

Apply ... Deny ... Repeat: A Victim of Crime Story

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Case Commented On: *Johnson v Alberta Criminal Injuries Review Board*, [2017 ABCA 281 \(CanLII\)](#)

This decision caught my attention because it reminded me of the movie [Edge of Tomorrow](#) wherein the main character lives the same day over and over fighting and dying in a repetitive time loop. *Johnson v Alberta Criminal Injuries Review Board* concerns an application by Johnson for a financial award under the *Victims of Crime Act*, [RSA 2000 c V-3](#) as compensation for an injury he sustained as the victim of a stabbing. His initial 2010 application for compensation has been considered in numerous administrative adjudications under the Act and judicial scrutiny, and this most recent decision by the Court of Appeal sends it back for yet one more consideration. It is an interesting glimpse into a repetitive loop formed within an administrative regime, and the case also demonstrates why judicial oversight over the exercise of statutory power is an essential component of our legal system.

The facts and repetitive process here are succinctly summarized by the Court as follows (at paras 2 – 8, 10):

For our purposes, the circumstances giving rise to the claim may be summarized as follows. On October 15, 2008, the appellant was stabbed in the back by his girlfriend wielding a pair of scissors. His wound was not serious. It was sutured and he was prescribed antibiotics. Unfortunately, the appellant did not fill out that prescription. Without the antibiotics he developed necrotizing fasciitis, or “flesh-eating disease”, for which he was hospitalized for several months and had to undergo numerous surgeries to combat this very aggressive, potentially fatal, illness. Although he survived, he has been left permanently scarred and disabled; he has limited use of his left arm and is unable to raise either arm above his shoulder.

Approximately two years later, he submitted a claim for compensation pursuant to the *Victims of Crime Act*, (the Act) RSA 2000, c v-3. That claim was initially denied because he had a criminal record which disqualified him from benefits.

That decision was appealed and subsequently rescinded because the tribunal had wrongly considered the appellant’s criminal convictions, entered while he was a young offender, in denying his application. The matter proceeded to a new hearing. This time the appellant’s application for compensation was denied because he had failed to properly respond to his injuries – namely, not taking the antibiotics that were prescribed to him. In addition, the appellant’s initial injury, the puncture

wound, was said to be so minor that it fell below the minimum level of injury that would be compensable under the Act.

The appellant appealed that decision. On review, that appeal was dismissed because the appellant failed to take the medical treatment prescribed to him (the antibiotics) and because the flesh-eating disease was an unforeseen complication or indirect injury, and neither is compensable under the Act.

The appellant then applied for judicial review of this decision, which was heard on May 30, 2014. The judicial review application was granted because the tribunal had based its decision on medical information that had not been disclosed to the appellant or his counsel. ...

On April 15, 2015, the Board rescinded the July 2012 decision which had been the subject of the judicial review, finding that the appellant's attendances at hospital were his way of taking reasonable steps to mitigate the injuries he suffered and, accordingly, he was not ineligible for compensation by virtue of section 6 of the Act. The matter was then remitted to the Director for a decision, with instructions to also consider the chambers judge's comments questioning whether the infection arising from the stab wound, the flesh-eating disease, was even compensable.

On July 24, 2015, the Director's designate again denied benefits, this time because the appellant had accumulated a significant criminal record (as an adult) during the seven years since he sustained the injury. ...

That decision was reviewed and, subject to one minor correction, confirmed by the Board on March 4, 2016.

The Court's rendition of the circumstances is slightly confusing because it does not employ the terminology in the Act for describing the various administrative steps. I will attempt to clarify that shortly, but the essential point is that Johnson's application for a financial award under the Act is considered in the 'first instance' 4 times, with new reasons provided each time his application is denied.

The *Victims of Crime Act* together with the *Victims of Crime Regulation*, [Alta Reg 63/2004](#) provides access to funds for those injured by a crime. In order to access the funds, a person must submit a prescribed application to the Director (appointed by the responsible Minister). The Director exercises discretion on whether the applicant is eligible for an award. Eligibility criteria are set out in the Act and the Regulation and include (1) the extent and type of injury; (2) whether the injury is the result of an injury specified in the Regulation; (3) whether the victim's own conduct contributed to the injury; (4) whether the victim sought and obtained medical treatment for the injury; and (5) whether the victim has a criminal record. Where the Director decides a financial award is merited, the amount of the award is determined in accordance with a schedule set out in the Regulation and the monies are paid out of a Crown administered fund.

An applicant who is not satisfied with the Director's decision can have that decision reviewed by the Criminal Injuries Review Board which is established by section 7 of the Act and whose members are appointed by the Lieutenant Governor in Council. The Chair

of the Board serves a gatekeeping function, and under section 14 can dismiss applications which he or she feels are frivolous. Section 14.01 of the Act states the Board review may confirm or rescind the Director's determination of eligibility for an award or confirm or vary the Director's decision on the amount of monies payable. Section 14 of the Regulation suggests Board hearings are conducted in person, and the Board must issue written reasons for its decision. An applicant or the Director may appeal a Board decision to the Court of Appeal under section 14.1 of the Act. There is no requirement to obtain leave of the Court (I have been conducting some research on the matter of leave requirements – see [Seeking Leave to Appeal](#) for more details).

A general theme in the Act and Regulation is that the perpetrator of a crime or someone with an extensive criminal record on serious offences is not eligible for compensation under this regime. This is the central issue for Johnson – as is set out in the quote above. At the time he sustained his injury, Johnson had a criminal record including convictions as a youth. His application was initially declined by the Director on the basis of the youth convictions, and on review the Board rescinded the Director's decision because section 7 of the Regulation states youth convictions are not to be considered in the eligibility determination. The matter went back to the Director who then dismissed Johnson's application because the evidence suggested he didn't properly treat his injury. The Board confirmed this determination and added that Johnson's injury was not a direct result of the offence in question.

It seems thereafter Johnson sought judicial review of the Board decision at the Court of Queen's Bench, although this is curious since the Act directs that a review or appeal go to the Court of Appeal. The Court's decision is unclear here, but it may be that this judicial review was on a gatekeeping determination by the Chair of the Board which would then not be a decision of the Board per se, or that the statutory appeal was added to the Act after this initial review. In any event, the judicial review is successful on procedural grounds (as noted above), and the matter once again finds its way back to the Director. The Director once again dismisses the application on the ground that Johnson had accumulated a criminal record which made him ineligible for an award under section 7 of the Regulation. In the time which had elapsed from his first application in 2010 to this subsequent review in 2015 Johnson had committed several offences. This decision was upheld by the Board in 2016, and it is this Board decision which is subject to the Court's review here.

Clearly the Director was not interested in awarding Johnson a financial benefit under the Act. Johnson pled impermissible bias at the Court of Appeal in this case, but the Court doesn't address this ground because it finds the Board erred in its interpretation of the legislation in how it construed the nature of Johnson's injury (at paras 16 – 22) and also by including a consideration of Johnson's criminal offences which occurred after his first application in 2010 which had been dismissed on unlawful grounds (at paras 22-23).

This decision by the Court illustrates the importance of judicial oversight on the exercise of statutory power. Here we see a delegate of the legislature repeatedly declining an application but coming up with new reasons each time to replace those found to be in error, and doing so on the basis of consistent facts and law. Surely a practice that runs afoul of any conception of being governing by the rule of law. While it may be that those who administer this system would rather not grant financial compensation to persons with a criminal record, the Act and Regulation do not provide them with the authority to decisively administer their power as such.

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