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Court Holds Judicial Review Not Available in Broader Public Sector Compensation Restraint Challenge

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The Divisional Court recently issued an important decision, [Association of Professors of the University of Ottawa v. University of Ottawa](#), with respect to the ability of a union to challenge a university's determination of compensation payable to its non-unionized employees on the basis that the determination is contrary to the *Broader Public Sector Accountability Act, 2010* (BPSAA).

In this case, the Association of Professors of the University of Ottawa (Association) commenced an application for judicial review of a compensation decision by the University of Ottawa (University) with respect to two non-unionized employees. It asserted that the decision was contrary to the BPSAA and *ultra vires* the powers of the University pursuant to the *University of Ottawa Act* (Act). The University took the position that the Divisional Court was without jurisdiction to hear the application and that the Association did not have standing to bring the application.

At first instance, the Association's application was considered by Justice Rocco of the Divisional Court, who found that the Court had jurisdiction to determine the application and that the Association had standing to bring it.

The University then brought a motion to set aside the decision of Justice Rocco on the basis that she erred in finding that the Court had jurisdiction to determine the application and in determining that the Association had standing to bring the application. The University also argued that the Court should strike the application because of the limitation on the availability of enforcement remedies under the BPSAA.

The Divisional Court granted the University's motion and found that the Court has no jurisdiction to hear the application for judicial review. Specifically, it confirmed that it has no jurisdiction to award the declaratory relief sought by the Association and that it may only grant declaratory relief in respect of the exercise or refusal to exercise a statutory power. The Divisional Court found that setting the compensation for two employees was not an exercise of a statutory power notwithstanding that the University was provided with such broad powers pursuant to section 11(c) of the Act.

The Divisional Court also dismissed the Association's argument that a remedy was available because the decision had a sufficient public law component. The Court applied the factors described by the Ontario Court of Appeal in *Setia v. Appleby College* and made the following findings:

- While the University has powers pursuant to the Act, that legislation does not have broad public effect. Further, compensation decisions affecting individual employees are not closely related to the statutory purpose of the Act, which is the advancement of learning.
- The public law remedy of judicial review is not suitable in this situation, in part because there is no clearly identified decision by the University that is questioned. In addition, the two employees whose compensation is at issue are not parties to the proceeding.
- Given that the constraints in the BPSAA do not apply to collective bargaining relationships, the University's determination with respect to the employees' compensation has no direct effect on the Association and its members.
- More importantly, compliance or non-compliance with the BPSAA in the compensation paid to two employees does not affect any broad segment of society.

On the basis of this analysis, the Divisional Court found that it does not have jurisdiction to hear the application for judicial review. It therefore did not consider the issue of standing or the impact of the remedial provisions in the BPSAA. The

Association's motion for leave to appeal the Divisional Court's decision was recently dismissed by the Ontario Court of Appeal, and therefore the decision is final.

The Divisional Court's decision is consistent with the Supreme Court of Canada's recent decision in [Highwood Congregation of Jehovah's Witnesses \(Judicial Committee\) v. Wall](#). The Supreme Court reaffirmed that "judicial review is about the legality of state decision making" and that "[s]imply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term." (See our *Raising the Bar* of June 6, 2018 [The Supreme Court of Canada Limits the Scope of Judicial Review](#) for more information about that decision.)

If you have questions about the Divisional Court decision or the impact of the BPSAA more broadly, please contact [Frank Cesario](#), who represented the University of Ottawa, at 416.864.7355 or [your regular Hicks Morley lawyer](#).

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