SUPREME COURT OF NOVA SCOTIA

Citation: *1445913 Ontario Inc. v. The Province of Nova Scotia*, 2024 NSSC 70

Date: 20240312
Docket: 519985
Registry: Halifax

Between:

1445913 Ontario Inc.

Applicant

v.

The Province of Nova Scotia as represented by the Minister of Labour, Skills and Immigration

Respondent

Judge:	The Honourable Justice Diane Rowe
Heard:	April 19, 2023, in Halifax, Nova Scotia
Final Written Submissions:	October 13, 2023
Counsel:	Richard Dunlop, for the Applicant Tim Leatch, for the Respondent

By the Court:

[1] 1445913 Ontario Inc., operating as HGC The Harman Group ("HGC"), is a long-haul trucking company that hauls goods across North America, throughout Canada, the United States, and Mexico. HGC has a terminal located at Debert, Nova Scotia, referred to as its Atlantic Terminal ("Atlantic Terminal"). Its head office is located in Ontario, and the company operates a fleet of Ontario plated trucks.

[2] The Nova Scotia Department of Labour, Skills and Immigration ("Department") is the lead government department for the Province of Nova Scotia, administering the Nova Scotia Nominee Program ("NSNP") via the Immigration and Population Development Group ("IPG").

[3] HGC was participating as an employer in the Skilled Worker Stream and the Occupations in Demand Stream, which are two streams established within the NSNP. These streams permit nominee employees to be given a "fast track" to permanent residency status, in keeping the NSNP objective of establishing approved nominees as resident within the Province of Nova Scotia.

[4] At various times throughout 2021, HGC submitted forms to the IPG, as required by the NSNP concerning nominee employees. The forms were the NSNP 200-Employer Information Forms ("NSNP Form") and contained information respecting the employees, or potential employees, of HGC who would be long haul truck drivers. On the NSNP Forms, HGC entered the Atlantic Terminal as the address when responding to the section "Address where the employee will work".

[5] IPG engaged in a compliance review of HGC's participation in the NSNP, and the Form 200 filings. On November 25, 2022, after concluding its review, the Director of IPG issued his Decision and found that HGC had committed a "misrepresentation" on the NSNP Forms, specifically regarding its response to the section "Address where the employee will work", with the company unable to make any further applications to the NSNP for 5 years. The Decision also rescinded the nominations of persons who were nominated via HGC and were yet to obtain permanent resident status, and closed applications for persons with open applications for nomination in connection with a HGC job offer.

[6] HGC requests Judicial Review of the Decision, the prohibition against HGC from participating in the NSNP, and requests that the Decision and all related orders or actions be quashed.

[7] HGC's Notice of Judicial Review seeks that the Decision be quashed on the following grounds:

> a. The Department breached the principles of natural justice and/or the duty of procedural fairness;
>
> b. The Decision is not reasonable specifically in regard to:
>
> i. The Department's findings on misrepresentation;
>
> ii. No rational connection between the findings and the imposition of a 5 year prohibition;
>
> iii. The 5 year prohibition is an unreasonably harsh sanction.

[8] The Department submits that the Decision was reasonable, in all respects, and requests that the Judicial Review be dismissed, with costs.

Preliminary Matter – Legal Authority for the NSNP

[9] This matter was heard on April 19, 2023, with oral submissions in support of the written briefs. As the Court heard and then considered the Judicial Review, it required further submissions from the parties concerning, specifically, what authorization in law there was for the intergovernmental agreement that is the foundation for the NSNP in Nova Scotia, which will be canvassed in more detail in this decision. The written submissions on this point were received by the Court on October 13, 2023.

[10] The Court's request to counsel was for submissions in regard to the bilateral agreement between Canada and Nova Scotia, entitled the "Canada-Nova Scotia

Co-operation on Immigration Agreement" ("the Agreement") that is the basis for the NSNP, pursuant to section 6 of the *Public Service Act*, RSNS 1989, c. 376. The Department also relies upon the "Canada-Nova Scotia Agreement on the Atlantic Immigration Program" (found at Tab 12 of its Book of Authorities) ("Atlantic Immigration Agreement") as authority for the term "misrepresentation" which is at issue in the Judicial Review (authorized by OIC 2021-291) and which sets out both designation and de-designation for "misrepresentation" by an employer participant, and outlines an appeal process within for programs, which may or may not include the NSNP.

[11] There is no provincial statute associated with the NSNP, which is a bilateral policy administered by the Department on behalf of Nova Scotia, in tandem with Canada, pursuant to an Agreement. Canada retains its authority for immigration in keeping with the *Constitution Act*, 1867 and its statutory authority for the *Immigration and Refugee Protection Act* SC 2001, c. 27 and its Regulations.

[12] Section 6 of the *Public Service Act* provides that a member of the Executive Council may, subject to the approval of Governor in Council, enter into an agreement with the Government of Canada. The Court asked, during the hearing, for detail on Order in Council (OIC) from Executive Council authorizing the

Agreement, pursuant to Section 6 of the *Public Service Act*. Counsel was not able to advise at that time.

[13] The Agreement in full was not part of the Record, which comprises 10 bound volumes of material. The Department had filed a Supplemental Record, including the Application Guides for the two streams for applicants, with associated Forms.

[14] The Agreement, and the Atlantic Immigration Agreement, however, was included with the Department's Book of Authorities, as a printout, rather than a copy, and without the associated OIC.

[15] The written submissions subsequently received from both parties indicate OIC 2007-368 authorized the Agreement. The Agreement was executed on September 19, 2007.

[16] The Agreement, provides at s. 1.17 (d) that:

> 1.17(d) Nova Scotia will exercise its responsibilities in the development and implementation of programs, policies and legislation, promotion and recruitment of immigrants, determination of provincial nominees and facilitating the settlement and integration of immigrants as set out in this Agreement.

[17] The Agreement includes an Annex A- Provincial Nominees ("Annex A") Sections 3.3 and 3.9 of the Annex A provides that:

> 3.3 In exercising its nomination authority under this Agreement, Nova Scotia will follow the procedures and criteria for nomination established by Nova Scotia, as amended from time to time, insofar as those procedures and criteria do not conflict with national immigration policy. Nova Scotia will share its criteria with Canada and keep written records of its assessments of its nominees against those criteria.
>
> …
>
> 3.9 Persons who are nominated by Nova Scotia will be considered as applicants in the Provincial Nominee Class as described in the *Immigration and Refugee Protection Regulations* and, as such, will be considered to be of benefit to the economic development of Nova Scota and that Nova Scotia has conducted due diligence to ensure that the applicant has the ability, and is likely, to become economically established in Nova Scotia.

[18] As the NSNP policy was created by the Province in keeping with the Agreement, the Court requested the additional information to ensure completeness.

Issues

[19] Is reasonableness the applicable standard of review for the Decision?

[20] If the answer to the first issue is affirmative, then has the Applicant shown that the Decision was not reasonable on the grounds set out above.

Issue 1 – Standard of Review

[21] The Applicant submits that reasonableness is the correct standard of review for the Decision. It relies on Justice Wood's (as he then was) determination concerning the applicable standard of review of an NSNP decision in *Xing v Nova Scotia (Immigration)* 2017 NSSC 70. In *Xing, supra,* it was determined that

reasonableness was the correct standard of Judicial Review for a decision in accordance with the scheme. The Decision addressed an appeal of the rescission of approval for the NSNP of the International Graduate application stream, since discontinued. As part of his consideration, Wood J. reviewed the applicability of the terms of the International Graduate Stream Application Guide, in lieu of statute, noting that this scheme was an area of concurrent jurisdiction by Canada and Nova Scotia. This Court notes that the decision in *Xing, supra,* was made before the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, in which there is a presumption that reasonableness is the appropriate standard for Judicial Review, subject to some exceptions.

[22] HGC submits, that section 6 of the *Public Service Act*, the OIC, the Agreement and its Annex A do not establish or articulate:

- Specific criteria for participation in the NSNP;
- Specific criteria that is to be included in the NSNP Application Guides;
- Any direction or guidance on the meaning of the terms contained in the NSNP Application Guides that are at issue in the judicial review application and, most specifically, the phrases "begin and/or end routes" and "misrepresentation."

[23] The Respondent also submits that reasonableness is the appropriate standard of review, as per *Vavilov, supra*. It submits that the Application Guides confirm

that there are no appeals contemplated in the NSNP process, and no other circumstances that give rise to correctness.

[24] Further, as the NSNP is not a creature of statute, and neither the Application Guides and Form have the force of law then, on the spectrum of "matters of "high policy" on the one hand and "pure law" on the other" (*Vavilov, supra*, at para 88) the NSNP and the Decision associated with the program fall closer to the policy end. It submits that while the Director applied the Application Guide criteria as written in making the Decision, that the criteria are not, and can not, be binding on the Director or the Department as a whole (*Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2.).

[25] The Agreement, at Annex A, section 3.3, explicitly states that Nova Scotia will follow "… the procedures and criteria for nomination established by Nova Scotia, as amended from time to time, insofar as those procedures and criteria do not conflict with national immigration policy".

[26] The Decision is closer to the "high policy" sphere contemplated in *Vavilov, supra*, as it applies the criteria established by the Province for the NSNP. The Decision does not require a correctness review although the NSNP is an administrative program with the potential for overlapping administrative

jurisdiction. Correctness is the standard to determine jurisdictional lines in situations where a court must intervene upon a Judicial Review where one administrative body has interpreted the scope of its authority in a manner that is incompatible with another body's jurisdiction (*Vavilov, supra*, at para 7). That is not asserted in this review, or evident on the Record. In this matter, reasonableness is the appropriate standard of review.

Issue 2 – Was the Decision Unreasonable

2.1 Reasonableness Standard

[27] HGC submits that the Decision is not reasonable regarding its findings on "misrepresentation" by HGC. It states that there is no connection between the Department's findings and the imposition of the 5 year prohibition. It also pleads that the 5 year prohibition is an unreasonably harsh sanction.

[28] In the submissions received, HGC pleads that the NSNP criteria were vague and ambiguous. It states that the interpretation of these criteria was not reasonable, or communicated to HGC, nor was there any 5 year penalty on an employer provided for as a sanction concerning "misrepresentation" within the applicable NSNP policy instruments in place at the time that HGC filed the Form(s).

[29] HGC also submits that the Department breached the principles of natural justice and/or the duty of procedural fairness.

[30] The Department, in making its Decision and imposing the 5 year ban on HGC, replies that the Decision is reasonable and in keeping with the policy established in the Agreement, the Guidelines, the Form, and the Atlantic Immigration Agreement, as a whole, and reasonably made in its context, and therefore should be accorded deference by the Court.

[31] The Supreme Court of Canada, most recently in *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)* 2024 SCC 4, in referring to *Vavilov, supra,* observed at paras 18-18 and 23 that:

> [17] Reasonableness review focuses both on the decision maker's reasoning process and the outcome (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 83-84). A reasonable decision is "justified in relation to the constellation of law and facts that are relevant to the decision"; the legal and factual contexts thus "operate as constraints on the decision maker in the exercise of its delegated powers" (para. 105). Relevant contextual constraints may include "the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker . . .; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual" (para. 106).
>
> [18] In conducting reasonableness review, reviewing judges must "be attentive to the application by decision makers of specialized knowledge" and "institutional expertise and experience" (para. 93; see also paras. 232-34). Judges must not reweigh and reassess the evidence considered by the decision maker, absent a fundamental misapprehension or failure to account for some aspect of the evidence (paras. 125-26). Reasonableness review thus entails deference to the

> decision maker, and, throughout, I examine the reasons offered by the IPC in light of the parties' arguments and the context of the proceedings.
>
> …
>
> [23] A reasonable decision is justified in relation to the salient aspects of the statute's text, context, and purpose, in line with the modern principle of statutory interpretation (*Vavilov*, at paras. 117-22). A minor omission of some element of text, context, or purpose is unlikely to be a basis for finding the decision unreasonable. Still, a court will intervene where "the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker" (para. 122).

[32] The Court is aware of the comment in *Vavilov, supra,* at para 23, establishing that the general presumptive rule of reasonableness applies to "…the merits of an administrative decision (i.e., judicial review of an administrative decisions [sic] *other than a review related to a breach of natural justice and/or the duty of procedural fairness*)." Given the Supreme Court's further remarks in *Vavilov, supra,* concerning the justifiability analysis, with the legal and factual context operating as constraints on the decision maker in the exercise of their power, this Court will be applying the reasonableness standard of review to the Decision, in its entirety. The elements pled by HGC as suggesting that the Decision breached principles of natural justice, appears was not pursued by HGC at the hearing.

[33] Fichaud, J.A., addressed the reasonableness standard in P*aladin Security Group Limited v. Canadian Union of Public Employees, Local 5479*, 2023 NSCA 86 at paras 39-46 as follows:

[39] In *Vavilov*, the majority's judgment set out the principles of reasonableness review. In *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, Justice Jamal for the majority reiterated *Vavilov*'s ruling. I will summarize the principles from *Vavilov* and *Mason*.

[40] Reasonableness is a "reasons first" approach. The reviewing court "must begin its inquiry into the reasonableness of the decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion". "Reasons first" means the reviewing court does not start with its view, *i.e.* it does not fashion its "own yardstick … to measure what the administrator did", and then proceed with "disguised correctness review". (*Vavilov*, paras. 83-84. *Mason*, paras. 8, 58, 60 and 62-63).

[41] Both the administrative decision's outcome and its reasoning matter. The outcome must be justifiable and, where reasons for the decision were required, the outcome must be "justified" by the reasons. The reviewing court "must consider only whether the decision made by the administrative decision maker – including both the rationale for the decision and the outcome to which it led – was reasonable". (*Vavilov*, paras. 86-87. *Mason*, paras. 58-59)

[42] Reasonableness is "a single standard that accounts for context". Reviewing courts are to analyze the administrative decisions "in light of the history and context of the proceedings in which they were rendered". The history and context may show that, after examination, an apparent shortcoming is not a failure of justification. History and context include the evidence, submissions, record, the policies and guidelines that informed the decision-maker's work and past decisions. Context also includes the administrative regime, the decision maker's institutional expertise, the degree of flexibility assigned to the decision maker by the governing statute and the extent to which the statute expects the decision maker to apply the purpose and policy underlying the legislation. (*Vavilov*, paras. 88-94, 97, 110; *Mason*, para. 61, 67, 70. See, for instance, *Labourers' International Union, Local 615 v. Grafton Developments Inc.*, 2023 NSCA 25, paras. 104-108, for how these factors affect the Nova Scotia Labour Board.)

[43] The "hallmarks of reasonableness" are "justification, transparency and intelligibility". Consequently, a decision will be unreasonable where "the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point". (*Vavilov*, paras. 99 and 103; *Mason*, para. 60)

[44] More specifically, the reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that 'there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived' [citation omitted]". A question-begging gap on a critical point may impair intelligibility. Mere repetition of the statutory

> language, followed by a peremptory conclusion "will rarely assist a reviewing court" and is "no substitute for statements of fact, analysis, inference and judgment". (*Vavilov*, para. 102; *Mason*, para. 65).
>
> [45] A "minor misstep" or a "merely superficial or peripheral" shortcoming will not suffice to overturn an administrative decision. Rather, the flaw must be "sufficiently central or significant to render the decision unreasonable". To determine whether there is a sufficiently central or significant flaw, the reviewing court asks whether the administrative decision "is based on an internally coherent and rational chain of analysis and … is justified in relation to the facts and law that constrain the decision maker". If yes, "[t]he reasonableness standard requires that a reviewing court defer to such a decision". If no, the decision "fails to provide a transparent and intelligible justification for the result" and is unreasonable. (*Vavilov*, para. 84-85, 99, 100-107; *Mason*, paras. 8, 59, 64).
>
> [46] *Vavilov*, paras. 105-135, and *Mason*, paras. 65-76 elaborated on the factors that "constrain the decision maker", under this test, and their utility in a particular case: the governing statutory scheme, other statutory or common law, principles of statutory interpretation, evidence before the decision maker, submissions of the parties, past practices and decisions, and the impact of the decision on the affected individuals. The factors are "not a checklist" and will vary in application and significance from case to case (*Vavilov*, para. 106; *Mason*, para. 66).

[34] Justice Boudreau in *Borden v. Nova Scotia Police Review Board* 2024, NSSC 30 (CanLII), noted at para 30 that: "… A reviewing court is not to ask itself what answer it would have given to the question at hand, but **rather whether the answer given by the administrative decision maker was a reasonable one."** [emphasis added]

The Decision

[35] The NSNP was established under the Agreement and Annex. The federal and provincial legislative authority for the Agreement is found in s. 8 of the *Immigration and Refugee Act* ("*IRPA*") and s. 6 of the *Public Service Act.* The

primary objective is stated that it is intended “to increase the economic benefits of immigration to Nova Scotia.

[36] Section 9 of the Agreement states that Nova Scotia is responsible for “…investigating potential program abuse to ensure ongoing rigour and confidence in the immigration program.”

[37] Nominees in the NSNP have a “fast track” to permanent residency so long as they meet the other requirements, and federal government requirements, as “economic class” applicant under s.12(2) of the *IRPA*.

[38] HGC was involved with two nomination streams, the Skilled Worker Stream and the Occupations in Demand Stream. The Application Guides for each of these streams were developed and published by the IPG, and form part of the record.

[39] Eligibility for a nominee is predicated on having a permanent job offer from a “Nova Scotia employer”. Reference to the Nova Scotia employer is set out in the Application Guides. The employer is required to file NSNP 200 Forms.

[40] HGC’s NSNP Forms appear to make similar representations concerning the address where the employee will work, set out as the Atlantic Terminal. They also indicate the number of employees in Nova Scotia.

[41] The Employer is required to attach "Detailed conditions of employment including all supporting documents; including but not limited to … location of employment (with the box checked).

[42] Finally, the Form has a declaration portion, stating that the information is "… truthful, complete and correct." It continues, with the following statement on the Form initialled by HGC that:

> I understand that any false statement (…) may result in (…)
>
> - Refusal of the corresponding application to the Nova Scotia Nominee Program; and/or
> - Refusal or withdrawal of the applicant's nomination; and/or
> - Decision by the Office of Immigration to refuse to process other applications involving the company.

[43] The Forms, as were completed and filed by HGC in support of its employee nominees, and reviewed for compliance by the Department, and are all initialled, and have similar or identical entries.

[44] The Application Guides include the statement that: "It is your responsibility to submit all documents required to validate eligibility criteria as set out in this guide." It was also noted that "Stream criteria may change without notice. You will find the most current NSNP stream information at

www.novascotiaimmigration.com. Applications may be assessed with the most current criteria irrespective of an application."

[45] The Application Guides currently contain sections on "misrepresentation", although these sections are addressed at the individual applicant or a proposed nominee. The September 28, 2020 version of the Application Guides first address a 5 year prohibition being imposed for "misrepresentation" in the "Important Information" portion.

[46] On October 15, 2020, IPG adopted a specific definition of misrepresentation in the Application Guides as follows:

> What is misrepresentation? Misrepresentation happens when you or someone else involved in your application does one of these things:
>
> - Is not truthful about one or more of the eligibility criteria.
> - Leaves out information we need to assess your application.

[47] The Skilled Worker Application Guide was amended as of May 3, 2022, to provide as follows in regard to "misrepresentation":

> The people included in your application include yourself, your employer, your spouse, and your dependents, or an immigration representative if you choose to use one.
>
> **Important!** If you are refused for misrepresentation, you will not be allowed to apply to any immigration stream for five years.

[48] The September 28, 2020 Application Guide, applicable to both streams, also began to include a footnote specifically in relation to transport truck drivers. The footnote reads:

> For Transport Truck Drivers (NOC 7511) whose work includes driving outside of the province, a job based in Nova Scotia means that the employer has physical premises (non-residential) in Nova Scotia where at least three staff work, trucks park, and Transport Truck Drivers begin and/or end routes."

[49] In April 14, 2022, HGC was put on notice that IPG was concerned about whether their nominees were employed in jobs that were based in Nova Scotia.

[50] A compliance officer contacted HGC via email (April 14, 2022), attaching formal correspondence, in which it referenced in detail what it identified as "the IP policy dated September 28, 2020" concerning Transport Truck Drivers (as per the footnote in the Application Guide as above) and listing 11 nominee employees in which it required additional information from HGC. The correspondence indicated the information filed by the company was not sufficient to "verify that employees' trips consistently started and ended…" at the Atlantic Terminal. Additional financial and reporting records associated with transport was requested in this correspondence in keeping with the IFTA (or International Fuel Tax Agreement) reporting requirements (this requires reporting to establish a truck's total driving kilometres allocated on a per state or province basis) for route analysis and the Atlantic Immigration Program (as per the Atlantic Immigration Agreement.)

[51] On September 12, 2022, Jason Cannon, the Director of Investigation and Compliance (IPG Director) sent a letter of "Intent to Sanction" to HGC setting out the Department's continuing concerns, and the results of its compliance review analysis of the documentation on file from HGC. The Intent to Sanction letter explained the program requirements, the analysis of the route records and the Director's concerns that the jobs must be based in Nova Scotia. In this correspondence, it was noted that HGC had established its physical office at the Atlantic Terminal to comply with policy, as it earlier had a virtual office, and it then established an office in Nova Scotia to comply with the requirements of the Application Guides and the Transport Truck Drivers policy statement, which was explicitly quoted in that letter to the company.

[52] The Director, in the Intent to Sanction letter, states that "With respect to an employee working as a NOC 7511, this declared location of work is considered the applicant's base of operations where the employee would park and begin and/or end their route."

[53] The Director's Intent to Sanction letter also specifically includes reference to the NSNP 200 Form, and the declaration portion of the Form concerning the potential result of a false statement, which would include, but is not limited to, refusal of the application, the nomination of an employee, and "… a Decision of

the Office of Immigration to refuse to process other applications involving the company…."

[54] The Director then adds a paragraph in the letter, in italics, and with the word "NOT" in caps, stating that there is a potential 5 year prohibition for employers or personal representatives for misrepresentation.

[55] The Director specifically raised concerns in the Intent to Sanction letter regarding:

- Information that the records show all trucking routes start and end in Ontario;
- That the driver records show kilometres recorded in Nova Scotia are components of routes that started or ended in Ontario;
- That driver off duty time is spent in Ontario, rather than Nova Scotia;
- The records show that trucks do not park in Nova Scotia; and that
- The IFTA returns to show 2.11% of total kilometres for the quarterly return were allocated to Nova Scotia, with just 2.72% of kilometres via New Brunswick which the trucks must transit to reach destinations outside of Atlantic Canada.

[56] The Director indicated that these findings would indicate that HGC trucks were not starting and stopping routes from Nova Scotia.

[57] HGC was advised then that the Director was not then making a final decision on the issue of misrepresentation by HGC and offered the company an opportunity to response in writing to the Intent to Sanction letter within 14

calendar days. The Director did advise that during the compliance review that no new applications would be accepted from the company, with pending applications to be suspended.

[58] HGC responded by phone and in writing over the course of the following months, as an extension to reply was permitted by the Department. It submitted supporting documents and included additional trip records in a different format. HGC also provided a list of trips, of about 600 undated entries.

[59] The Director issued a final decision on November 25, 2022, which is the Decision under review.

[60] The Decision indicates that the Director had considered the additional submissions from HGC.

[61] In doing so, the Director did not reiterate the underlying policy statements in the Letter of Intent to Sanction, but addressed conclusions on the evidence that HGC drivers were only entering Nova Scotia as part of a contiguous trip beginning and ending in Caledon, Ontario. He also identified that many contiguous trips by the nominee drivers under review did not enter Nova Scotia at all.

[62] The Director writes that “In determining that HGC has committed misrepresentation, IPG has considered the totality of material provided by HGC,

including (but not limited to) the electronic logging device (ELD) logs and paper logs referenced in the submissions of HGC. The paper logs have not changed the position of IPG… Although some drivers show routes that include routes with Nova Scotia segments, and some drivers show non-driving time in Nova Scotia, all routes have segments that include your Caledon base of operations… Furthermore, each of the drivers show most of their multiple day off-duty segments spent in Ontario, rather than Nova Scotia."

[63] The Director did not consider that the additional evidence that HGC had 15 leased trucks would skew the IFTA data (and these trucks did not have IFTA records provided). The Director reviewed the paper logs provided by HGC, and concluded that they were unreliable or incomplete. In addition, he noted that HGC had additional information in relation to 4 of the 10 identified nominee drivers in the Letter of Intent to Sanction.

[64] The Director considered that the HGC trucks changed shipping document numbers, changed truck numbers, switched from paper to electronic logs, changed co-drivers and changed trailer numbers, but did none of those functions at the Atlantic Terminal.

[65] As a result of this, the Director concluded that the concerns identified in the September 12, 2022 correspondence were not resolved and that he was not satisfied that HGC operated in a manner that satisfied IPG program requirements. He again concluded that the base of operations was Caledon, Ontario, and "… your statement that your drivers' work location is Debert, NS, is false, and constitutes misrepresentation."

Submissions

[66] The burden falls on HGC to establish that the Decision was unreasonable.

[67] It argues that the criteria found in the Footnote of the Application Guide, specifically the portion bolded here, plays a central role in the Decision:

> "…a job based in Nova Scotia means that the employer has physical premises (non-residential) in Nova Scotia where at least three staff work, trucks park and Transport Truck Drivers **begin and/or end routes**."

[68] HGC submits that the NSNP Form and Application Guide do not provide guidance on the meaning of "begin and/or end routes" criteria. Further, as there is no publicly available document that defines this criteria, it is vague and ambiguous.

[69] HGC indicates that the phrase "begin and/or end route" is a unique phrase, not found in legal databases and therefore not a "term of art".

[70] HGC states that in the Decision, the Director's use of "begin and/or end route" is that the routes must begin and end in Debert at the Atlantic Terminal. HGC invites the Court to consider that the term is permissive and may begin or end in Debert.

[71] It submits that the Director's failure to clearly and unambiguously define the "begin and/or end routes" criteria in policy, including in the Decision, indicates that the basis for the finding of "misrepresentation" is unreasonable, as the criteria is not transparent, intelligible and justified.

[72] HGC further argues that there is a distinction between "misrepresentation" and a failure to satisfy criteria, which are themselves "vague and ambiguous".

[73] In addition, as "misrepresentation" is defined by the NSNP in its policy documents, that the Court should consider that the Application Guides are binding as they have a "coercive tone." HGC urges the Court to consider principles of contractual interpretation be applied to the term "misrepresentation".

[74] The company submits that the imposition of the 5 year ban is a retroactive penalty, and is unreasonable, as the policy was not in place until after the company had filed its Forms. Embedded within this, is a suggestion that the rule of law, and

presumably then procedural fairness demands that serious penalties may only be imposed if advance notice is provided by the decision maker.

[75] HGC requests that the Court consider the content of the Form, specifically the question “Where employee will work” as difficult to define, citing the company’s intent to expand its business and the nature of long haul trucking, which itself requires that the “place of work” is mobile.

[76] HGC requests that the Court consider that the Form makes no reference to the Application Guide, and that there is no explicit possibility in the Form of a potential 5 year ban. It requests that the Court consider that the Application Guide was directed to a prospective applicant nominee, and that HGC as an employer was not the intended reader per se.

[77] In response, the Department maintains the Decision was reasonable, based on the Record, with the overarching Agreements and policies. It submits that HGC has not satisfied the burden upon it to demonstrate it is an unreasonable Decision. It specifically rejects any argument that principles of contract law are applicable.

[78] It submits that the Director made a careful and measured review of the materials, notified the company of its administrative risk, offered an opportunity for it to participate before the final decision, and applied the policy in a rational

and intelligible manner. Further, the Director's findings on what constituted a trucking route, and where it begins or ends, should be accorded a level of deference by a reviewing Court, as they are mundane and factual findings, and are key to the Decision.

[79] The Department highlights to the Court that there are no individual nominees before the Court on this Judicial Review Application. None of them have applied for a Judicial Review in respect to their own applications.

Analysis

[80] The Decision should be read in light of the record and the administrative regime as well as the submissions of counsel, and all public policies and guidelines that inform the Decision. I have reviewed and taken this all into account, as it was submitted to the Court. However, I will be referring to the most relevant portions here.

[81] The Court is not to undertake a correctness review, to determine whether the Director correctly interpreted and applied the terms and definitions in the policy instruments that underpin the Decision.

[82] The Court is to consider whether the Decision has the hallmarks of reasonableness: justification, transparency, and intelligibility.

[83] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrained the decision maker (per *Vavilov, supra*). The reasonableness standard requires that a reviewing court defer to such a decision.

[84] In this matter, while there is no governing statue, the NSNP, its rationale and purpose, are found within the Agreement and Annex. The purpose of the NSNP is to stream in immigrants who will provide an economic benefit to Nova Scotia, subject to the policy requirements that may be set by Nova Scotia, and may be amended from time to time.

[85] The Department undertook a compliance review of HGC, on the basis of its review of HGC employer Forms filed for nominees by the company. It expressed concern to HGC that the representation it had made on filed forms that the address of employment was the Atlantic Terminal, and therefore that the jobs of Truck Driver nominees as being “based in Nova Scotia”, may not be true.

[86] The Director indicates in the Letter of Intent to Sanction to HGC that he is relying on the footnote in the Applicant Guideline that defines when a Truck

Driver is employed in a job based in Nova Scotia as one where **"… at least three staff work, trucks park and Transport Truck Drivers begin and/or end routes."** These are all included factors in the determination of whether the job is or is not based in Nova Scotia.

[87] The Director indicates in his Decision that, on his review of all of the materials, including logs, that his finding is that trucks did not park at the Atlantic Terminal, there was little lay over in Nova Scotia of its employees, and that negligibly few routes began and ended in Nova Scotia, leading him to conclude that he is satisfied that the jobs are not based in Nova Scotia. He then concludes that the company misrepresented that the address of employment for the Truck Drivers, as defined in the Guideline, is the Atlantic Terminal as the company had represented in the Forms. The Decision then directs that the prohibition warned of, as referenced in the Letter of Intent to Sanction, will be made as a result of his consideration of the file.

[88] While there is not a reiteration of the contents of the Form, and Applicant Guide, in the Decision to the extent done in the Letter of Intent to Sanction, it is clear that the contents of the Letter of Intent to Sanction is included by reference within the Decision, and the Decision is best read and understood in harmony with it. The Decision letter is reflective of a final determination on the Director's

conclusion that the company misrepresented that its employees are based in Nova Scotia, as the materials he reviewed carefully indicate that it is not credible for the company to make such an assertion on the Forms filed. It is apparent that the Director then concludes that the company has made a misrepresentation concerning the place of employment for the nominees.

[89] The Court finds the Decision does not exhibit a failure of rationality, or intelligibility. The path of reasoning is readily apparent in regards to the basis for the IPG compliance review that was undertaken, as well as the final outcome, reflected in the Decision.

[90] The burden is on HGC to show that the Decision is unreasonable. To do so, there must be more than a "superficial or peripheral" flaw in the Decision, one which affects the merits. The shortcomings must be sufficiently central to the Decision so as to make it unreasonable.

[91] The submission that the Decision is centrally flawed as the Director failed to outline in the Decision how he parsed "and/or" in regard to the routes of the trucking company, or did so in an unreasonable manner, is untenable. The Director was aware that the overarching purpose of the NSNP is to facilitate immigration to

the Province and participation in the provincial economy by all participants. This purpose was communicated to HGC in IPG correspondence.

[92] The NSNP purpose is evident, on a plain reading, of the Guides and the Agreement, with Annex, and is available to the public and participants.

[93] Attempting to separate out the intended audience for the Guides, in a way to differentiate their contents and policy application, is not appropriate here. The Court has looked to the entirety of the Record and finds that the Decision is in harmony with the NSNP, and will not engage in a piecemeal analysis of each element of the program's documentation. There do not appear to be misleading or conflicting statements by the Department to any of the participants in the NSNP policy documents or Form, as they indicate that all participants in the NSNP have obligations to be complete and accurate in their representations to the Department.

[94] It was not unreasonable for the Director to interpret that the "and/or" phrase concerning Truck Drivers and their routes in this context as meaning that the routes must be undertaken in a way that demonstrate a primary connection with the

Province of Nova Scotia. The term “and/or” denotes a function, in which two words can be taken together or individually.[1]

[95] As was remarked upon in *Vavilov*, *supra*, judicial review is not a “line-by-line treasure hunt for error” (at para. 102). Judicial restraint remains appropriate in reviews of administrative decisions, particularly as administrative decision makers are not judges, and cannot be expected to write as a judge might write (*Vavilov*, *supra* at para 92).

[96] The concepts used in a Decision can be highly specific to their fields of expertise, and in this Decision, the analysis of long haul trucking practices and the manner in which a transport trucking company may be meaningfully connected to a specific location as a base, are findings by the Director and are a key element in making this Decision, that are afforded deference by the Court.

[97] In the Decision, the Director chose the word “and” for the functional choice as he determined that Nova Scotia, and the Atlantic Terminal as specified by HGC in its Form, was not the address of employment. This interpretation is more closely attuned to the purposes and goals of the overarching Agreement, the Guidelines,

[1] Merriam- Webster defines the term “And/or- used as a function word to indicate that two words can be taken together or individually”. “And/or.” Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/and%2For. Accessed 7 Mar. 2024.

the Form and the overall NSNP policy position, which is to increase the number of persons resident and employed in the Province of Nova Scotia.

[98] The Court notes that the NSNP policy is not legally binding on the Department in the same manner as a statute or regulation. However, the Agreement and Annex contemplate that the criteria and processes are subject to amendment from time to time unilaterally by Nova Scotia (as per the Annex). The only constraints on the Province in regard to creating and managing the NSNP policy are in relation to ensuring its policy does not conflict with Canada's immigration law and related policy. The criteria and policy are updated from time to time, and the policy documents referenced earlier in this decision alert the public to that possibility and advise that the policy in effect will be determinative of any issue.

[99] In that sense, the retroactivity submission of HGC as it relates to the application of the policy for participant employers found to have made a misrepresentation resulting in prohibition, is not sufficient to displace the Decision as being unreasonable.

[100] HGC was advised of the potential for a prohibition from NSNP participation, in the broadest manner, as it initialled the section on each Form that if the information filed by the employer was "…not truthful, complete and correct"

that it may result in a “Decision by the Office of Immigration to refuse to process other applications involving the company.”

[101] While the specificity of a 5 year term of prohibition was an element of later policy, this was one in place in a Guideline for the NSNP that pre-dated the HGC compliance review and Letter of Intent to Sanction sent to the company which referenced this as a possible sanction.

Conclusion

[102] The IPG Director’s Decision was reasonable and is undisturbed by this Court. HGC’s application for Judicial Review is dismissed.

[103] If the parties cannot agree on costs, I would ask for written submissions within 30 days.

Diane Rowe, J.