Region (the "PDD-DS"). No agreement was reached by the parties on these points.

[6] The PDD-DS issued the original decision on May 21st, 2017 (the "Original Decision") for the proposed FMSA for the period June 1st, 2017, to May 31st, 2018. The PDD-DS denied the following:

a. A policy exemption to be guaranteed for the Perrys to work up to 40 hours per week in a "Team Leader" role;

b. An increase to wage allocations to reflect receipt minimum wage increases;

c. An increase to "Service Delivery and Administration" to reflect inflation rates in Alberta;

d. An increase in kilometrage paid to staff while directly working with Curtis;

e. Team Leader position to remain within the staffing complement; and,

f. A decreased budget of [not more than] 8%.

[7] The Perrys did not sign the proposed FMSA for 2017 – 2018.

[8] It was proposed that the parties engage in mediation responding to the position of the Perrys in relation to the Original Decision. However, the Perrys opted to file a Notice of Appeal on October 13th, 2017, as Disability Services had not progressed to schedule and conduct the mediation.

[9] On October 20th, 2017, the Notice of Appeal was denied by Ms. Donna Edhart, acting in her capacity as delegate of the Minister, on the basis that an appeal was not available to the Perrys in these circumstances.

[10] The Perrys filed a notice of application for judicial review of Ms. Edhart's decision.

[11] The application was heard by Mr. Justice Ackerl who issued a decision dated January 21st, 2019: ***Perry v Alberta (Community and Social Services)***, 2019 ABQB 43. Justice Ackerl concluded, following the decision of Justice Renke in ***AB v Alberta (Persons with Developmental Disabilities Central Region)***, 2018 ABQB 181, as follows at para 42:

2025 ABKB 68 (CanLII)

> [42] In applying ***AB*** to this case, I conclude the May 12, 2017, decision was made by a designated director. It is subject to appeal. I also find that, although it involves an FMSA, the decision is reviewable under s 15(2). Finally, I conclude all of the Applicants' six requests to amend the FMSA satisfy the appeal criteria under that section. It is undisputed that Curtis Perry was receiving, or had applied for, services. ...

The application was for judicial review was allowed on the basis that Ms. Edhart's decision was unreasonable and directed the matter to be considered by the Appeal Panel on the issues identified by Justice Ackerl.

[12] The Appeal Panel issued reasons dated November 2nd, 2021, addressing preliminary objections by the Perrys that the Appeal Panel ought to recuse itself, and over the scope of the appeal.

[13] A hearing before the Appeal Panel was originally scheduled for June 6th, 2019, but was adjourned to August 20th, 2019. There were subsequent delays, some of which related to the COVID restrictions on any in-person appearance, and correspondence between the parties whether certain issues ought to be properly considered within the scope of the appeal.

[14] The appeal was heard by written submissions only on March 4th, 2022. The Appeal Panel's decision was released on May 31st, 2022.

[15] This is the decision that is now subject to this application for judicial review.

[16] The decision of the Appeal Panel dated May 31st, 2022, is as follows:

a. Varying the Director's decision so that the Perrys could work up to 40 hours per week at the "Team Leader rate" only for the period to June 1st, 2017, to May 31st, 2018;

b. Confirming the Director's decision that no further adjustment be made for minimum wage increases as wages and budgets had already been adjusted according to Government of Alberta minimum rates;

c. Confirming the Director's decision that increases to the budget for "Administration and Service Delivery" costs will be based on future submissions, and approval thereof to be at the Director's discretion;

d. Confirming the Director's decision on the $0.30 cents per kilometer rate;

e. Confirming the Director's decision to fund a Team Leader at least 16 hours per week to assist the FMS Administrator with scheduling, monitoring and some staff training; and,

f. Confirming the Director's decision to approve the overall budget at $171,000.00 for the 2017 – 2018 term.

[17] The Applicants submit that, while the appeal decision is framed as having decided eight (mostly budgetary) issues, there is one overarching issue which made the appeal decision unreasonable: The decision not to resolve funding/budgetary terms to the present time and thereby limiting the decision for the period June 1st, 2017, to May 31st, 2018. The Applicants submit that this unreasonable circumscription effectively fetters the Perrys' ability to seek relief by virtue of the *Limitations Act* and breaching Curtis's *Charter* rights.

2025 ABKB 68 (CanLII)

[18] The Applicants seek an order directing an omnibus FMSA for the period of June 1st, 2017, to present, based on the FMSA last in force (2016 – 2017) in funding commensurate therewith, with readjustment to such funding to be finalized within twelve months.

[19] In response, the Respondent submits that there are two main grounds for dismissing the Originating Application for judicial review:

a. The Originating Application did not name or serve the Appeal Panel in accordance with the requirements of the ***Alberta Rules of Court***, AR 124/2010; and,

b. The Appeal Panel's decision was reasonable and accordingly, there is no basis for this Court to interfere.

[20] The Respondent takes the position that, in addition to these two grounds and even if the Court is of the view that the Appeal Panel need not be named or served and that the decision of the Appeal Panel was unreasonable, it is submitted that the only available relief to the Applicant in this case is to remit the relevant matters back to the Appeal Panel. Based on the Applicants' brief, the Applicant is not seeking this relief.

[21] The parties agreed to adjourn the Minister's application to strike the Originating Application, to be heard on the same date as the Perrys' application for judicial review.

II. Standard of Review

[22] The parties agree that the standard of review for this application for judicial review is one of reasonableness: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65. None of the exceptional circumstances cited by the Supreme Court in ***Vavilov*** that would engage the standard of review of correctness apply to the issues in this review.

III. Application for judicial review not filed and served within the time limit

[23] Rule 3.15(2) and (3) of the ***Alberta Rules of Court*** provide as follows:

> 3.15(2) Subject to *rule 3.16*, [*Originating application for judicial review: habeas corpus*], an originating application for judicial review to set aside a decision or act of a person or body must be filed and served within 6 months after the date of the decision or act, and *rule 13.5* [*Variation of time periods*] does not apply to this time period.
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> 3.15(3) An originating application for judicial review must be served on
>
> (a) the person or body in respect of whose act or omission a remedy is sought,
>
> (b) the Minister of Justice or the Attorney General for Canada, or both, as the circumstances require, and
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> (c) every person or body directly affected by the application.

[24] The application for judicial review of the Appeal Panel's decision named as Respondent, His Majesty the King in Right of Alberta, as represented by the Minister of Seniors, Community

2025 ABKB 68 (CanLII)

and Social Services. The Appeal Panel was not named as a respondent, nor was it served with the Originating Notice as required by Rule 3.15(3)(a).

[25] Rule 3.15 has been interpreted by the Courts as a limitation period that is to be interpreted strictly.

[26] As the Court ruled in ***Tartal v Alberta (Human Rights Commission)***, 2023 ABKB 381 at paras 33 and 34:

> [33] Compliance with Rule 3.15 is mandatory and the six-month time period to both file and serve the Originating Application cannot be extended or varied: ***Julien*** at para 6; ***Yuill v Alberta (Workers' Compensation Appeals Commission)***, 2016 ABQB 369 at paras 75 and 78; ***ENMAX*** at para 13 and 30; ***Boll*** at para 68. Failure to either file or serve within the limitation period is fatal and the desired remedy - setting aside the decision - cannot be granted.
>
> [34] The limitation period is strictly construed: ***Athabasca CA*** at para 27. The strict time limit supports the public policy objectives of finality and certainty. The parties affected by the administrative decision are entitled to know when the outcome is final and legal challenges are closed: ***Baker v Drouin***, 2017 ABQB 204 at para 13. Effective public decision-making demands precision and clarity; administrative decision-makers need to know precisely when and how their decisions can be subject to judicial intervention: ***Central Halifax Community Association v Halifax (Regional Municipality)***, 2007 NSCA 39 at para 25, leave to appeal dismissed [2007] SCCA No 279. Closure allows everyone to move forward: ***Johannesson v Alberta (Workers' Compensation Board, Appeal Commission)***, (1995), 1995 CanLII 9160 (AB KB), 32 Alta LR (3d) 373, 175 AR 34 (QB) at para 34.

[27] Counsel previously representing the Perrys did serve His Majesty the King, but not the Appeal Panel although the Appeal Panel had been served in previous judicial review applications by the Perrys. The Appeal Panel did not become aware of the Originating Application until after the six-month period required by the *Rules of Court* and was never actually served.

[28] Counsel for the Applicants cited the decision of ***Environmental Defence Canada Inc. v Alberta***, 2024 ABKB 265. However, this case does not stand for the proposition that service on the Minister is sufficient service on the tribunal. As the Court stated in para 32, that decision was limited to unique facts in that the Commissioner who issued the report under review then ceased to exist and there was no physical office for service. In this case, the Appeal Panel continued to have a legal existence, its address for service was known, and it ought to have been served within the six-month time period prescribed by the *Rules*.

[29] In its reply, the Applicants cited Rule 3.16 that deals with an Originating Application for judicial review for *habeas corpus*. However, this rule has no application here. The Applicants want secure funding for a day program, and this is not an issue for *habeas corpus*.

[30] I find that the Originating Notice was not served on the Appeal Panel within the time limitation required by the *Rules of Court* and ought to be struck.

2025 ABKB 68 (CanLII)

IV. Consideration of the application for judicial review on its merits

[31] If I am incorrect in ruling that the Originating Application for judicial review was not served on the Appeal Panel within the time limitation, then I will also consider the merits of the application for judicial review.

[32] The overarching issue raised by the Applicants, submitting that the Appeal Panel's decision was unreasonable, was that the Appeal Panel failed to "resolve the funding/budgetary issues" for the period of time from June 1st, 2018, to the date of appeal hearing in 2022. Four issues in this regard were raised by the Applicants and I will deal with those in turn.

a. the Appeal Panel acted within the scope of its authority

[33] It was reasonable that the Appeal Panel decided that it could only deal with the Original Decision and was therefore limited to making decisions with respect to the 2017 – 2018 funding year.

[34] The Appeal Panel is confined to the jurisdiction delegated to it under the *PDD Act*. Furthermore, the appeal right given to Curtis Perry under s 15(2) of the *PDD Act* is his right as an individual who is receiving services or has applied to receive services to appeal a decision of the Director respecting those services if he is affected by that decision.

[35] The appealable issues in the Original Decision under s 15(2) were defined by Mr. Justice Ackerl in his decision, *supra*.

[36] The Original Decision references six items specifically discussed between PDD and the Perrys in relation to the 2017/2018 FMSA and the Director's decision in relation to those terms.

[37] Furthermore, PDD agreed that it was appropriate for the Appeal Panel to deal with the audit and an extension of the proposed three-month period for the full year. PDD did not oppose that extension for the purposes of the appeal. There is no mention in the appeal of a request that PDD make a decision to grant funding in perpetuity. The issue of funding beyond the 2017/2018 funding period was never decided, and therefore it was incapable of being reviewed by the Appeal Panel.

[38] The Appeal Panel wrote in the appeal decision that:

> The Appellant's parents request the Appeal Panel resolve contract negotiations to bring the matter to the present time. The decisions by this Appeal Panel are for the agreement period of June 1st, 2017 to May 31st, 2018. It may serve as a guideline to resolve subsequent agreement terms; however, it is not binding on either party as those periods are not before the Appeal Panel. There are many potential factors which influence the decisions on agreements from 2018 to present. The Appeal Panel declines to apply hindsight to a time that may be influenced by the events of the 2017 – 2018 agreement.

[39] Under the *PDD Act*, the Appeal Panel only has the delegated authority to confirm, deny or vary a decision that has been made by a Director, when that decision is found to be appealable, following the process established for appeal from those decisions. This is what the Appeal Panel did here.

[40] Upon judicial review, I find that the Appeal Panel acted within the scope of its authority. The Appeal Panel's determination was reasonable in this regard.

2025 ABKB 68 (CanLII)

b. Curtis Perry's *Charter* rights

[41] In their brief, the Applicants raised an issue of a potential s 7 *Charter* claim. The *Charter* was not raised as an issue before the Appeal Panel. This is a new issue raised on this judicial review.

[42] I find that there is no clear articulation of which s 7 *Charter* right has been breached in this case, and no analysis of how that specific *Charter* right has been breached.

[43] Section 7 of the *Charter* does not confer a constitutional right to a certain level of funding for health or social benefits: ***Foley v Victoria Hospital London Health Sciences Centre***, 2023 ONSC 7155 at paras 47 to 50.

[44] In this case, the Appeal Panel had made no determination as to constitutionality of a law, including under the *Charter*, and therefore the standard of review of correctness is not invoked here.

[45] The discretionary decision at issue in this judicial review is the Appeal Panel's alleged decision not to make any determination as to Curtis Perry's entitlement to funding beyond the 2017/2018 funding year.

[46] The Appeal Panel's decision cannot be unreasonable because it failed to consider a *Charter* value that was not relevant to the purposes of its decision: ***Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)***, 2023 SCC 31 at paras 66 and 73.

[47] Furthermore, the Appeal Panel did not decide that Curtis Perry was not entitled to funding beyond the 2017/2018 funding year. Nor did the decision deprive Curtis Perry of whatever rights he has for the years from 2018 to 2024. If Curtis Perry does not receive funding for this period, and if the Perrys are unable to pursue legal recourse as against PDD as a result of limitation periods that may have intervened, neither of which are in evidence, that is not the result of any decision of the Appeal Panel.

c. The decision did not infringe Curtis Perry's dignity

[48] The Perrys had submitted that the Appeal Panel "direct PDD to commence interim funding as soon as possible, to ensure Curtis' continued dignity". However, the Appeal Panel did not have the authority to direct the Government of Alberta to provide interim funding and there was nothing to substantively address in its reasons other than what it stated in terms of its authority. Furthermore, government funding decisions are matters of policy which do not fall within the Court's jurisdiction but within the jurisdiction of the executive branch of the government. Therefore, these are not subject to judicial review: ***Hamilton-Wentworth (Regional Municipality) v Ontario (Minister of Transportation) (Div. Ct.)***, 1991 CanLII 7099 (ON SC); ***Deskin v Ontario***, 2023 ONSC 5584 at paras 59 to 78.

d. The principle of responsive justification and the exemption decision

[49] The Perrys submit that the Original Decision and the appeal decision are unreasonable for failing to properly consider the severity of the decisions on Curtis, a vulnerable Albertan, which decisions hinge almost entirely on the unjustified and unexplained acceptance of a policy, which has no force in law. The Perrys submit that this amounts to a breach of the "principle of responsive of justification".

2025 ABKB 68 (CanLII)

[50] This ground raised by the Perrys relates in part to a matter that was dealt with in detail by the Appeal Panel. The Appeal Panel clarified the decision of the Director by finding that the Perrys were to be paid for services they provided for Curtis Perry for up to 40 hours a week during the 2017/2018 funding period, even though they are immediate family, and this was otherwise contrary to PDD policy.

[51] The Appeal Panel reached this decision on the basis that the Perrys should be entitled to a qualified exemption from the relevant PDD policy for the 2017/2018 year. The Perrys were successful on this issue and accordingly Curtis Perry is not entitled to judicially review a decision that he has won.

[52] For the reasons previously stated, it was not unreasonable for the Appeal Panel to refuse to grant a longer or permanent exemption from the PDD policy.

[53] The Perrys asserted that the Appeal Panel's decision failed to properly consider that it puts Curtis Perry in a position of "perpetual uncertainty" with respect to funding. However, there is no authority to the effect that Canadian Citizens are legally entitled to government funding for disabilities. Funding in conjunction with an FMSA is grant funding. This is funding which is entirely at the discretion of the Minister under the *Government Organization Act* and *Ministerial Grants Regulation.*

[54] While the Perrys may have issues with government funding uncertainty, that is not something that either the Appeal Panel or this Court on judicial review has jurisdiction to address.

e. Procedural fairness

[55] The record demonstrates that there were delays during the procedural history outlined previously in these Reasons for Decision. However, there were several reasons for delay at particular points in the proceedings, including adjournment caused by the Respondent's lawyers' illness, correspondence between the parties on issues including the scope of the review by the Appeal Panel, and the COVID pandemic which prevented, for a period of time, in-person hearings. In short, it was not the Appeal Panel's intent to cause delay, and I find that on the whole and taking into account these factors, the record does not demonstrate procedural unfairness giving rise to a breach of any duty of natural justice.

[56] In response to the assertion that the Appeal Panel caused delay, or that it did so unfairly, the Applicants in their brief suggest that during the appeal process, the Perrys may have chosen not to pursue other remedies and limitation periods may now be in play for past funding. This has nothing to do with the Appeal Panel nor the procedure before it. Furthermore, there is no evidence before this Court as to what has occurred in terms of discussions between the Perrys and PDD regarding funding for Curtis Perry in the period from 2019 to 2024 or what the position of PDD is with respect to such funding. Any such evidence would have been entirely irrelevant to judicial review in any event.

f. The relief claimed is not available

[57] The relief sought by the Perrys is beyond the jurisdiction of this Court on judicial review.

[58] On judicial review, a Court may uphold or quash the decision under review. If a Court quashes the decision of an administrative decision maker, it is most often appropriate to remit the matter to the decision maker: ***Vavilov,*** *supra* at para 142. The Court may also issue directions to

2025 ABKB 68 (CanLII)

be followed by the decision maker, stating what it may or may not do or give directions to avert unfair procedure.

[59] The only circumstance in which the reviewing Court can do anything other than remit the matter to the tribunal is where the outcome is inevitable so that remitting the case to the tribunal would serve no useful purpose: ***Vavilov***, *supra* at para 142.

[60] There is no authority for the proposition that the Appeal Panel or this Court could grant the remedies requested by the Perrys, including a declaration that Curtis Perry is entitled to grant funding from PDD from June 1st, 2018 to the date of this decision, or the ancillary request relating to budget, negotiating further terms within a six-month period, an order that the Minister pay over 1.3 million dollars subject to reconciliation based on further negotiations, and a judgment for interest on the amounts payable.

[61] None of this relief is properly available on judicial review.

2025 ABKB 68 (CanLII)

V. Conclusion

[62] The application to strike the Notice of Appeal for failure to comply with Rule 3.15(2) and (3) of the *Rules of Court* is allowed.

[63] The application for judicial review by the Applicants is dismissed.

[64] A single set of costs combining both applications is awarded to the Respondent payable by the Applicants under Column 1 of Schedule C of the *Rules of Court*, for applications made requiring a brief.

Heard on the 27th day of June, 2024.
Dated at the City of Edmonton, Alberta this 6th day of February, 2025.

James T. Neilson
J.C.K.B.A.

Appearances:

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