CITATION: NOVA Chemicals Corp. v. Dow Chemical Canada ULC, 2025 ONSC 4334
DIVISIONAL COURT FILE NO.: 049/23
DATE: 20250724

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Backhouse, Lococo and Mew JJ.

BETWEEN:	
NOVA CHEMICALS CORPORATION Applicant	*Jean-Simon Schoenholz* and *Geneviève Fauteux*, for the Applicant
– **and** –	
DOW CHEMICAL CANADA ULC Respondent	*Brad Hanna, Adam Chisholm* and *Sezen Izer*, for the Respondent
	HEARD in Toronto: 26 March 2025

REASONS FOR DECISION

MEW J.

Introduction

[1] The applicant, NOVA Chemicals Corporation ("NOVA"), seeks judicial review of a decision of the Committee of Adjustment of the Township of St. Clair (the "Decision") granting the respondent Dow Chemical Canada ULC ("Dow")'s application for a minor variance under s. 45 of the *Planning Act*, R.S.O. 1990, c. P.13 (the "Act"). The applicant asks this court to quash the Decision and dismiss Dow's application for a minor variance on the basis that the Decision was unreasonable due to a lack of responsive reasons, and because the Committee of Adjustment (the "Committee") breached NOVA's procedural fairness rights.

[2] As a preliminary issue, NOVA also asks the Court to strike certain portions of an affidavit of Herbert Daichendt, sworn on 5 April 2024 contained in Dow's responding record, claiming it

contains voluminous yet inaccurate and irrelevant information that was not presented before the Committee.

[3] For the reasons set out below, the application for judicial review is granted and Dow's application for a minor variance remitted to the Committee for a determination *de novo* on its merits.

Background and Procedural History

[4] Dow and NOVA are rival companies in the plastics industry. They occupy abutting properties.

[5] Pursuant to the Township's *Zoning By-Law No. 17 of 2003*, buildings in Industrial Type 3 zones, including the parties' properties, are to have a maximum building height of 14 metres and minimum side yard setback (being the distance between a structure and the property line) of 30 metres.

[6] The properties upon which they operate were formerly operated by another company as one industrial property; Dow and NOVA each purchased a portion of this property. As such, there are places along the property line at which the properties are non-compliant with the Township's By-Law concerning set-back and height requirements.

[7] Dow now wants to build an addition to one of its existing structures, which is located close to or on the existing property line. The parties engaged in discussions about Dow's plans, but were unable to reach a setback agreement.

[8] On 3 August 2023, Dow applied to the Committee for a minor variance of the Township's zoning By-Law under the Act to permit construction of the addition. The proposed addition contemplated Dow building the new structure directly on the shared property line, eliminating any setback (from 30 to 0 metres), and nearly doubling the height of the existing building (from a maximum of 16 to 25 metres).

[9] NOVA claims not to have been aware of Dow's application until 22 August 2023, when it received the Committee's Notice of Public Hearing.

[10] A hearing of the Committee was convened on 28 August 2023; however, the hearing of Dow's application was adjourned to 25 September 2023 after NOVA's counsel informed the Committee that NOVA lacked sufficient details about the proposed addition to fully articulate its reasons for opposing the application.

[11] NOVA then notified the Committee of its intention to make submissions opposing Dow's minor variance application, and provided the Committee with written submissions outlining NOVA's grounds for objection. NOVA submitted that the construction of the addition proposed by Dow did not meet the requirements of s. 45 of the Act and, in particular, would:

a. require continuing trespass, including aerial trespass, on the NOVA lands;

b. result in ingress and egress issues to the NOVA lands due to the complete elimination of the set-back, for *inter alia*, maintenance purposes;

c. cause property damage to the NOVA lands, including as a result of excavation encroachment;

d. result in NOVA needing to complete relocation work as a direct result of the Building Addition, and that this would cause operational downtime and costs to NOVA; and,

e. be a nuisance, interfere with NOVA's enjoyment of its property rights over the NOVA lands, and stand as an obstacle for potential future development on the NOVA lands.

[12] The Committee met on 25 September, and, in addition to the written submissions that had been filed, received oral submissions from NOVA and Dow. NOVA claims that it was not given an opportunity to make reply submissions, having been told by a Committee member to "take it up on appeal" (Dow disputes this).

[13] The Committee approved the application, releasing its decision on 26 September 2023.

Decision under appeal

[14] The entirety of the Committee's Decision was as follows:

> That Application A-36-23, submitted by DOW Chemical Canada ULC be APPROVED.
>
> This decision permits the construction of a 72.65m² (782ft²) building addition to an existing 5417m² building located at the north of the property, used for packaging of finished product (plastic pellets) and seeks relief from provisions of the Township Zoning By-Law 17 of 2003 as follows:
>
> • To deviate from Table "A", with regards to the minimum side yard setback, from 30m to 0m
>
> • To deviate from Table "A", with regards to the maximum building height, from14m to 25m
>
> The Committee feels the variance is minor in nature, meets the intent of both the Official Plan and Zoning By-law, and is desirable for the development and use of the land.

[15] A note to the Decision stated that "[o]nly individuals, corporations and public bodies may appeal decisions in respect of applications for minor variance to the Ontario Land Tribunal (OLT)" and that the last day to appeal the Decision was 16 October 2023.

[16] NOVA filed an appeal with the OLT. However, on 31 October 2023, it was advised by the OLT that, as a result of amendments to the Act effected by the *More Homes Built Faster Act, 2022*, S.O. 2022, c. 21, only a "specified person or public body" could appeal the Decision, and that the OLT had determined that, accordingly the applicant did not have a right of appeal.

Jurisdiction

[17] The absence of a statutory right of appeal does not necessarily prohibit a party from seeking judicial review of a decision pursuant to s. 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, C.J.1: *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, 489 D.L.R. (4th) 191, at paras. 43-50.

[18] At common law, a person will have standing to seek a remedy in proceedings for judicial review if they are an "aggrieved person", an "affected person", or someone who is "exceptionally prejudiced" by the impugned administrative action: Donald J. M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 2024), ¶ 4:14.

[19] Although the respondent accepts that in appropriate circumstances the court could grant the applicant standing to seek judicial review, it submits that the rationale for the recent legislative amendments was to limit appeals which hold up the implementation of minor variance planning decisions. It argues that in the absence of any compelling evidence that the applicant will suffer any adverse effects from the proposed addition, the court should decline the applicant's standing to seek judicial review.

[20] The applicant counters that the effect of the respondent's argument would be to render the decision, and many others like it, immune from judicial scrutiny. Furthermore, the absence of any adequate alternative remedy is a factor which will weigh in favour of a court exercising its discretion to undertake judicial review: *Yatar*, at para. 57.

[21] In my view, a reasonable assessment of the facts and circumstances of the parties' dispute leads to the conclusion that the applicant is an aggrieved or affected party.

[22] Despite the swell of accusations and counter-accusations that the dispute between these parties is motivated by competitive factors, it is not uncommon for the owner of a neighbouring property to be granted standing to challenge a planning decision: *Tungland v. Edmonton (City)*, 2017 ABQB 246, 50 Alta. L.R. (6th) 389.

[23] In the present case, the fact that the variance requested includes locating the new structure directly on the shared property line (when the zoning By-Law provides for a 30 metre setback) which would be nearly twice the height of the existing building, is strongly supportive of granting the applicant standing.

[24] The rationale for the statutory amendments that removed the right of appeal for parties in the applicant's position may well have been to reduce obstacles in the minor variance application process, as will be discussed below. However, the statute not only specifies that reasons must be given by a committee of adjustment, but states what those reasons should contain. Where an affected party without right of appeal seeks judicial review of a committee of adjustment's decision

on a minor variance application, the committee's alleged failure to give the reasons it is statutorily required to provide should weigh heavily in favour of permitting judicial review.

[25] I am satisfied in the circumstances that the court should entertain this application for judicial review on its merits.

Standard of Review

[26] The presumptive standard of review is that of reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653. Issues of procedural fairness are reviewable on a correctness standard, applying the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

Issues to be determined

[27] The applicant raises the following issues:

a. Motion to Strike

To the extent that the Daichendt affidavit goes beyond providing the court with general background that is not contained in the record of proceedings before the Committee, should all or portions of the affidavit be struck out?

b. Was the Decision Unreasonable?

i. Was the Decision's recitation of the language contained in s. 45(1) of the Act sufficient to discharge the requirement to give reasons contained in *Vavilov* and s. 45(8.1) of the Act?

ii. If so, could the Committee reasonably have concluded that the proposed variance, was "minor", necessary, or consistent with the intents and purposes of the Township's Official Plan and by-laws?

c. Was the Applicant Denied Procedural Fairness?

Did the Committee deprive NOVA of a meaningful opportunity to be heard by:

i. Failing to provide NOVA with notice of *ex parte* communications between Dow and the Committee Clerk concerning negotiations that had been going on between the parties and, hence, depriving NOVA of the opportunity to respond to those communications; and

ii. Cutting the hearing short without giving NOVA the opportunity to make reply submissions based on the Committee's mistaken assumption that NOVA would have a right of appeal against the Decision.

[28] As I will explain, the Decision cannot stand because the Committee failed to give reasons in accordance with *Vavilov* and, specifically, s. 45(8.1) of the Act. It is therefore not necessary to engage in a detailed analysis of the other substantive issues raised.

Preliminary Issue – Motion to Strike

[29] Both parties filed evidence on this application in addition to the record before the Committee.

[30] The general rule on an application for judicial review is that the evidence before the court should essentially be the material that was before the decision maker at the time the decision was being made: *Sierra Club Canada v. Ontario (Ministry of Natural Resources and Ministry of Transportation)*, 2011 ONSC 4086 (Div. Ct.), at para. 13; *Rockcliffe Park Residents Assn. v. Ottawa (City)*, 2024 ONSC 2690 (Div. Ct.), at para. 34.

[31] As the Divisional Court explained in *Sierra Club Canada*, at para. 14, evidence to supplement the record before the decision maker is permissible only in exceptional circumstances, for example, to demonstrate an absence of evidence on an essential point in the decision, or to show a breach of natural justice that cannot be proved by mere reference to the record.

[32] The applicant served two affidavits in support of its application for judicial review:

a. An affidavit of Leo Dumaine, sworn 14 March 2024, which is 5 ½ pages in length and includes 13 exhibits. Portions of the affidavit and some of the exhibits address procedural fairness issues raised in the notice of application.

b. An affidavit from Samantha Jenkins, sworn 14 March 2024, consisting of 4 ½ pages and including one exhibit. Ms. Jenkins is an in-house lawyer at NOVA and attended the Committee hearings on 28 August 2023 and 25 September 2023 in her capacity as NOVA's client representative. Her affidavit addresses what she observed at those hearings and attaches what she states to be her contemporaneous notes of the 25 September 2024 meeting.

[33] The respondent does not challenge the admissibility of either the Dumaine or Jenkins affidavits.

[34] The affidavit of Herbert Daichendt, sworn on 5 April 2024 and contained in Dow's responding record, is 22 ½ pages in length, containing 32 exhibits, for a total of 1,172 pages.

[35] The deponents of the three affidavits were cross-examined.

[36] The Daichendt affidavit sets out a fairly detailed history of the Dow and NOVA properties, as well as agreements that the parties have entered into (a shared services agreement and an easement agreement). To the extent that the Daichendt affidavit contains background, and seemingly non-contentious information, I do not regard it as offensive to the general practice concerning evidence on applications for judicial review.

[37] To similar effect, other parts of Mr. Daichendt's affidavit address procedural fairness matters that arise from the Dumaine and Jenkins affidavit. Such evidence is presumptively admissible on an application such as this.

[38] Mr. Daichendt's affidavit also confirms that there were *ex parte* communications between Dow and the Township's representative. Some, but not all, of these communications were included in the record of proceedings of the Committee of Adjustment. However, to the extent that the Daichendt affidavit attaches Dow's communications with the Township which were not contained in the Township's record of proceedings, the inclusion of such communications is acceptable.

[39] Where the Daichendt affidavit crosses a line, however, is when it enters details of discussions between the parties prior to the minor variance application being made, the rationale for the application, and a recitation of the arguments and submissions made by Mr. Daichendt in his capacity as Dow's representative at the Committee hearings. Such evidence exceeds what is permissible, is of no assistance to this court, and should not be considered.

[40] Similarly, the Daichendt affidavit attaches lengthy decisions from the Alberta Court of Queen's Bench and the Alberta Court of Appeal concerning a different dispute between the parties which litigation, according to one of Mr. Daichendt's communications to the Township, was said to give the appearance that NOVA was motivated by competitive factors to obstruct Dow's fair business advancement and restrict operations and future development on its St. Clair River site. Such evidence is also of no assistance to the court on this application for judicial review.

[41] Even though there are portions of the affidavits that do not strictly speaking offend the usual practice, by any measure the amount of material placed before this court by these two well resourced parties was excessive and surplus to needs.

[42] Rather than surgically exclude objectionable portions of the Daichendt affidavit, evidence contained in the affidavits filed by the parties which violates the principles concerning appropriate evidence on judicial review applications that I have outlined above has not informed my decision.

The Requirement to Give Reasons

[43] The relevant provisions of the Act are as follows:

> **Powers of committee**
> 45 (1) The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.
>
> **Criteria**

(1.0.1) The committee of adjustment shall authorize a minor variance under subsection (1) only if, in addition to satisfying the requirements of that subsection, the minor variance conforms with,

(a) the prescribed criteria, if any; and

(b) the criteria established by the local municipality by by-law, if any.

….

Power of committee to grant minor variances
(3) A council that has constituted a committee of adjustment may by by-law empower the committee of adjustment to grant minor variances from the provisions of any by-law of the municipality that implements an official plan, or from such by-laws of the municipality as are specified and that implement an official plan, and when a committee of adjustment is so empowered subsection (1) applies with necessary modifications.

….

Decision
(8) No decision of the committee on an application is valid unless it is concurred in by the majority of the members of the committee that heard the application. 2015, c. 26, s. 29 (3).

Same
(8.1) The decision of the committee, whether granting or refusing an application, shall be in writing, shall be signed by the members who concur in the decision and shall,

(a) set out the reasons for the decision; and

(b) contain a brief explanation of the effect, if any, that the written and oral submissions mentioned in subsection (8.2) had on the decision. 2015, c. 26, s. 29 (3).

Written and oral submissions
(8.2) Clause (8.1) (b) applies to,

(a) any written submissions relating to the application that were made to the committee before its decision; and

(b) any oral submissions relating to the application that were made at a hearing.

[44] Pursuant to s. 45(1) of the Act, an applicant bears the burden of establishing that the variance from the provisions of the by-law sought, in respect of the land, building or structure or use thereof, is:

a. A minor variance;

b. Desirable, in the opinion of the Committee, for the appropriate development or use of the land, building or structure;

c. Maintains, in the opinion of the Committee, the general intent and purpose of the zoning by-law; and

d. Maintains, in the opinion of the Committee, the general intent and purpose of the official plan.

[45] It is well established that it is incumbent on a Committee of Adjustment to consider each of these requirements and, in its reasons, set out whatever may be reasonably necessary to demonstrate that it did so and that, before an application for a variance is granted, all of the requirements were satisfied: *Vincent v. Degasperis* (2005), 256 D.L.R. (4th) 566 (Ont. Div. Ct.), at para. 11.

[46] As the Supreme Court noted in *Vavilov*, at para. 81, where – as is the case under s. 45 of the Act – reasons are required, "they are the primary mechanism by which administrative decision makers show that their decisions are reasonable – both to the affected parties and to the reviewing courts".

[47] At para. 102 of *Vavilov*, the Supreme Court held that reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the decision maker's rationale.

[48] At the core of the applicant's submissions is that the Committee's reasons, which simply recite the language of s. 45(1), fail to meaningfully engage with the central issues and concerns raised by the application.

[49] The purpose of a minor variance is to grant relief from the rigid application of the zoning by-law, having regard for individual circumstances and the broader public interest.

[50] The question of whether or not a proposed variance is "minor" will often be contentious. The statute does not define the term "minor variance". In *Vincent*, this court held, at para. 12:

> A minor variance is, according to the definition of "minor" given in the Concise Oxford Dictionary, one that is "lesser or comparatively small in size or importance". This definition is similar to what is given in many other authoritative dictionaries and is also how the word, in my experience, is used in common parlance. It follows that a variance can be more than a minor variance for two reasons, namely, that it is too large to be considered minor or that it is too important to be considered minor.

[51] It is also well established that the term "minor variance" is a relative one and should be flexibly applied: *McNamara Corporation Ltd. and Colekin Investments Ltd.*, (1977), 15 O.R. (2d) 718 (Div. Ct.), *Perry v. Taggart*, [1971] 3 O.R. 666 (H.C.)

[52] The respondent argues that, depending on the process used in assessing variances, even "template reasons" provided by a Committee of Adjustment, taken in combination with other information provided to the Committee, could be sufficient: *Johnston, Re*, 2008 CarswellOnt 1806 (O.M.B.), at para. 15.

[53] The respondent, referring to various paragraphs of the Supreme Court's decision in *Vavilov*, argues that:

a. The adequacy of reasons "is not a 'stand-alone' basis for quashing a decision" (para. 304 of the reasons of Abella and Karakatsanis J.J., concurring with the result);

b. Reasons "must not be assessed against a standard of perfection", and do not require "all the arguments, statutory provisions, jurisprudence or other details" required in a judicial position (*Vavilov*, at para. 91, citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16);

c. An administrative decision maker's expertise and choice of procedures may lead to outcomes that "might be puzzling or counterintuitive on its face", but may nevertheless accord with practical realities and be reasonable (*Vavilov*, at para. 93); and

d. Reasons should be read in light of the record and with appropriate sensitivity to the administrative setting in which they were given. A reviewing court must look to the record as a whole to understand the decision, and in doing so, the court will often uncover a clear rationale for the decision (*Vavilov*, at paras. 137-138).

[54] The principal difficulty with the respondent's arguments are that the reasons given by the Committee are reasons in name only. They give no clue as to the justification for the Decision.

[55] The question of whether or not Dow's application could properly be considered as being for a "minor variance" was clearly a contentious issue. As this court noted in *McNamara*, whether variances are minor must in each case be determined in light of the particular facts and circumstances of the case. I agree with NOVA that the Decision is entirely deficient in that it contains no examination of the facts or circumstances. Specifically, it does not address NOVA's concerns that the total elimination of the 30 metre setback is not minor. Nor does it address NOVA's contentions concerning the adverse impacts of the proposed variance on NOVA's property.

[56] As previously noted, the respondent relies on the concurring opinion in *Vavilov*, at para. 304, that the adequacy of reasons should not be a stand-alone basis for quashing a decision. That may be so where the basis for a decision by a specialised administrative actor is readily apparent from the record, but not clearly expressed in written reasons. That is not the present case. Nor is it a case where an administrative decision maker failed to address a relevant factor in reaching a decision, but such omission was not material to the decision rendered: in such circumstances, the

applicant would bear the burden of showing that the omission rendered the decision reached unreasonable.

[57] I would add that Dow takes issue with NOVA's contention that it was not given a chance to reply to Dow's submissions to the Committee, having been told that it would need to "take it up on appeal". Suffice it to say that NOVA's suggestion that the lack of reasons provided by the Committee of Adjustment reflected the Committee's mistaken belief that it was a mere staging post on the way to an inevitable *de novo* appeal, is understandable in the circumstances.

[58] Ultimately, I am satisfied that the absence of reasons for the Committee's decision is, in and of itself, a sufficient basis for quashing the decision.

[59] Given this finding, I do not consider it necessary to determine the fairness issues raised by the applicant. I therefore turn to the appropriate remedy.

Remedy

[60] While the applicant acknowledges that ordinarily the most appropriate remedy would be to remit the matter back to the Committee for consideration, it submits that there is an exception to that general rule when a particular outcome is inevitable, and remitting it back would serve no purpose: *Vavilov*, at para. 142.

[61] During the course of her cross examination, Ms. Jenkins expressed her impression that the Committee of Adjustment felt that it was in a "lose-lose because it's between two big employers" which, she felt, prompted the comment by one of the panel members to "take it up on appeal". Ms. Jenkins' impression was that the Committee member wanted to wash his hands of the decision, and thereby avoid antagonising one of the parties, and instead to defer the ultimate decision to an appeal.

[62] The respondent submits that if the court deems it appropriate to intervene, the matter should be remitted to the Committee of Adjustment, which has expertise in planning issues concerning the Township.

[63] In my view, the Committee is the appropriate authority to determine Dow's application for a minor variance. I do not accept the suggestion that the outcome of the application is inevitable. Even if, as the applicant suggests, the Committee had wanted to avoid upsetting a major employer in the Township, believing that a final decision on the merits of the application would be made on appeal, there is no basis for believing that the Committee cannot and would not determine the application through the employment of a fair process and an appropriately reasoned decision,

[64] Accordingly, I would remit this matter back to the Committee for a full reconsideration of Dow's minor variance application.

Costs

[65] The costs incurred by the parties in relation to this judicial review application are significant. NOVA's costs outline on the motion to strike discloses actual costs of $79,133.99

($47,615.99 on a partial indemnity basis and $71,254.47 on a substantial indemnity basis). On the substantive application, NOVA's actual costs are $370,306.69 ($225,048.84 on a partial indemnity basis and $333,992.23 on a substantial indemnity basis).

[66] Dow's costs are also sizeable. $71,207.52 in respect of the motion to strike ($42,724.51 on a partial indemnity basis, and $64,086.76 on a substantial indemnity basis). On the application proper, Dow's full indemnity costs are $277,993.56 ($166,796.14 on a partial indemnity basis and $250,194.20 on a substantial indemnity basis).

[67] In accordance with the usual practice of the Divisional Court, counsel were invited by the court to agree on the amount of costs that should be awarded to the successful party. The court indicated to counsel that, absent agreement, the court would typically fix costs in a case such as this in a range of $15,000 to $25,000.

[68] The parties were unable to reach an agreement on costs.

[69] We see no reason to depart from this court's usual practice. Although the indemnity principle underscores the law of costs, the court may, in appropriate circumstances, exercise its discretion not to reward excessive litigation that incurs costs which are entirely disproportionate. The parties, having chosen to lavish their resources on what amounts to a dispute between two commercial neighbours (and competitors), should not be surprised that the costs awarded are limited to what the court regards as proportionate to the issues in dispute.

[70] NOVA has been successful on this application for judicial review and the related motion to strike, and is entitled to its costs on a partial indemnity scale.

[71] Those costs are fixed in the amount of $25,000, all inclusive.

Disposition

[72] For the foregoing reasons, the application is allowed, with costs, the Decision is quashed, and Dow's application for a minor variance is remitted to the Committee of Adjustment for determination on its merits following a rehearing of the application.

_____
Mew J.

I agree: _____
Backhouse J.

I agree: _____
Lococo J.

Date: 24 July 2025

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Applicant

– **and** –

DOW CHEMICAL CANADA ULC

Respondent

REASONS FOR DECISION

MEW J.

Date: 24 July 2025