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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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The Role of Guidelines in Tribunal Decision-Making: *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196

Facts: The Chairperson of the Immigration and Refugee Board of Canada identified four decisions of the Refugee Appeal Division ("RAD") as Jurisprudential Guides ("JGs") pursuant to the *Immigration and Refugee Protection Act*.[1] The guides concerned a Pakistani refugee claimant (Pakistan Guide); a Chinese refugee claimant (China Guide); an Indian refugee claimant (India Guide); and a Nigerian refugee claimant (Nigeria Guide). The policy notes accompanying the issuance of the JGs stress that the fair and efficient determination of refugee claims before the Refugee Protection Division and the RAD is of "great importance" to the Board, and is "essential" to the Board dealing with a "significant backlog" in the refugee determination continuum. They go on to state that these JGs are meant to facilitate decision-making "in a manner that meets the twin requirements of fairness and efficiency". All of the policy notes also explain that "RPD and RAD members are expected to apply [JGs] in

[1] SC 2001, c 27.

cases with similar facts or provide reasoned justifications for not doing so". They add that the JGs are meant to assist RPD and RAD members in narrowing the issues to be determined, and to promote fairness, consistency and efficiency in writing reasons. Finally, the policy notes accompanying the issuance of the China, India and Pakistan JGs specifically set out the requirement that the Research Directorate of the Board must monitor and report to the RAD Deputy Chairperson any developments in the country of origin information that could have an impact on the factual foundation of the JGs.

CARL sought judicial review of the designation of the JGs. The Federal Court found that the impugned JGs had been validly enacted and that the Chairperson had authority under the IRPA to issue JGs that include factual considerations. However, the Court held that the statement of expectation included in the policy notes accompanying the JGs pertaining to Pakistan, India and China were unlawful and inoperative to the extent only that they pressured Board members to adopt the RAD's own findings, on issues that went beyond the evidence specific to claimants. The Court saw no issue, however, with the JG pertaining to Nigeria which, given its particular emphasis on each claim's specific circumstances, did not fetter the discretion of Board members or improperly interfere with their independence. By the time of the appeal, the JGs for Pakistan, China and India had all been repealed, leaving only the Nigeria Guide still in force.

CARL appealed the determination that the Chairperson had authority to issue the JGs. The Minister cross-appealed the determination that the JGs issued with respect to Pakistan, India and China unlawfully fetter the discretion of members of the Refugee Protection Division and the Refugee Appeal Division to make their own factual findings, or improperly encroach upon their adjudicative independence.

Decision: Appeal dismissed. Cross-appeal allowed.

In dealing with the standard of review, the Court noted that the procedural fairness issue relating to the fettering of discretion is subject to the correctness standard of review. The court went further and commented that "it is not at all clear" why parties and courts keep assessing procedural fairness within the framework of judicial review, considering that it goes to the manner in which a decision is made rather than to the substance of the decision. What matters, at the end of the day, is whether or not procedural fairness has been met.

On the issue of whether the Chairperson had the authority to issue JGs on issues of fact, the Court found that the Chairperson implicitly interpreted s. 159(1)(h) as conferring upon him the authority to issue JGs on factual issues, and that implicit interpretation was reasonable. Although the Chairperson did not formally engage in a statutory interpretation exercise, his implicit interpretation is consistent with the text, context and purpose of the provision. Administrative agencies do not require an express grant of statutory authority in order to use "soft law" such as policy statements, guidelines, manuals and handbooks to structure the exercise of their discretion. In this case, there is an express statutory grant of authority to the Chairperson. Moreover, there

is no limitation confining the scope of paragraph 159(1)(h) to issues of law or mixed fact and law. On the contrary, the authority of the Chairperson to issue JGs is conferred in the broadest terms, as long as their purposes are to assist members in carrying out their duties.

To achieve the Board's mandate as a tribunal with a large, diverse body of members adjudicating a high volume of cases, the IRB has been provided with an arsenal of tools including not only JGs, but also guidelines and persuasive decisions. The legislative context in which s. 159(1)(h) is found is consistent with the broad interpretation that the Chairperson has given to that provision, namely to ensure that Board members carry out their duties efficiently and without undue delays. The only limitation to the plain wording of s. 159(1)(h) to which CARL could can point is the use of the word "jurisprudential". For the appellant, the term "jurisprudence" can only refer to legal principles as they are set out in the case law or court decisions. The Court found little support for this narrow reading of this concept. Further, the issuance of JGs on factual issues is not tantamount to the establishment of binding legal precedents.

CARL argued that the Chairperson's interpretation of s. 159(1)(h) is inconsistent with the IRB's Policy on the Use of Jurisprudential Guides, which states that "[a] decision may be identified as a [JG] on either a question of law or a question of mixed law and fact". However, it is well established that such a policy, as other soft law tools upon which administrative tribunals rely in their daily operations, cannot supersede the authority given to the Chairperson under the law and fetter his or her discretion. Such a policy cannot be interpreted as constraining or circumscribing the statutory authority conferred by Parliament.

CARL had challenged the statement of expectations accompanying the JGs on the basis that they are an institutional mechanism used by the Chairperson to communicate preferred findings of fact. In doing so, the Chairperson infringes on the independence of decision-makers to the extent that they have the burden to explain why they do not follow the applicable JG. The problem is further compounded by the fact that the JGs are based on a factual record that is not disclosed to the public or other adjudicators. In advancing this argument, CARL relied on the Supreme Court's jurisprudence relating to full-board consultations.[2] The Court of Appeal did not agree with CARL's argument that those cases leave no room for internal guidance on factual issues of the type found in the impugned JGs. While the plain words in those cases may lead to an understanding that administrative bodies' institutional processes are restricted to questions of law and policy, the Court was loathe to adopt such a strict reading of the established principles and to infer that JGs dealing with particular aspects of country conditions necessarily infringe the principles of natural justice. Institutional constraints faced by an administrative tribunal inform the rules of natural justice, which do not have a fixed content. Consistency should not be reached at the expense of natural justice,

[2] *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282 [*Consolidated-Bathurst*] and *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4.

and must not compromise the judicial independence of panel members and their capacity to decide on the basis of the particular facts of each case and of their opinions. Decision-makers must be free to come to their own findings of fact, without any external pressure.

However, none of the impugned JGs improperly encroach upon Board members' adjudicative independence. First, the reviews of country condition evidence or analytical frameworks found in the impugned JGs are of a special nature to the extent that they go beyond the evidence specific to any particular claimant. The accuracy of the review of a specific country condition is not dependent upon a claimant's specific circumstances, and is not meant to be. Second, thee JGs are meant to apply to all claimants originating from the same country to which they are directed and whose situation broadly raise the same issues. They are also clearly identified and posted on the IRB website, and are readily available to all claimants and their counsel. They are therefore much less susceptible to give rise to an apprehension of coercion or to a perception of interference by superiors. Third, and more importantly, Board members remain free to decide cases on the basis of their own assessment of the facts and of the evidence before them.

Finally, CARL argued that the cumulative effect of the facts and context surrounding the issuance of the Nigeria JG gives rise to a reasonable apprehension of bias. The Court rejected this argument.

Commentary: At the heart of this interesting case is the longstanding tension between ensuring consistency and efficiency in administrative decision-making, and ensuring that decision-makers are free to decide a case based on their own conscience and view of the facts and applicable law. The administrative system cannot function if either of those goals is sacrificed to the other. This tension is particularly acute for the IRB, which has an immense workload and significant backlog of often factually and legally complex matters. The Chairperson's power to identify JGs is an important tool in enabling the IRB to deal with its case load. However, if that power is misused, JGs can potentially fetter decision-makers' ability to decide cases and impair the fundamental principle of *audi alteram partem*.

The Court's decision provides a clear, practical approach to navigating that tension. The Court's decision was focused in equal measure on the statutory scheme as well as the on-the-ground realities of the IRB, in addition to the impugned JGs and the statements of expectation.

Among the aspects of this case that will have relevance beyond the IRB context is the reminder that while decision-makers are free to adopt policies, guidelines and other "soft law tools" to facilitate their work and give notice to those they serve, such instruments cannot circumscribing the statutory authority conferred on the decision-maker in the legislation. While this point may be trite, the use of such guidance documents has become so common place that a return to first principles is useful — especially given the potential increase in judicial review applications

in the wake of *Vavilov*, where applicants may be tempted to argued that a decision is unreasonable by the mere fact that it did not comport with a policy or guideline. Such a departure is not in and of itself problematic, provided that the decision is responsive to the facts, submissions and issues in the case and appropriately justified by the decision-maker.

Statutory appeal involving off-duty conduct of regulated professional: *Strom v. Saskatchewan Registered Nurses' Association*, 2020 SKCA 112

FACTS: S is a registered nurse whose grandfather died at a health centre after spending 13 years in long-term care there. While S was on maternity leave, she posted comments on her personal Facebook page about the care her grandfather had received in his last days at the health centre, and included a link to a newspaper article about end-of-life care. These posts were available only to her Facebook friends. However, S then used Twitter to tweet her posts to Saskatchewan's Minister of Health and the opposition leader. At that point, the posts became public. S claimed that she had made them public inadvertently.

Employees at the health centre reported S's posts to the Saskatchewan Registered Nurses Association ("SRNA"), which charged S with professional misconduct under the *Registered Nurses Act, 1988*.[3] The Act defines professional misconduct as "any matter, conduct or thing, whether or not disgraceful or dishonourable, that is contrary to the best interests of the public or nurses or tends to harm the standing of the profession of nursing".

The Discipline Committee of the SRNA determined that S's posts amounted to professional misconduct. The Committee found that S should have "gathere[ed] the facts", made all criticisms through "proper channels", and exhausted all of those channels before going public. The Committee acknowledge that its decision would infringe S's right to freedom of expression, but concluded that such infringement was justified under s. 1 of the *Charter*. In the result, the Committee found S guilty of professional misconduct, reprimanded her, fined her $1,000, required her to submit two self-reflective essays, and ordered her to pay $25,000 in costs.

The statutory framework provides that "[f]or the purposes of this Act, professional misconduct is a question of fact". It also provides for a statutory right of appeal to the Saskatchewan Court of Queen's Bench. S appealed the Committee's decision. The Court dismissed S's appeal, applying the *Doré* framework and concluding that the Committee's decision was reasonable within that framework.[4] That decision was made prior to the release of the Supreme Court of Canada's decision in *Vavilov*.[5]

[3] SS 1988-89, c R-12.2

[4] *Doré v. Barreau du Québec*, 2012 SCC 12.

[5] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

S launched a further appeal to the Court of Appeal, pursuant to a different and restricted statutory right of appeal that allows for appeals "on a point of law".

DECISION: Appeal allowed. The Committee erred in finding S guilty of professional misconduct and the Court of Queen's Bench erred in upholding that decision.

In the wake of *Vavilov*, the appellate standards of review apply in an appeal of a Discipline Committee's decision, not those applicable on judicial review (which includes the *Doré* framework). The fact that the legislation characterizes professional misconduct as a "question of fact" is not determinative. Here, it is self-evident that the exercise undertaken by the Committee cannot be characterized as deciding a question of fact *simpliciter* for standard of review purposes, as it involves questions of statutory interpretation. The Legislature's decision to characterize professional misconduct as a "question of fact" is designed to limit appellate review and give the Committee broad discretion in determining what amounts to professional misconduct.

For appellate review purposes, the Committee's decision as to whether S's conduct amounted to professional misconduct was a discretionary decision, subject to the standard of review in *Penner*: "A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice… [or] where the lower court gives no or insufficient weight to relevant considerations."[6]

Whether off-duty conduct is professional misconduct depends on the nexus between that conduct and the profession or professional activity. Absent such a nexus, off-duty conduct is not professional misconduct. Examining whether such a nexus exists requires a contextual analysis that looks at all the particular circumstances of the case and various competing interests, including, in this case, the potential impact on S's personal autonomy and freedom of expression.

The Committee's reasoning discloses a series of omissions that together constitute an error in principle. The Committee found that S intentionally criticized those who cared for her grandfather, with no further analysis of the tone, content or purpose of the posts as a whole. These were important contextual factors in assessing whether the necessary nexus exists. The Committee's decision cherry-picked the most critical portions of the posts, but failed to consider that (i) S made laudatory comments as well; (ii) S included a link to a newspaper article making broader policy arguments relating to improving palliative care in Canada; (iii) S self-identified as a grieving granddaughter, which would influence how a reader would tend to understand the meaning of the posts and thus their impact on the profession; (iv) the posts were a brief online conversation with a few participants in the course of a single day; (v) the posts were not shown to be untrue or exaggerated; (vi)

[6] Citing *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.

disciplining S would have a significant impact of S's personal autonomy and freedom of speech; and (vii) there is a potential benefit of public discourse on issues relating to the healthcare system, particularly considering that many long-term care residents lack the ability to speak for themselves.

While there was evidence that employees of the health centre were upset or angry by S's comments, there was no evidence of S's comments having any impact on the community, the residents or their families. The question of whether damage of this kind occurred was an important consideration in these circumstances.

The professional misconduct findings must be set aside based on the Committee's failure to consider relevant considerations sufficiently or at all.

With respect to the *Charter* issue, the parties agreed that S's section 2(b) rights were infringed. The question was whether the infringement was justified under s. 1. The court below applied a reasonableness standard. Following *Vavilov*, the appropriate standard of review on this issue on a statutory appeal is correctness. An appellate court's task in this regard is described in *Doré*, despite the fact that the standard of review is now correctness. An administrative decision that gives effect as fully as possible to the *Charter* protection at issue — here, freedom of expression — given the particular statutory mandate will be found to be correct on appeal.

Here, the statutory objective is protecting the public interest and the standing of the profession by setting and enforcing standards as to public speech by registered nurses relating to healthcare. This is a pressing and substantial objective and the Committee's decision was rationally connected to this objective. But it was ultimately not proportionate.

The correct approach to assessing whether speech relating to healthcare constitutes professional misconduct would account for the unique circumstances of each case — such as what the nurse said, the context in which they said it, and the reason it was said — thereby enabling the Committee to gauge the value of the impugned speech. Relevant factors might include: (i) whether the speech was made on or off-duty; (ii) whether the nurse identified themself as a nurse; (iii) the extent of professional connection between the nurse and the individuals or institutions criticized; (iv) whether the speech related to services provided to the nurse, their family or friends; (v) whether the speech was the result of emotional distress or mental health issues; (vi) the truth or fairness of any criticism levied by the nurse; (vii) the size and nature of the audience; (viii) whether the statement was intended to contribute to social or political discourse about an important issue; and (ix) the nature and scope of damage to the profession and the public interest.

Here, there was no evidence that punishing S would have a salutary effect apart from perhaps providing some satisfaction to staff at the health centre she criticized. On the other hand, the Committee's decision has a serious negative impact on S's freedom of speech and autonomy.

The decision of the Committee was set aside. If this matter were decided solely on the professional misconduct, the appropriate remedy might have been to remit the matter to the Committee, but this was considered not to be the appropriate remedy since appeal was also disposed of on the constitutional ground.

COMMENTARY: Perhaps not surprisingly, the *Strom* decision has attracted significant attention in legal circles (and beyond) as an important test of how far regulated professionals can go in exercising their right to free expression.

On that score, the case offers some useful guidance in terms of the analytical framework and contextual considerations that will help determine when 'off-duty' conduct will attract a finding of professional misconduct. While the exact analysis to follow in a given case will depend on the statutory wording and scheme in question — including, for example, the statutory standard that needs to be met for a finding of professional misconduct[7] — the depth and thoroughness of the Court's discussion suggests it will be persuasive beyond the confines of this case. It is likely to be of particular use when discipline committees and courts are dealing with the increasingly pervasive issue of regulated professionals publishing their opinions on social media.

Beyond that, *Strom* also appears to be the first appellate court to tackle the thorny problem of *Doré*'s role in statutory appeals in the post-*Vavilov* era. *Doré* was already on shaky ground prior to *Vavilov*; now, one wonders what role, if any, *Doré* — a framework developed within the context of judicial review and grounded in the concept of reasonableness — would have in the context of statutory appeals. *Strom* suggests that, practically, it may not play much of a role at all. Indeed, while the Court purports to continue applying something very close to the *Doré* framework, in substance the Court's analysis is much closer to a traditional *Oakes* analysis. This may have been what the Court meant when it characterized the exercise being undertaken as *Doré*, but on a "correctness" standard.

Although *Doré* and *Oakes* share much in common, there are some important distinctions. For example, *Doré* does not require identifying a "pressing and substantial" objective or put the burden on any party to meet that requirement, while *Oakes* does (and the Court effectively required one in *Strom*). *Doré* and its progeny can also be read as suggesting a somewhat more lax approach to balancing *Charter* infringements against legislative objectives: discretionary administrative decisions pass reasonableness muster so long as the infringement is "proportionate" in light of the statutory objective. By contrast, most cases under *Oakes* use more rigorous language when it comes to proportionality in general, particularly at the final two stages (minimal impairment and proportionality *strictu sensu*). The approach taken decision in *Strom* more closely

[7] For example, many Ontario statutes or regulations use the phrase "conduct unbecoming a member" of the particular profession.

resembles this line of case law than the *Doré* jurisprudence.

A final point of interest from *Strom* is the Court's refusal to allow statutory language to definitively determine whether a particular matter is a "question of fact" for the purposes of appellate review; it is the substance of the issue that must prevail. It is hard to disagree with the Court's conclusion that questions of professional misconduct are not all properly characterized as "questions of fact". But particularly when viewed through a post-*Vavilov* lens, it could be argued that the Court's approach undercuts legislative intent: by classifying matters of professional misconduct as "questions of fact" and restricting statutory appeals to "points of law", the legislature presumably intended for matters of professional misconduct *not* to be addressed by way of statutory appeals, but rather by way of judicial review. Whatever the *true* characterization of those issues when it comes to substantive review, it could be argued that *for the purposes of determining the appropriate route of review*, the classification scheme set out in the statute is the one that ought to be applied. However, the ideal solution would lie in legislative amendment, through which findings of professional misconduct could be explicitly excluded from statutory appeals (if that is indeed the intent) by using language that does not depend on artificially deeming them all to be "questions of fact".

Procedural fairness in a statutory appeal: *Rogers Communications Canada Inc. v. Ontario Energy Board*, 2020 ONSC 6549 (Div Ct)

Facts: There are tens of thousands of hydro poles in Ontario; their primary use is to carry the power lines that distribute electricity to homes and businesses. For the most part, the poles are owned by electricity utilities ("local distribution companies" or "LDCs"). LDCs can also charge telecommunications companies to use the poles for their own cables. Initially those companies entered into a private contract with the LDCs for the use space on the poles. The contract expired. In 2003, the Canadian Cable Television Association ("CCTA") applied to the Board, on behalf of all cable companies operating in Ontario, requesting access to the poles on uniform terms at a province-wide uniform rate. The application asked that the LDC's licences with the Board be amended to include a condition providing the requested access at a standard cost. The Board decided the application in 2005, and since that time the licences held by LDCs have included the condition that they must provide access to their distribution poles to telecommunication companies and charge a Board-approved rate.

The decision providing for mandatory access expressly gave LDCs the option of applying for a variation from the province-wide charge if their circumstances warranted it. Since 2014, four LDCs brought applications before the Board to depart from the province-wide default pole attachment charge. Outside of these four individual inquiries the province-wide charge had remained what was imposed in 2005, at a value of $22.35. The increases determined in the four intervening cases suggested that the charge was undervalued and out of date.

In 2015, the Board announced its intention to conduct a "comprehensive policy review of miscellaneous rates and charges" applied by LDCs for specific activities or services they provide to their customers. This policy review was broader than the pole attachment charge, but that charge was a priority. A Pole Attachment Working Group ("PAWG") was established and met four times. After the final meeting, Board staff asked the PAWG to provide comments on certain "key" issues. The Board also retained an expert consultant with technical expertise in pole attachments and cost allocation methodologies for determining wireline pole attachment charges, and received a report from the consultant. The Board issued a draft of its proposed report on the policy review. This draft report set out the Board's intention to set a province wide pole attachment charge of $52.00, with a mechanistic process for annually updating that charge. The Board invited interested persons to provide comments on the draft report. Rogers Communications and other carriers provided comments in which they asserted a lack of fairness and evidence-based decision making in the process. The Board then issued its Final Report in which it determined that it was in the public interest to raise the province-wide Pole Attachment Charge to $43.63, which would be phased in.

Rogers and other carriers brought an appeal under the Act seeking to quash and set aside the Final Report and remit the matter back to the Ontario Energy Board for a full hearing. The carriers alleged that the Board erred in not affording them a full hearing and denying them procedural fairness. The Board objected to the chosen procedure, taking the position that the Board's Final Report is not an "order" and therefore does not fall within the scope of the statutory appeal provision. Instead, the carriers' would need to apply for judicial review.

Decision: Appeal dismissed.

On the issue of whether the proceeding was properly brought as an appeal or should be by way of judicial review, prior to the hearing parties consented, and the Court ordered, that the matter would proceed as an appeal in terms of procedure; that the Notice of Appeal would be amended to include an alternative request for the same relief under the *Judicial Review Procedure Act*; and that the question as to whether this proceeding is properly framed as an appeal or judicial review would be left to the panel hearing the proceeding on its merits. That panel noted that there is no question the carriers have a right to proceed in the Divisional Court. The impact of proceeding one way or the other relates to the standard of review: in accordance with *Vavilov*, if it is an appeal then the appellate standards of review apply; if it is a judicial review then the reasonableness standard of review applies. The question turns on whether the Final Report is an "order".

Subection 19(2) of the Act provides: "The Board shall make any determination in a proceeding by order." A policy review of the sort undertaken by the Board with respect to the pole attachment charge is a "proceeding" as that term is defined in the Board's Rules of Practice and Procedure. Accordingly, any determination regarding the value and status of that charge would be made by order.

Moreover, in 2005 the Board implemented the uniform licence condition by way of an order, and the Court reasoned that the Final Report amends that order: to amend an order, the Board must make an order.

With respect to the carriers' argument that the Board was required to hold a full hearing, the Court held that the policy review fell within the scope of s. 70(1) of the Act which provides: "The Board may, with or without a hearing, grant an approval, consent or make a determination that may be required for any of the matters provided for in a licensee's licence." The carriers argued that even if the Act did not require a hearing, the Board was required to hold a hearing through the principle of legitimate expectations, based on its past practices. The Court rejected the argument. Although the Board held a hearing in 2005, it was dealing with a new issue for the first time; it did not set a practice for the future. In the four cases in which specific rates were set for individual LDCs also were not sufficient to hold out the promise of "a full hearing" in respect of the policy review.

The carriers further relied on the principle of legitimate expectation arising from the promise associated with the undertaking of the policy review. They point out that when the Board announced the review, it referred only to the "methodology" associated with the calculation of the charge, not a revision of the charge itself. The Court found no case that sustains a claim of legitimate expectation based not on a positive assertion of a promised process, but on a limitation of the subject matter to be considered. In the context of a policy review, the proposition would be problematic. Further, the Board did not in fact indicate that the review was limited to methodology; it also encompassed "the appropriate treatment of any revenues that carriers may receive from third parties"—which would reasonably include the rates, upon which such revenues would be based.

Finally, the Court disposed of the carriers' procedural fairness argument. It held that deference applies to the Board's decision as to the process it adopted to conduct the policy review. The process, as adopted, accounts for and balances the factors enunciated in *Baker v. Canada* in a reasonable and appropriate way. The process being appealed, in its particular circumstances, was procedurally fair.

Commentary: While much of this decision turns on the specific regulatory framework for the Ontario Energy Board as set out in the *Ontario Energy Board Act*, it provides insight into how (at least some courts) view their role post-*Vavilov* in statutory appeals from decisions of sophisticated decision-makers, acting in a highly specialized regulatory sphere.

The Court held that the case fell within the scope of the statutory appeal provision, which is limited to questions of law or jurisdiction. As a result, the appellate standards of review applied. Nonetheless, the Court held that deference was warranted in assessing whether the process the Board had adopted breached the carriers' right to a fair process. Relying on several pre-*Vavilov* cases the Court noted that in determining the scope of procedural fairness for a particular procedural decision by a tribunal, there is a degree of deference.

Considering that *Vavilov* was expressly about review of the *substance* of administrative decisions, rather than the fairness of their process, the Court's decision may reflect a correct understanding of the law. However, matters of process and substance are often intertwined, especially where process issues require an interpretation of the decision-maker's statute. *Vavilov* does not explicitly consider how procedural fairness issues should be addressed on a statutory appeal in which the appellate standards of review apply — but one would expect that if the court intended to replace *Baker* as the prevailing approach to review for procedural fairness in those circumstances, it would have said so.

The upshot of the Court's decision in this case—applying the *Baker* factors and being respectful of (or showing deference to) the decision-maker's own choice of procedures, even in a statutory appeal and regardless of the standard of review—is a sound approach that is now well established, at least in the Ontario and Federal courts. However, when the time comes for a court to tackle the issue head-on post-*Vavilov*, it remains to be seen whether this will be another area of evolution in the law.

This case is also notable because of the court's practical approach to addressing the threshold issue of the proper review procedure. The distinction between statutory appeals and judicial reviews matters more post-*Vavilov* and therefore we can expect these issues to arise more often. A practical approach—provided the case is ultimately in the same court in any event—allows the parties and the court to focus on the substantive issue without getting unduly bogged down in matters of pre-hearing procedure.

Multiple legal errors lead to discipline decision being overturned: *PEO v Rew*, 2020 ONSC 6018 (Div Ct)

FACTS: In 2009, Rew, an engineering firm, gave an insurer a second opinion on whether a house needed to be demolished because of contaminated soil and groundwater. An engineer who reviewed Rew's work and concluded that it was inadequate complained about Rew to the Association of Professional Engineers of Ontario ("PEO"). The complaint was referred to a discipline panel, which ultimately held, in two sets of reasons, that Rew had not committed professional misconduct, and dismissed the allegations.

DECISION: Appeal allowed. Matter remitted for reconsideration by a differently-constituted panel.

The matter came before the Divisional Court by way of an appeal under s. 31 of Ontario's *Professional Engineers Act*. Therefore, under *Vavilov*, the standards of review were those that apply in an appeal, not a judicial review.

The PEO advanced eight grounds of appeal. The most significant of them are discussed below.

The PEO argued that the discipline panel applied too high a standard of proof, rather than the required standard of proof on a balance of probabilities that applies to all civil

cases[8]. The Divisional Court agreed. The PEO discipline panel had described the standard of proof as "more than enough … much more than enough to tip the Balance of Probabilities." It also erroneously described the proceeding as akin to a criminal prosecution, where the presumption of innocence applied. Finally, it referred to the need for "clear, convincing, and cogent evidence" which, in context, indicated the kind of intermediate standard of proof that *McDougall* proscribes.

Next, the PEO argued that the discipline panel erred by not treating one allegation of professional misconduct — practicing without a certificate of authorization — as a strict liability offence (*i.e.* an offence without a *mens rea* requirement, but with a due diligence defence available). One corporate respondent did not have a certificate of authorization when it provided services in 2009. The discipline panel dismissed this allegation because it found that there was no intention to practice without a certificate. Again, the Divisional Court agreed with the PEO: the relevant section of the *Professional Engineers Act* created a strict liability offence. While Rew could have established a defence by proving that it had exercised due diligence, a lack of intention alone was not a defence, let alone was intention a required element that the prosecution needed to prove.

The PEO complained that the panel had drawn an adverse inference against it because it had not called the adjuster with the insurer who had instructed Rew. The court agreed: to draw an adverse inference, a witness must be within the exclusive control of the party that fails to call him or her, there must be no adequate explanation for the failure to call the witness, and the witness must have key evidence. Here, the adjuster was not within the PEO's exclusive control, and the PEO had given an adequate explanation for why it had not called the adjuster.

Finally, the PEO alleged that the panel had applied the test for negligence from the law of tort, focusing on concepts of harm and causation. It should have applied the definition in the professional misconduct regulation under the *Professional Engineers Act*, namely "a failure to maintain the standards" of a "reasonable and prudent practitioner", regardless of whether it causes harm. The Court agreed.

COMMENTARY: The decision illustrates the importance of careful and legally correct decision-making. Although the member of the discipline panel who wrote the reasons was a lawyer, the decisions included multiple legal and evidentiary errors. The unfortunate result was that a matter arising out of engineering work done in 2009 had to be remitted for a new hearing.

In particular, the error on the standard of proof is concerning. *FH v McDougall* was decided twelve years ago, and still, it seems, some disciplinary bodies are applying "clear and convincing evidence" as though it were an intermediate standard of proof (which is an error of law) and not a description of the *kind* of evidence that is always required to prove something on a balance of probabilities (which is not an error of law).

[8] *FH v McDougall*, 2008 SCC 53.

The Divisional Court's statement of when an adverse inference for failure to call a witness is also useful. Too often counsel or parties say that an adverse inference should be drawn simply because a witness is not called, without turning their minds to the specific elements of the test for an adverse inference: exclusive control of the witness, no adequate explanation for failure to call, and key evidence.

No need to publicize institutional interpretation of statutory provisions: *Sticky Nuggz Inc. v. Alcohol and Gaming Commission of Ontario*, 2020 ONSC 5916 (Div Ct)

Facts: Sticky Nuggz Inc. sought to operate a retail cannabis store in Toronto.

Under the governing regulatory framework, set out in the *Cannabis Licence Act, 2018* (the "*CLA*") and regulations, an operator must obtain a Retail Sales Authorization ("RSA") in respect of any cannabis store they wish to operate. The *CLA* and regulations sets out certain circumstances in which the Registrar of the Alcohol and Gaming Commission of Ontario (the "AGCO") must refuse to issue an RSA. One of these is where a proposed cannabis store is within 150 meters of a school. The regulations provide that this distance is to be measured from a school's property line or boundary but do not otherwise specify the method of measurement. If a proposed location is within 150 meters of a school, the Registrar must refuse to issue the RSA. Written reasons need not be given.

Since January 2019, when it first became possible to apply to operate retail cannabis stores, the Registrar has adopted a straight-line, or "as the crow flies," method for measuring the distance between proposed stores and schools. If a proposed location is within 150 meters of a school, the application is automatically rejected and the applicant notified of the reason why.

In February 2020, Sticky Nuggz applied for an RSA. Its application was rejected as its proposed store was within 150 meters of a school. The applicant requested a reconsideration by the Registrar, arguing that the distance to the nearby school should be measured using an "on the street" or "as the wolf runs" method of measurement. The Registrar declined to use this alternative method of measurement and confirmed the rejection of the RSA application, without providing any reasons for why it preferred one measurement approach over another.

Sticky Nuggz applied to the Divisional Court for judicial review of the Registrar's decision.

Decision: Application dismissed.

The Divisional Court rejected each of Sticky Nuggz's arguments for why the Registrar's decision was unreasonable.

First, the Court disagreed that the Registrar's decision was not sufficiently transparent because the Registrar's method of measuring distance was not made public until after Sticky Nuggz's RSA application was rejected. The Court concluded that the whether the AGCO publicly announced the straight-line method

was irrelevant to whether its interpretation of the *CLA* and regulations was reasonable — but that, in any event, the straight-line method of measurement had been noted on the AGCO's website since as early as January 2019.

Second, the Court disagreed with the applicant that the Registrar's interpretation was unreasonable in light of applicable statutory interpretation principles, including because it gave primacy to one legislative objective of the governing scheme (protecting youth) at the expense of another (combatting the illegal market). In doing so, the Court held that the AGCO has "superior expertise, relative to the Court, in deciding how to balance competing concerns and priorities" and should be given the "greatest deference" in doing so.

Third, the Court easily rejected the argument that the Registrar improperly fettered its discretion, noting that in selecting a measurement method, the Registrar was not exercising discretion but interpreting and implementing a legislative requirement.

Finally, the Court rejected the argument that the decision was unreasonable because it fails to mention that the applicant had spent significant funds preparing its proposed location: the applicant's financial investment was not a relevant consideration.

Commentary: The first notable aspect of the Court's decision is its consideration of the meaning of "transparency" as an aspect of reasonableness in the context of 'front line'-type application decisions. The Court rejected the argument that an administrative decision maker's statutory interpretation may be unreasonable merely because the decision maker failed to publicize it before applying it in a particular instance. This is undoubtedly a sound conclusion. It would be unreasonable to require an administrative body to turn its mind to all questions of statutory interpretation that may arise in the course of administering a regulatory scheme and publicize its conclusions on all such questions in advance of receiving applications that engage such questions.

That being said, where an administrative body has turned its mind to a particular question of interpretation — such as the one in this case — publicizing that interpretation may support the reasonableness of decisions applying that interpretation. In particular, publicizing an interpretation of a certain statutory requirement and then applying that interpretation consistently will guard against claims that a particular decision is unreasonable because it is unjustifiably inconsistent with past decisions, or that it was made for an improper motive.

The reason the Court gives for why the AGO did not need to publicize its statutory interpretation prior to applying it in a given case is that the "transparency" aspect of reasonableness only extends to "transparency of the reasons and the decision itself, not the transparency of the regulator's internal institutional decision-making process." The Court provides no further analysis and does not elaborate on where the line between a particular decision and a broader "institutional decision-making process" is to be drawn. Except to the extent that written reasons are commonly required for administrative

decisions affecting individual applicants, but rarely required for more "institutional" decisions such as the passage of guidelines, rules or directives, it is not obvious why the former but not the latter would be subject to the requirement of transparency. Given that resolving this question was unnecessary for the Court to resolve the applicant's claim of unreasonableness, it remains for another day.

A second notable aspect of the Court's decision is its treatment of the applicant's statutory interpretation arguments. The Registrar not having given written reasons for its interpretation, the Court was limited to comparing the two competing interpretations put forward by the parties, rather than considering the reasoning process that led to the Registrar's interpretation. In upholding the Registrar's interpretation, the Court emphasized the high degree of deference it accorded to the Registrar in this respect, including because of the its familiarity with the practical realities of the regulatory scheme and its expertise relative to that of the Court. The Court's approach in this respect illustrates the continued relevance and prominence of these concepts in the post-*Vavilov* landscape — including in the context of an administrative' body's statutory interpretation for which no reasons are given.

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