CITATION: 1582235 Ontario Limited v. Ontario, 2020 ONSC 1279
DIVISIONAL COURT FILE NO.: 351/19
DATE: 20200515

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Sachs, Backhouse and Mew JJ.

BETWEEN:	
1582235 Ontario Limited, Canadian Reproductive Imaging Inc., Clearview Diagnostic Imaging Inc. and Dr. Alexander Hartman	*Jonathan C. Lisus and Zain Naqi*, Counsel for the Applicants
Applicants	
– **and** –	
Ontario (Ministry of Health and Long-Term Care)	*Tamara D. Barclay and Stephanie Figliomeni*, Counsel for the Respondent
Respondent	
	HEARD at Toronto: February 25, 2020

REASONS FOR DECISION

SACHS and BACKHOUSE JJ.

OVERVIEW

[1] This application arises out of a billing dispute between the Ontario Ministry of Health and Long-Term Care (the "Ministry"), Dr. Hartman and three corporations owned and operated by Dr. Hartman and his family (the "Applicants"). Specifically, the dispute concerns the alleged overbilling of physician's fees for services rendered by Dr. Hartman in the amount of $985,000 as well as $1.6 million in facility fees (or overhead costs), incurred through the provision of medical services in Independent Health Facilities ("IHFs") operated by the Corporate Applicants (as

defined below) pursuant to the *Independent Health Facilities Act*[1] (the "*IHFA*"). The claim that facility fees were overbilled falls out of and is directly related to the physician's fees claimed as an overpayment.

[2] The Applicants applied for judicial review of the Ministry's conduct with respect to (a) its decision to set off $1.6 million in future monies payable for facility fees on account of alleged past overbilling; (b) its delay in submitting its opinion of the alleged overbilling for physician's fees to an independent adjudicative tribunal, and (c) its delay in granting licensing applications involving the Corporate Applicants. In essence, the Applicants' position is that the Ministry had no authority to impose the set-off, has targeted Dr. Hartman as one of the top-billing physicians in Ontario and has acted unlawfully and in bad faith. They seek an order for *mandamus* requiring the Ministry to reverse the unlawful conduct and reimburse the monies taken.

[3] At the relevant time, the *Health Insurance Act*[2] ("*HIA*") provided for an independent review of disputes regarding physician's billings by the Physician Payment Review Board ("PPRB"). There was no such independent review of billing disputes for facility fees provided for in the *IHFA*. However, there is no dispute that a determination from the PPRB with respect to the alleged overbilling of $985,000 of physician fees would have resolved the claim of overbilling with respect to the $1.6 million of facility fees, both of which arose out of the same allegations and the same review. There was no statutory authority in the *IHFA* to set off amounts the Ministry claimed had been overbilled for physician fees against future monies owed. The *IHFA* provided for set-off for amounts that "for a prescribed reason" should not have been paid for facility fees, but no reasons were ever prescribed by Cabinet.

[4] The Ministry's position initially was that there could be no independent adjudication by the PPRB sought by Dr. Hartman of the physician's fees claim until the Ministry had completed its review. When the Ministry confirmed that it had completed its review and that it continued to be of the opinion that Dr. Hartman had overbilled physician's fees and owed $985,000, it took the position that there was no entitlement to an independent review by the PPRB because the Ministry had not issued a Final Opinion, a prerequisite to a PPRB review. At the same time, the Ministry imposed a $1.6 million set-off for the related claim for overbilled facility fees based on the same claims of overbilling that applied to the physician's fees. The Ministry's position is that while there is no statutory provision authorizing set-off, the set-off was legal by virtue of its implied authority under the *IHFA* and under equitable set-off.

[5] The parties agree that the lawfulness (and hence reasonableness) of the Ministry's conduct must be determined in light of the statutory scheme in force at the time it took its set-off action.

[6] Amendments to the *HIA* and *IHFA* were passed in December 2019 which overhauled the billing audit and review process for physician and facility fees and replaced the PPRB with the Health Services Appeal and Review Board ("HSARB"). The amendments now expressly authorize

---

[1] *Independent Health Facilities Act*, R.S.O. 1990, c. I.3.
[2] *Health Insurance Act*, R.S.O. 1990, c. H.6.

the Minister to form an opinion on the overbilling of facility fees, which immediately gives rise to a debt for which the Minister can engage in set-off, but this gives the licensee a right to an independent adjudication by the HSARB of the billing dispute over facility fees.

[7] Three months after the notice of application for judicial review was issued, the licensing applications were approved. The PPRB no longer exists. As a result, the Applicants no longer seek the relief claimed with respect to physician's fees or the licensing applications. Nevertheless, the Applicants submit that the Ministry's conduct in regard to these issues was part of its campaign to pressure the Applicants into a settlement on its terms and demonstrates its bad faith. The Applicants also argue that the set-off decision was unreasonable and that they were denied procedural fairness in relation to the Ministry's decision about allegedly overbilled facility fees.

[8] For the reasons set out below, we have concluded that the set-off decision for facility fees was not expressly or impliedly authorized by the statutory scheme in force at the time, that the Ministry's decision to proceed by way of equitable set-off was unreasonable and that the Applicants are entitled to an order by way of *mandamus* requiring the Ministry to reverse its decision to impose a $1.6 million set-off against future facility fees owed to the Applicants.

BACKGROUND

[9] Dr. Hartman is a practicing radiologist in Ontario. 1582235 Ontario Limited, Canadian Reproductive Imaging Inc., and Clearview Reproductive Imaging Inc. (collectively, the "Corporate Applicants") are owned and operated by Dr. Hartman and his family. The *IHFA* came into force in 1990 and establishes a statutory scheme for the issuance of licences to facility operators to provide specified health services at specified sites known as IHFs. The Hartman family (through various entities) has operated IHFs since the establishment of this regime three decades ago.

[10] The Corporate Applicants collectively hold 28 licenses under the *IHFA* to operate community-based diagnostic imaging clinics. Prior to this dispute, licenses were routinely issued within a one to two- month period of application. In July 2018, the Corporate Applicants made licensing applications to facilitate internal restructuring and to advance new business initiatives, including a partnership at Mount Sinai hospital.

The Statutory Scheme

[11] Medical services performed by physicians in Ontario are generally funded on a fee-for-service model. Under this model, physicians submit billing claims for insured medical services to the General Manager of the Ontario Health Insurance Plan ("OHIP"). OHIP will then pay the physician a professional fee for each service according to the fee codes set out in a Schedule of Benefits and Fees. This funding regime is governed by the *HIA* and its regulations.

[12] Funding for IHFs is governed by a separate statute, the *IHFA*. IHFs may charge "facility fees" to the Ministry on a fee-for-service basis in respect of overhead or operating costs and services that support the provision of the insured medical service. By way of example, if a radiologist reviews an ultrasound, a professional fee may be billed to OHIP for that insured service. Additionally, the IHF where the ultrasound image was generated will be entitled to charge a separate facility fee associated with that service. This latter fee, the facility fee, is meant to cover,

amongst other things, the cost of the equipment and having a technologist produce the ultrasound image.

[13] Pursuant to the *IHFA*, the licensing process for IHFs is overseen by the Director of Independent Health Facilities (the "Director") in the Ministry.

[14] The pre-December 10, 2019 legislative framework for auditing physician billings arose out of a comprehensive review conducted by former Supreme Court Justice Peter Cory. The review was a response to several high-profile audits that had caused catastrophic consequences to physicians and their families, including physician suicides. The Cory review cited many concerns with the audit system including, in particular, the Ministry's powers to directly recover fees by set-off against future monies payable to the physician, which it recommended be repealed. Justice Cory also criticized the widespread use of statistical sampling by the Ministry to calculate the amount of its alleged claims. Justice Cory recommended enhanced procedures in the fee recovery process, including hearings before an independent body with documentary disclosure, cross-examinations and a robust appeals process. The *HIA* was amended in 2007 to substantially implement the Cory recommendations, including eliminating the direct recovery provisions under the old regime and creating the PPRB, which was the only body empowered to order recovery of fees from a physician.

[15] The parties agree that the reasonableness of the Ministry's conduct must be determined based on the statutory scheme in force at the time it took its set-off action. Accordingly, the provisions of the *HIA and IHFA* in force prior to the December 10, 2019 amendments are the relevant provisions for the purposes of this review. These provisions are set out below:

> *Health Insurance Act*, R.S.O. 1990, c. H.6
>
> **Notice of initial opinion**
>
> 18(14) Where the General Manager is of the initial opinion that a circumstance described in subsection (2) exists in respect of one or more claims paid for services provided by a physician, the General Manager may give the physician a notice that,
>
> (a) sets out a brief statement of the facts giving rise to the General Manager's initial opinion as well as the General Manager's interpretation of any of the provisions of the schedule of benefits relevant to the matter;
>
> (b) advises that the General Manager is reviewing the physician's claims and that the physician may, not later than 20 business days after receiving the notice, provide the General Manager in writing with any information that he or she believes is relevant to determining whether a circumstance described in subsection (2) exists in respect of the claim or claims paid as submitted by the physician or an insured person for services provided by the physician; and
>
> (c) advises that the physician may seek an opinion of the joint committee in accordance with clause 5 (3) (a) unless the joint

committee has already provided an opinion on the interpretation of those provisions).

Notice

18(15) If, after reviewing records and other information in his or her possession and any opinions received from the joint committee, the General Manager is of the opinion that a circumstance described in subsection (2) exists in respect of one or more claims paid for services provided by the physician, the General Manager may give a notice to the physician that,

(a) provides the physician with the General Manager's reasons for his or her opinion; and

(b) notifies the physician that, unless the physician submits future claims for those services in accordance with the General Manager's opinion, future claims may be referred to the Review Board and payments for those services may be subject to reimbursement in whole or in part after the date notice is given.

Disagreement with notice

18(16) The physician may, within 20 business days of receiving the notice under subsection (15), give a notice to the Review Board requesting it to hold a hearing with respect to the interpretation of any of the provisions of the schedule of benefits relevant to the matter.

Where continuing inappropriate claims

(17) If the General Manager has given a notice under subsection (15) and the physician has not requested a hearing by the Review Board within the time provided in subsection (16) and if, upon reviewing the claims for services rendered by the physician and any other information in the General Manager's possession, the General Manager is of the opinion that a circumstance described in subsection (2) continues to exist, the General Manager may give a notice to the Review Board requesting it to hold a hearing, and shall promptly give the physician notice of the request.

Immediate referral for false claims by physician

(18) Despite subsection (17), the General Manager may give a notice to the Review Board requesting it to hold a hearing without giving a notice to the physician under subsection (15), but shall promptly afterwards give notice to the physician of the request for a hearing, if the General Manager is of the opinion that a circumstance described in subsection (2) exists in respect of one or more claims paid for services provided by the physician, and that the physician

> knew or ought to have known that the claims submitted to the Plan were false.
>
> **Settlement with physician**
>
> (19) Nothing in this section prevents the General Manager and physician from settling, at any time and despite any other provision of this Act, any disagreement between the General Manager and the physician with respect to accounts.

[16] Unlike the *HIA*, the *IHFA* did not contain a procedure for addressing billing disputes over facility fees and it did not establish a board or tribunal similar to the PPRB to adjudicate such matters. The relevant provisions of the *IHFA* prior to the December 10, 2019 amendments are:

> *Independent Health Facilities Act*, R.S.O. 1990, c. I.3
>
> **Minister to pay for services**
>
> **24** (1) The Minister shall pay such amounts as may be prescribed for services rendered in an independent health facility.
>
> **Minister may pay costs**
>
> (2) Subject to the regulations, the Minister may pay all or part of the capital costs or operating costs of an independent health facility or of the costs of the services provided in an independent health facility according to the method of payment approved by the Minister.
>
> **Recoveries**
>
> (3) If the Minister is of the opinion that amounts that, for a prescribed reason, should not have been paid to a person were in fact paid to the person under subsection (1), the Minister may set off the amount against any amounts payable to the person under this section in the future.
>
> **Costs of establishing**
>
> (4) The Minister may pay all or part of the costs of establishing an independent health facility.
>
> **Delegation**
>
> (5) The Minister may delegate any power of the Minister under this section.

Legislative Amendments

[17] As previously noted, in December 2019, the *HIA* and the *IHFA* were amended. Amongst other things, the amendments replaced the PPRB with the HSARB in the *HIA*. The new *IHFA* now also expressly authorizes the Ministry to form an opinion on the overbilling of facility fees, which immediately gives rise to debt for which the Ministry can engage in set-off. After the Ministry has formed this opinion, a licensee can, pursuant to the *IHFA*, request a hearing before the HSARB.

Chronology and Factual Background

- In December 2015, the Ministry initiated a review of Dr. Hartman's professional fee billings as part of a project to audit top-billing physicians in the province.

- On January 12, 2016, Dr. Hartman delivered information and records requested by the Ministry in connection with its billing review.

- On July 28, 2016, the Ministry advised that it had made significant progress in its review.

- On January 17, 2017, the Ministry requested additional information and records from Dr. Hartman. By February 2017, the Ministry received a letter and over 500 medical records from Dr. Hartman.

- On November 16, 2017, the Ministry alleged to the College of Physicians and Surgeons (the "CPSO") that Dr. Hartman had committed professional misconduct. The CPSO opened an investigation and ultimately concluded that no disciplinary action was warranted.

- By letter dated November 16, 2017, the Ministry notified Dr. Hartman of the Ministry's Initial Opinion that there were payment errors of $984,713.79 and advised him that "To resolve the above noted payment errors, you may send a cheque for $984,713.79." The opinion was generated using statistical inference from a sample of records.

- Although the Applicants took issue with the Ministry's approach, they changed their billing practices to conform to the Ministry's advice in November of 2017. However, they never accepted the Ministry's interpretation of the *Schedule of Benefits*, nor its claims of billing errors.

- In December 2017, counsel for Dr. Hartman responded to the Initial Opinion, disputing the allegations of improper billing and seeking disclosure of the documentary support for the Ministry's allegations and the identity of the experts it used to arrive at that opinion.

- On March 14, 2018, the Ministry responded with some specific examples of billings issues. The Ministry proposed an "engagement" with Dr. Hartman "regarding a method to resolve this matter."

- On April 11, 2018 the Applicants agreed to meet with the Ministry.

- On July 20, 2018, the Ministry proposed a teleconference or a sit-down meeting in Kingston and raised for the first time a new claim for "the associated Technical Fees totalling $1,613,952.25 to be discussed as well." The calculation of the Technical Fees (or facility fees) provided by the Ministry in the July 20, 2019 letter was directly related to and based on the same claims of overbilling that applied to the $985,000 in physician's fees.

- Jeffrey Hutchison, the Program Manager of the Ministry's Audit and Adjudication Unit deposed on cross-examination: that there was one review with respect to both the $985,000 in physician's fees and $1.6 million in facility fees claimed to have been paid in error and the latter claim falls out of the former; facility fees do not exist independently of professional fees; facility fees are, by definition incidental to the provision of insured services and, with minor exceptions that do not apply here, can only be charged to OHIP where there are corresponding professional fees.

- Pauline Ryan, Director of Health Services Branch and the Director of the Independent Health Facilities in the Ministry, also confirmed this on her cross-examination: the facility fees claimed as an overpayment to the Corporate Applicants are directly related to and arise from the physician's fees claimed as an overpayment.

- On September 12, 2018, Pauline Ryan advised that she would not be proceeding with a review of the licensing transfer applications until concerns identified by the Ministry's Payment Accountability Unit were resolved. On cross-examination, she stated that she relied upon s. 6(1) of the *IHFA* which provides: "The person will operate the facility competently and with honesty and integrity."

- The parties had a settlement meeting on October 28, 2018 to discuss the overbilling dispute. During that meeting, the Applicants disputed the Ministry's examples of overbilling.

- In December 2018, the Ministry advised that it had not changed its view on the billing issues or reimbursement of the amounts claimed. It declined to disclose the experts it had consulted in reaching its conclusions. In response, Dr. Hartman advised of his desire to have a hearing scheduled before the PPRB.

- On or about December 24, 2018, the Ministry advised:

> "… resolution matters pursuant to s.18(19) of the Health Insurance Act (HIA) are not matters that can be reviewed by the Physician Payment Review Board (PPRB). Furthermore, this was the initial review conducted by the ministry of Dr. Hartman's claims and medical records in order to verify whether payment to Dr. Hartman was appropriate. The PPRB does not have jurisdiction to conduct a review of a physician's claims under the HIA until a final review has been conducted by the ministry and your client has been provided with notice by the ministry pursuant to s.18(15) of the HIA. Such a notice has not been provided.
>
> In addition, the PPRB has no jurisdiction to address claims related to technical fees under the Independent Health Facilities Act. If any case conference is scheduled by the PPRB, the ministry will take the position that the PPRB does not have

> jurisdiction in this matter, and will oppose the scheduling of any hearing by the PPRB."

The Ministry advised it would provide a more complete response by January 21, 2019.

- On March 20, 2019, counsel for Dr. Hartman wrote to the Ministry complaining that the Ministry's self-imposed January 21, 2019 deadline had long passed. The letter stated that if the Ministry was continuing to seek reimbursement then "it is clearly time for the Physician Payment Review Board to exercise its jurisdiction over the billing questions raised. The Ministry cannot prevent recourse to the relevant statutory remedies through its own delay, especially when that delay is causing significant prejudice on an ongoing basis. If the Ministry is taking a position that necessitates a hearing before the Physician Payment Review Board, the hearing must be scheduled as soon as possible."

- On or around April 1, 2019, the Ministry advised that it would not be identifying the medical experts it had relied upon. It again advised that the PPRB did not have jurisdiction to conduct a review of a physician's claims until a final review had been conducted and a final notice has been provided to the physician pursuant to s. 18(15) of the *HIA*. It advised: "Such a notice has not been provided to Dr. Hartman…. The Ministry's position is that a repayment of $984,713.79 (Professional Fees) would resolve the inappropriate billings of professional fees by Dr. Hartman."

- At the same time, the Ministry advised that it would set off $1,613,952.25 (Facility Fees) against future payments to be made by the Ministry to the Corporate Applicants over a 12 month period.

- On April 22, 2019, counsel for the Corporate Applicants responded to the Ministry that the set-off was entirely without statutory authority and was arbitrary. The letter stated that "the Ministry has consistently taken the position that it has only conducted an initial review to verify whether payment to Dr. Hartman was appropriate and has continued to assert that it has not made any final determination with respect to those professional fees. However in relation to the facility fees that are directly associated with those professional fees and which involve the exact same allegations of improper billing, the Ministry has made a final decision to set them off against future fees."

- On April 24, 2019, counsel for Dr. Hartman again requested that the billing dispute be referred to a hearing before the PPRB to allow for a full and fair adjudication of the Ministry's allegations.

- On May 3, 2019, general counsel for the Ministry advised that it had completed the review and continued to be of the opinion that Dr. Hartman had received $984,713.79 in error for claims paid between April 1, 2014 and January 5, 2017. The Ministry continued to refuse to issue the Final Notice so that the matter could be referred to adjudication by the PPRB. The Ministry's letter stated:

> "At this time, the ministry is exercising its option to work directly with your client to resolve the overpayment of professional fees under the Health Insurance Act (HIA), in accordance with section 18(19) of the HIA.
> The ministry's intent to recover facility fee overpayments through set off only relates to the facility fees paid to the IHFs under the Independent Health Facilities Act (IHFA) and that is a separate matter. The Physician Payment Review Board (PPRB) does not have jurisdiction to review that matter.
>
> To resolve the payment errors described in the November 16, 2017 letter, your client may send a cheque to my attention made out to the Minister of Finance at the above address."

- On cross-examination on November 7, 2019, Pauline Ryan acknowledged that under the *HIA*, once a final determination has been made by the Ministry, a notice is issued communicating that determination and there is a statutory right of the physician to go to the PPRB for a determination as to whether the physician's billings are offside the schedule of benefits. She acknowledged that that process would determine whether the physician was correct or the Ministry was correct. She testified that her payment accountability area was not in a position to make that decision at that point in time.

- At another point in her cross-examination, Pauline Ryan acknowledged that the Applicants could rely upon the general counsel's letter that the Ministry had completed its review, that the Ministry had formed the opinion that Dr. Hartman owed $985,000 to the Crown and that Dr. Hartman had made it clear that he did not agree. She was unable to identify a reason for why the Final Notice had not been issued.

- During his cross-examination on November 26, 2019 Jeffrey Hutchison (the Manager of the Ministry's audit unit) deposed that going to the PPRB is "an administratively burdensome process" that he finds unsatisfactory because "we have to prove each and every claim item, so we can't look at things globally…We try to avoid that by coming to mutual agreement by using [ss.]18(19) [of the *HIA*]."

- On May 10, 2019 the Applicants advised of their intention to bring a judicial review application.

- On May 14, 2019 the Ministry's facility fee set-off began.

- On June 21, 2019, the Applicants commenced an application for judicial review.

- On July 11, 2019, Ministry counsel wrote to Applicants' counsel alleging that the Ministry's preliminary estimate of overbilling for facility fees was approximately $12 million. This was for facility fees billed by the Applicant's clinics in relation to medical services provided by physicians other than Dr. Hartman.

- On September 18, 2019, the Ministry approved the outstanding licensing applications with conditions.

- On October 11, 2019, the Ministry delivered 23 letters to the Applicants (one for each IHF licence) requesting tens of thousands of medical records.

- On October 30, 2019, the Ministry sent letters to the physicians, other than Dr. Hartman, who bill through the Applicants' IHFs informing them of the October 11, 2019 records request.

COURT'S JURISDICTION

[18] Pursuant to s. 2(1) of the *Judicial Review Procedure Act*,[3] the Divisional Court has jurisdiction to grant any relief that an applicant would be entitled to in (1) proceedings by way of an application for an order in the nature of *mandamus*, prohibition or *certiorari*, or (2) proceedings by way of an action for a declaration or for an injunction or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

STANDARD OF REVIEW

[19] The parties agree that there is no standard of review in respect of procedural fairness issues. Rather, it is for the court to determine whether the requisite level of procedural fairness has been accorded, taking into account the factors in *Baker v. Canada (Minister of Citizenship and Immigration*.[4]

[20] The other challenges to the Ministry's actions involve assessing the lawfulness of those decisions on the basis that the decisions were made in bad faith and/or that they were made without jurisdiction. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[5] the Supreme Court specified that a court reviewing an administrative decision (other than a review relating to procedural fairness) must start with the presumption that the applicable standard of review is reasonableness.[6] Situations where the presumption is rebutted are where the legislature has indicated that there is to be a different standard of review or where the review involves constitutional questions, questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between two or more administrative bodies. In the latter three situations concerns for the rule of law dictate that the applicable standard is correctness.[7]

[21] For questions involving the lawfulness of an administrative judicial maker's decision (sometimes referred to as jurisdictional questions), the Supreme Court has definitively concluded that "it is not necessary to maintain this category of correctness review".[8] Concerns about an administrative decision maker exceeding their authority or feeling free to determine the extent of

---

[3] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.
[4] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.
[5] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1.
[6] *Vavilov*, at para. 23.
[7] *Ibid*, at para. 53.
[8] *Ibid*, at para. 67.

their own authority can, according to the Supreme Court, be adequately addressed through the reasonableness framework. "Reasonableness review is both robust and responsive to context."[9]

> Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority.[10]

[22] The Applicants argue that this case concerns the "jurisdictional boundaries" between two administrative bodies – the Ministry and the PPRB. We disagree. At its core the questions raised by the Applicants concern bad faith, procedural fairness and whether the Ministry had the authority to take the facility fees in the way it did.

ANALYSIS

The issues which must be determined are:

1. Did the Ministry act in bad faith?

2. Was the set-off decision (for facility fees) reasonable?

3. Was there a denial of procedural fairness?

4. Are the Applicants entitled to an order by way of *mandamus* that the Ministry reverse its set-off decision for facility fees?

Issue 1: Did the Ministry act in bad faith?

Applicants' Submissions

[23] The Applicants submit that the Ministry acted in bad faith when it refused to refer the matter to the PPRB once the Ministry had completed its review of Dr. Hartman's billings and formed an opinion that Dr. Hartman was billing inappropriately. According to the Applicants, the Ministry deliberately held Dr. Hartman in a state of statutory limbo to dodge an independent adjudication of its allegations. The Ministry's billing review has gone on for four years; an "initial opinion" was delivered pursuant to s. 18(14) of the *HIA* in November 2017; and more than two years have passed without a "final notice" having issued under s. 18(15). This unreasonable delay was based on the Ministry's desire to avoid adjudication and wait until the new more onerous amendments came into effect.

[24] The Applicants further submit that the Director acted in bad faith in withholding her decisions on the licensing decisions, which were made in September 2019 following the filing of this application. The Applicants submit that the "Director had no authority under the *IHFA* to stall

---

[9] *Ibid*.
[10] *Ibid*, at para. 68.

licensing decisions. While she was entitled to approve (with or without conditions) or refuse a request, holding the Applicants in statutory limbo was not an option and was one of the tactics used to pressure the Applicants into settlement on the Ministry's terms."

Ministry's Submissions

[25] The Ministry submits that it has initiated the secondary review process of Dr. Hartman's billings to assess whether the concerns it identified in the Initial Opinion have been addressed, and that it is awaiting receipt of the further Medical Records requested. No Final Notice was issued and no post-Initial Opinion review was conducted prior to the December 2019 amendments to the *HIA*. Accordingly, the PPRB did not have jurisdiction then (because the pre-conditions to a hearing were not met), and the PPRB does not have jurisdiction now (because it has been replaced by the HSARB). Ultimately, the review process is not unreasonable in light of the voluminous records, the time and effort expended in attempts to resolve the dispute, and the need for an appropriate sample-size of post-education billing data and Medical Records. Dr. Hartman has also suffered no prejudice or harm as a result; he continues to bill OHIP and receive payment for physician services rendered.

[26] The Ministry submits that the Director acted reasonably with respect to the eight Internal Transfer licensing applications and the five Third-Party Transfer licensing applications, all of which were approved, with conditions in September 2019. There is no right to an IHF licence, and the Ministry maintains a high level of discretionary control pursuant to the *IHFA*. The *IHFA* does not provide a timeframe by which the Director has to render a decision and there is no requirement to consider an IHF licensee's past licence approval as a reason to grant a new licence. The Initial Opinion and information regarding Dr. Hartman's billing practices raised concerns respecting whether the Corporate Applicants, which were controlled by Dr. Hartman, would operate the IHFs with honesty and integrity as required in s. 6(1) of the *IHFA*. Moreover, the Internal Transfer Applications included clear language that licence applications and IHF billing matters were explicitly linked. The Applicants' allegation of prejudice is not supported by any evidence. Indeed, Mr. Hartman admitted that, among other things, each of the clinics continued to operate, no staff were laid off, and no change was made to the quantum, level or types of services the clinics offered. Ultimately, the Director was reasonably concerned and approved the licences only when she was satisfied that comprehensive conditions addressing the billing practices could be attached to the licence approvals.

Finding on Whether the Ministry Acted in Bad Faith

[27] In *Enterprise Sibeca Inc. v. Frelighsburg (Municipality)*,[11] the Supreme Court described bad faith as "acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith." The Ministry is responsible for ensuring accountability for the expenditure of public funds for payment of physician fees and facility fees and for protecting the public from fraudulent and exorbitant billing claims. We accept

[11] *Enterprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3. S.C.R. 304, at para. 26.

that the Ministry's actions were motivated by that responsibility. In our view, the Applicants' complaints about the Ministry's conduct do not rise to the level of bad faith.

[28] We consider it more appropriate to consider the Applicants' concerns in the context of determining whether the Ministry was entitled to resort to equitable set off to collect the facility fees that it maintained were owing.

Issue 2(a): Was the Set-Off Decision reasonable under the *IHFA*?

Applicants' Submissions

[29] The Applicants submit that the Ministry's set-off of facility fees is unreasonable because no legal authority existed at the time the Ministry took this action. It is a principle of the rule of law that, absent a grant of legal authority, an administrative action is unreasonable. There was no regulation passed that prescribed reasons pursuant to subsection 24(3) of the *IHFA*, the only express legal set-off provision that exists in the *IHFA*.

[30] The Applicants further submit that the Ministry concedes that there is no statutory authority for this action and that the Ministry does not rely upon subsection 24(3).

The Ministry's Submissions

[31] The Ministry submits that the decision was consistent with the *IHFA* and that the Director had implied authority to seek reimbursement of overpaid facility fees based on a proper interpretation of the *IHFA*. The powers conferred by an enabling statute are to be construed to "include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature."[12] This rule is consistent with the *Legislation Act*.[13] The following considerations indicate that it is appropriate to interpret the *IHFA* as authorizing the Director to seek reimbursement of overpaid facility fees:

(1) The *IHFA* lacks a tribunal-led adjudicative process for assessed overpayments;

(2) S. 24 contemplates the Minister having the sole authority to set-off overpayments where reasons are prescribed, subject to judicial review;

(3) The *IHFA* lacks express language ousting the applicability of common law or equity; and,

(4) The purpose of the *IHFA* is to provide a mechanism for licensing and funding facilities that are required to operate competently, responsibly and with honesty and integrity.[14]

---

[12] *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140.
[13] *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, ss. 64(1), 64(2), and 78.
[14] See, e.g., *IHFA*, s. 1, 3, 6(1), and 18(1).

Finding on whether the Set-Off Decision was Unreasonable under the *IHFA*

[32] During cross-examinations in these proceedings, the Ministry conceded that there is no express statutory provision that they are relying upon to authorize the set-off at issue.

[33] There was an express power in s. 24(3) of the *IHFA* granting the Ministry an express power of set-off for a prescribed reason. It empowered the executive to enact regulations to govern the exercise of that power. No reasons were ever prescribed however.

[34] As set out by the Supreme Court in *ATCO*,[15] an implied power must arise out of "practical necessity" or by "practical implication" to give proper effect to legislative intent. No evidence was led as to why the government was unable to enact regulations to prescribe conditions for recovery and set-off pursuant to s. 24(3). Having failed to enact regulations, the Ministry cannot make out a case for "necessity". Where the legislature has spoken and "dealt with [a matter] through use of expressly granted powers," there is, by definition, "an absence of necessity."[16]

[35] The Ministry has not cited any authority for the proposition that an implied power may co-exist with an express power. The Legislature cannot be taken to have created a scheme where implied powers may replace the express language of the statute.

[36] Under the December 2019 amendments to the *IHFA,* the Minister may obtain or recover overpaid facility fees by way of set-off against future facility fee charges that, in the opinion of the Minister, an IHF owes to the Minister. The Minister's opinion that the overpayment has been made immediately creates a debt owing to the Crown. The fact that the Legislature took the step to enact these new provisions conferring these powers on the Minister to recover overpaid facility fees underscores the fact that at the time the Minister exercised the set-off at issue it did not have the implied authority under the statute to do so.

[37] The Ministry concedes that the lawfulness of its conduct must be determined based on the statutory scheme in force at the time it took its set-off action. The amendments do not change the fact that the Ministry's set-off action was unauthorized under the *IHFA* in effect at the time. There is no authority, either express or implied, for the set-off under the pre-December 10, 2019 *IHFA* in effect at the time the Ministry made and implemented its set-off decision.

[38] As *Vavilov* confirms, a reasonableness standard of review does not allow an administrative decision-maker to "interpret the scope of its own authority beyond what the legislature intended."[17] Thus, to the extent that the Ministry relied on a statutory authority, either express or implied, to exercise the right to set off at issue, that decision was unreasonable.

---

[15] *ATCO*, at para. 73.
[16] *Ibid*.
[17] *Vavilov*, at para. 109.

Issue 2(b): Did the Ministry lawfully rely on equitable set-off?

Reasonableness Review of an Administrative Decision to Apply Equitable Law Principles

[39] *Vavilov* also provides guidance on the application of a reasonableness review to the application of equitable law principles by an administrative decision-maker. Principles that have been developed to govern the application of common law "impose constraints on how and what an administrative decision maker can lawfully decide."[18] "Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision has been interpreted."[19]

> That being said, administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable. For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context. Conversely, a decision maker that rigidly applies a common law doctrine without adapting it to the relevant administrative context may be acting unreasonably. In short, whether an administrative decision maker has acted unreasonably in adapting a legal or equitable doctrine involves a highly context-specific determination. [Cites omitted.][20]

Finding on Whether the Set-off Decision (for Facility Fees) was Reasonable under Equitable Set-off

[40] The Applicants submit that equitable set-off has no application under these circumstances. There was a statutory scheme in place to allow for set-off, but the government chose not to pass the necessary regulations so that set-off could be resorted to. The manager of the Ministry's audit unit, Mr. Hutchinson, deposed on cross-examination, that this was the first and only case in which the Ministry had relied on equitable set-off to recover facility fees. The Ministry did so in a situation where Dr. Hartman was continually asking for a hearing before the PPRB to determine whether the Ministry's claim for overpaid physician fees could be made out. Since physician fees and facility fees are effectively "two sides of the same coin", that hearing would also have decided the validity of the Ministry's facility fee claim. To allow the Ministry to use equitable set-off in these circumstances would be to allow the Ministry to avail itself of an equitable remedy to undermine the statutory scheme in place.

[41] The Ministry argues that the Applicants are incorrect in arguing that the government cannot resort to equity in the face of a statutory scheme. In *Royal Crest Lifecare Group Inc. v.*

---

[18] *Vavilov*, at para. 111.
[19] *Ibid*, at para. 112.
[20] *Ibid*, at para. 113.

Ontario, a trustee in bankruptcy for Royal Crest brought an application for a declaration that the province was not entitled to set-off $1 million that it owed to Royal Crest against the $4 million which Royal Crest owed to it. The Ontario Superior Court of Justice held that equitable set-off was available, notwithstanding the inapplicability of the legal set-off provision in the *Nursing Homes Act*.[21] On appeal, the Court of Appeal affirmed the decision.[22] Furthermore, although the Director had never previously resorted to equitable set-off, she was not precluded from doing so.

[42] On the application for judicial review, the Ministry also took the position that Dr. Hartman never had the right to have the $985,000.00 physician fee dispute determined by the PPRB. Consistent with the Cory recommendations, the provisions of the *HIA* were drafted to provide that the first time the Ministry alleges an overpayment of physician fees, it is regarded as an opportunity to educate. The Ministry issues an Initial Opinion, and if the doctor changes his or her billing practices in accordance with that Initial Opinion (which Dr. Hartman did in November of 2017), then nothing further is done. It is only if the doctor overbills a second time or does not change his or practices that a procedure is instituted whereby the Ministry can issue a Final Notice and hearing can be held before the PPRB.

[43] The leading authority on equitable set-off is the Supreme Court's decision in *Telford v. Holt*.[23] In that decision, Wilson J. (who wrote for the court) relied on a decision of the British Columbia Court of Appeal, which extracted the following principles from the English authorities:

> (a) "The party relying on a set-off must show some equitable ground for being protected against his adversary's demands";
>
> (b) "The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed";
>
> (c) "A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim;"
>
> (d) "The plaintiff's claim and cross-claim need not arise out of the same contract";
>
> (e) "Unliquidated claims are on the same footing as liquidated claims".[24]

[44] In *Telford v. Holt*, the third requirement for the availability of equitable set-off is that the cross-claim (in this case the Ministry's claim for the repayment of $1,613,952.25 in facility

---

[21] *Nursing Homes Act*, R.S.O. 1990, c. N.7.
[22] *Royal Crest Lifecare Group Inc. et al v. Ontario (Health and Long-Term Care)*, 2009 ONCA 397, aff'g Toronto 08-CL-7406 (S.C.).
[23] *Telford v. Holt*, [1987] 2 S.C.R. 193
[24] *Ibid*, at para. 35.

fees) must be so clearly connected to the demand of the plaintiff (in this case the Applicant's billing to the Ministry for ongoing facility fees) that it would be "manifestly unjust" to allow the plaintiff to enforce payment without taking into consideration the cross-claim. Thus, inherent in the third requirement is a consideration of fairness. Wilson J.'s discussion of the British Columbia Court of Appeal case and the court's reliance on a decision of Lord Denning makes this clear.[25] As she wrote:

> The court held that it would be unfair for the creditor to be paid his claim without allowing the debtor to raise an equity against the creditor in the form of his own claim to the extent it had been held to be well-founded.

[45] Wilson J. then went on to consider the facts of the case before her and found that the two mortgages at issue in the set-off claim were made as part of the same land exchange deal and were part of the consideration for the reciprocal transfer in that deal and therefore, they were, in her view, "closely connected and meet the requirements for an equitable set off. They were made with reference to one another. It would be unfair to enforce only one side of the land exchange agreement."[26]

[46] Thus, not only did Wilson J. ask herself whether the claim and cross-claim were closely connected; she also asked herself whether it would be unfair to enforce only one side of the agreement. As put by Palmer, Kelly R. in her text "The Law of Set-Off in Canada", 1993: Canada Law Book Inc.:

> Accordingly, the test which Wilson J. derived from her review of the case law in order to approach the facts in *Holt v. Telford* appears to be twofold in its requirements: some form of close connection, and what would be "fair" (or "unfair") in the circumstances.[27]

[47] In this case, unlike in *Royal Crest*, there are a number of considerations that would militate in favour of finding that it would not be manifestly unjust for the Applicants to be paid its claims for ongoing facility fees without taking into consideration the cross-claim by the Ministry for facility fees.

[48] First, unlike in *Royal Crest*, at the time the Ministry availed itself of the remedy of equitable set-off, there was no statutory authority that declared that the claim for overpaid facility fees created a debt to the Crown. In the new legislation that was passed in December of 2019, there is a provision that such a claim does create a debt to the Crown.

[49] Second, at the time the Ministry exercised its right to equitable set-off it knew that the alleged overpayments for facility fees were being disputed by the Applicants and that the Applicants had been pushing for a hearing with respect to the physician fees that would have

---

[25] *Telford v. Holt*, at para. 38.
[26] *Ibid*, at para. 39.
[27] Palmer, Kelly R. in her text "The Law of Set-Off in Canada", 1993: Canada Law Book Inc., at p. 140.

incidentally determined the validity of the claim for facility fees (since the two claims are inextricably connected). Instead of granting that hearing (which the Ministry found "an administratively burdensome process") the Ministry chose to avail itself of a remedy it had never used before. In *Royal Crest*, the validity of the cross-claim for overpaid subsidies was not in dispute.

[50] The Ministry's position before us that there was no right to a hearing in relation to the $985,000.00 worth of physician fees in dispute because at that point the Ministry was engaged in what was regarded as an educational process, is totally at odds with the way that the Ministry treated Dr. Hartman. Its interactions in terms of the alleged overbilling of $985,000.00 took the form of demands for payment, not efforts to educate. In November of 2017, when the Ministry advised Dr. Hartman of its Initial Opinion that there were payment errors of $984,713.00, they also told him that "To resolve the above noted payment errors, you may send a cheque for $984,713.79."

[51] With respect to Dr. Hartman's right to a hearing, it is useful to review the Ministry's conduct. After attempts to resolve the matter failed, Dr. Hartman requested a hearing before the PPRB in December of 2018. The Ministry responded on December 24, 2018 by advising that he could not have a hearing before the PPRB in relation to the physician fees because "The PPRB does not have jurisdiction to conduct a review of physician's claims under the HIA until a final review has been conducted by the ministry and your client has been provided with notice by the ministry pursuant to s. 18(15) of the HIA. Such a notice has not been provided."

[52] In March of 2019 Dr. Hartman wrote again asking to have a hearing before the PPRB as soon as possible. On April 1, 2019 the Ministry repeated its position that the PPRB had no jurisdiction since it had not yet conducted a final review and issued a final notice. It then stated that the matter could be resolved if Dr. Hartman simply paid the $948,713.79 it was claiming and advised that it would be setting off just over $1.6 million in facility fees relating to the physician fees against future facility fee payments. On April 24, 2019 Dr. Hartman protested the set-off and asked for a hearing. On May 3, 2019, the Ministry advised that it had completed its review, but that there could be no hearing before the PPRB because it had not issued a final notice.

[53] Throughout its dealings with Dr. Hartman the Ministry never took the position that Dr. Hartman would never be entitled to a hearing before the PPRB in relation to the disputed physician fees. Its position was that he was not entitled to a hearing yet- first it had to complete its review and issue a final notice. Nor is the Ministry's position before us consistent with the evidence of the Director of Health Services and Independent Health Facilities' evidence on cross-examination that Dr. Hartman could rely on the May 3, 2019 letter for the fact that the Ministry had completed its review and she did not know why the Final Notice had not been issued.

[54] Again, it is worth noting that in the current legislation, the Ministry is statutorily authorized to exercise a right of set-off to collect alleged overpaid facility fees, but the facility against whom the set-off is exercised is entitled to request a hearing to determine the validity of the Ministry's claims. In this case the Ministry is both claiming a right to set-off and claiming that the Applicants were not entitled to an independent adjudication of the disputed claim underlying the exercise of that right.

[55] The Cory amendments to the *HIA* in 2007 arose out of concern for the fairness of the way physicians were being treated by the government in relation to billing disputes. The 2007 amendments eliminated the availability of set-off for physicians' fees when there was a billing dispute and provided for an independent review of the dispute before the PPRB. The Cory review did not deal with the *IHFA* and there was no right under the *IHFA* to have facility fees determined by an independent tribunal like the PPRB. However, the entitlement to facility fees "falls out of" the entitlement to physician fees. They do not exist independently of physician fees. The resolution of a dispute in relation to physician fees would also resolve the dispute in relation to facility fees.

[56] Under the December 2019 amendments there is a right to a hearing if the Ministry exercises the right to set off in relation to facility fees.

[57] The Ministry exercised its right to set-off before the December 2019 amendments and it did so in a situation where it had refused to issue the required notice so that Dr. Hartman could have a hearing before the PPRB. In effect, it used the remedy of equitable set-off as a vehicle for a more draconian procedure than either the legislation in place at the time or the amended legislation in December of 2019 contemplated. Under both, there is provision for an independent adjudication of the dispute. To allow an equitable remedy to be used to avoid an independent adjudication that the Ministry may find "administratively burdensome" when there is a real dispute about the validity of a cross-claim would be to allow an equitable remedy to be adapted to perpetrate unfairness. This is inconsistent with the purpose of equity and inconsistent with what happened in *Royal Crest*.

[58] For these reasons we find that the Ministry acted unreasonably when it availed itself of the remedy of equitable set-off in the context that it did.

Issue 3: Procedural Fairness

[59] In view of our finding with respect to the reasonableness of the set-off decision, we do not find it necessary to deal with this issue.

Issue 4: Entitlement to Mandamus

Applicants' Submissions

[60] The Applicants submit that the relief sought is an order for *mandamus* requiring the Ministry to reverse its unlawful conduct and that there is ample authority for such orders.[28]

[28] See *Whitton v. Canada (Attorney General)*, 2002 FCA 46, [2002] 4 F.C. 126, at paras. 36-37; *Beaudoin v. William Head Institution* (1997), 139 F.T.R. 133 (F.C.), at para. 18; *Petrashuyk v. Law Society (Alberta)* (1983), 29 Alta. L.R. (2d) 251, at para. 31, aff'd [1988] 2 S.C.R. 385. See generally *Great Lakes United v. Canada (Minister of Environment)*, 2009 FC 408, [2010] 2 F.C.R. 515, at paras. 70-73 and 241; and *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 150.

Respondent's Submissions

[61] The Ministry submits that the Applicants' request for reimbursement of the set-off of overpaid facility fees amounts to a request for compensation or damages, which this court has repeatedly held is unavailable in the context of a judicial review application.[29] The *Judicial Review Procedure Act* limits the relief available on judicial review. Moreover, the Applicants do not meet the requirements for an order of mandamus.

Finding on the Entitlement to *Mandamus*

[62] The Applicants seek a remedy quashing the Ministry's set-off decision and ordering that the Ministry reimburse the Applicants for the facility fees that were taken pursuant to its unlawful and, therefore, unreasonable set-off decision.

[63] The Ministry argues that the Applicants' request for reimbursement is, in effect a request for damages, something that cannot be obtained on an application for judicial review.

[64] We agree that damages are not available on judicial review. We disagree that this is what the Applicants are seeking. In this case, the only way to remedy the wrong that the Ministry engaged in is to order relief by way of *mandamus*, requiring the Minister to reimburse the Applicants for the monies they took by way of the set-off decision. This is not a case where remitting the matter to the Ministry to re-consider is appropriate as the result is inevitable – the option of set-off was not available to the Ministry when it made the decision it did. Nor would simply granting declaratory relief be appropriate as the Ministry would still be in possession of funds that it had no lawful right to take at the time it did. There is authority to grant relief by way of *mandamus* in exceptional circumstances where a decision to not do so threatens to bring the administration of justice into disrepute (see for example: *D'Errico v. Canada (Attorney General)*[30]). It would threaten to bring the administration of justice into disrepute if the Ministry were permitted to benefit from conduct that a court has found to be unlawful.

[65] The Ministry also submits that the Applicants do not meet the requirements for an order for *mandamus*. In particular, according to the Ministry, the Ministry had no duty to pay the ongoing claims for facility fees. This submission runs counter to the language of s. 24(1) of the *IHFA*, which states that "The Minister shall pay such amounts as may be prescribed for services rendered in an independent health facility."

CONCLUSION

[66] For these reasons, we would allow the application for judicial review, quash the Ministry's set-off decision and issue an order by way of *mandamus* requiring the Ministry to

---

[29] *Queensway Excavating & Landscaping Ltd. v. Toronto (City)*, 2019 ONSC 5860, 93 M.P.L.R. (5th) 84 (Div. Ct.), at para. 89, citing *Chol v. York University*, [2004] O.J. No. 1093, at para. 14 (Div. Ct.).
[30] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167, at para. 16.

reimburse the Applicants for any facility fees that were taken pursuant to its unlawful set-off decision.

[67] As the successful parties, the Applicants are entitled to their costs of this application. Failing agreement, the parties shall make submissions electronically on the question of costs. The Applicants shall file their submissions within two weeks from the date of the release of this decision and the Ministry shall have 14 days thereafter to respond.

_____

Sachs J.

_____

Backhouse J.

I agree: _____

Mew J.

Released: May 15, 2020

CITATION: 1582235 Ontario Limited v. Ontario, 2020 ONSC 1279
DIVISIONAL COURT FILE NO.: 351/19
DATE: 20200515

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Backhouse and Mew JJ.

BETWEEN:

1582235 Ontario Limited, Canadian Reproductive Imaging Inc. and Clearview Diagnostic Inc. and Dr. Alexander Hartman

-and-

Ontario (Ministry of Health and Long-Term Care)

REASONS FOR DECISION

Sachs, Backhouse and Mew JJ.

Released: May 15, 2020