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# ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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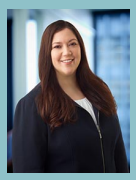

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## The *Vavilov* approach to reasonableness and revisiting *Charter* values: *Ontario Nurses' Association v Participating Nursing Homes*, 2021 ONCA 148

**Facts:** Participating Nursing Homes is a group of employers that operate for-profit nursing homes in Ontario. The Unions represent nursing and other staff who work in PHN homes. Employment in the nursing home sector is almost exclusively female. Ontario's *Pay Equity Act*[1] requires every employer in the province to establish and maintain compensation practices that provide for pay equity. Systemic discrimination in employment is identified by undertaking a comparison between female job classes and male job classes in terms of compensation and the value of work performed. The Act proscribes three methods for achieving pay equity. One of those methods, the "proxy methods", is used for establishments—like PHN's—without any male job classes. It involves comparing PHN's female job class to a female job class at a proxy employer's establishment. The proxy female job class is used because it has already achieved pay equity by way of comparison to a male job class at the proxy employer's

[1] RSO 1990, c P.7

establishment. To achieve pay equity for all female job classes within the seeking establishment, the female job class that was compared to the proxy female job class becomes the "key female job class" and all other female job classes at the seeking establishment are evaluated to ensure the value/compensation relationship for their jobs is equal to that of the key female job class.

In 1994, PHN took steps to establish compensation practices for female employees that complied with the Act using the proxy method. PHN and the Unions engaged in extensive negotiations and reached an agreement that established pay equity for all PHN female job classes by 2005. The Unions took the position that PHN failed to maintain pay-equity-compliant compensation practise since that time and brought applications to the Pay Equity Hearings Tribunal. The Unions argued that because the PHN *established* pay equity through the proxy method, the Act requires that pay equity be *maintained* using that same method. The Tribunal dismissed the applications, holding that the proxy method does not apply for the purposes of maintaining pay equity.

The Unions applied for judicial review and were successful in the Divisional Court. PHN then applied for and was granted leave to appeal. Because one of the grounds of appeal challenged the correctness of the Court of Appeal's earlier decision in *Taylor-Baptiste v Ontario Public Service Employees Union*,[2] a 5-judge panel heard the appeal.

[2] 2015 ONCA 495, leave to appeal refused [2015] SCCA no. 412.

Decision: Appeal dismissed. Matter remitted to the Tribunal to specify what procedures should be used to ensure those employees who have established pay equity through the proxy method will continue to have access to male comparators to maintain pay equity.

A bare majority of the panel (Benotto J.A., joined by Brown and Zarnett JJ.A.) agreed with the Divisional Court that the Tribunal's decision was unreasonable. The majority started its analysis by setting out the principles governing reasonableness review of the Tribunal's decision. According to *Vavilov*,[3] a tribunal's governing statute is important in considering whether the tribunal's decision is reasonable in light of the relevant factual and legal constraints that bear on it. The administrative decision must be consistent with the principles of statutory interpretation and comply with the rationale and purview of the statutory scheme under which the decision is made. A reviewing court does not interpret the statute *de novo*. It must focus its analysis on why the Tribunal's decision is unreasonable, and not on what the court would have decided in the Tribunal's place.

The Tribunal's decision set out an approach to pay equity maintenance that is limited to an internal comparison between the key female job class and the non-key female job classes. The Tribunal's interpretation of the Act deprives women in establishments without male job classes acces to an ongoing deemed male comparator. It is unreasonable as it ignores the purpose, scheme and plain wording of the Act.

[3] 2019 SCC 65.

The scheme of the Act is built on the fundamental premise that redressing systemic gender discrimination in employment compensation requires a comparison between male and female job classes. Section 21.13 of the Act indicates that comparison to male job classes is the way to identify systemic discrimination. The Tribunal did not consider that section, leading to a loss of confidence in the outcome reached. Had the Tribunal relied on s. 21.13—which provides that comparison with the proxy job class is the way to identify systemic discrimination in establishments using the proxy method—it may have arrived at a different result.

The proxy method was added to the Act by way of amendment specifically to provide for deemed male comparators for establishments where no male job classes exist. Female job classes in the proxy establishment are treated as if they were male job classes because those classes have already achieved pay equity by way of comparison to male job classes within the proxy employer's establishment.

All three comparison methods in the Act involve a direct or indirect comparison between female and male job classes. It is unreasonable to interpret the Act as doing away with an ongoing deemed male comparator when it comes to an employer's duty to maintain pay equity in female-dominated establishments that used the proxy method to establish pay equity. The Tribunal's distinction between applying the proxy method to the obligation to establish pay equity, and applying it to the obligation to maintain pay equity is not grounded in the plain language or scheme of the Act.

Moreover, not using the proxy method to maintain pay-equity-compliant compensation practices would undermine the purpose of the Act.

The Tribunal's reasons are transparent and intelligible, but there is nothing in the Act that would justify eliminating a male comparator for maintaining pay equity in establishments where the proxy method was used to establish pay equity. The only reasonable interpretation of the Act is that it requires the use of the proxy method to maintain pay-equity-compliant compensation practices in such establishments.

Because the majority's conclusion that the Tribunal's decision is unreasonable rests on statutory interpretation principles, it was unnecessary to determine whether the Tribunal erred in failing to take into account *Charter* values in interpreting the Act. Accordingly there is no need to decide whether *Taylor-Baptiste* was wrongly decided.

Two dissenting judges (Huscroft J.A., joined by Strathy C.J.O.) would have allowed the appeal. The Tribunal held hearings over several days and heard evidence from lay and expert witnesses regarding the key issues. The Tribunal wrote lengthy and detailed reasons for decision, which reviewed the legislative history, the study that gave rise to the amendments establishing the proxy method, and the government's various discussion papers and legislative statements. The Tribunal analyzed the positions of the parties and reviewed the case law. Ultimately the Tribunal decided not to adopt either of the parties' positions and instead outlined its own formula

for compensation practices in the parties' workplaces to maintain pay equity. The Tribunal's decision is thorough and cogent and makes sense of an extremely complicated legislative scheme. The decision reflects the Tribunal's considerable expertise and its entitled to deference. There is no basis to conclude that it is unreasonable.

The dissenting judges pointed out that reasonableness review usually assumes a range of reasonable decisions, and the court's task is to ensure that a particular decision is transparent, intelligible and justified. Reasonableness is an inherently deferentially standard of review. Courts are required to defer to and uphold decisions with which they may not agree, provided only that those decisions are reasonable. *Vavilov* has provided considerable guidance on the question: how does reasonableness review operate? But it does not change the essential nature of reasonableness review. *Vavilov* confirms that the reasonableness of a decision is to be assess having regard to the reasons given for the decision.

The tension in *Vavilov* concerns the intensity of the reasonableness review that the Court endorses. Reasonableness remains a deferential form of review and the Court in *Vavilov* emphasises concepts such as "respect" and "restraint". At the same time, the Court describes reasonableness as a "robust" form of review. There are statements in *Vavilov* that appear to be in tension with the concept of deference. But in addition to the concept of deference, the Court also endorses the continued importance of an administrative decision maker's expertise. Courts lack the expertise that specialist administrative decision makers have. This is a reason for courts to exercise considerable caution before concluding that a particular decision is unreasonable, especially if in making the decision the tribunal is acting within the sphere of its specialised knowledge, carrying out its mandate to create solutions to problems.

The Tribunal's decision is thorough, cogent and reflects its considerable expertise in pay equity as well as in the diverse labour relations contexts in which pay equity disputes arise. The Tribunal cannot be said to have ignored the purpose, scheme and plain wording of the Act. The Tribunal specifically considered and rejected the interpretation that the majority concludes is the only reasonable one available. The majority do not engage with the Tribunal's reasons. There is no basis to suggest that the Tribunal misunderstood its mandate or to lose confidence in its decision. The Tribunal's decision is reasonable.

Because the dissenting judges concluded that the Tribunal's decision was not unreasonable, it was necessary to address the *Charter* arguments. The dissent concluded that *Charter* values are relevant to statutory interpretation only where genuine ambiguity exists. To the extent *Taylor-Baptiste* says otherwise, it should not be followed.

In interpreting legislation, *Charter* values are relevant only to the interpretation of legislation that is genuinely ambiguous: *Bell ExpressVu Partnership v Rex*.[4] The same rule applies for administrative decision makers as for courts:

[4] 2002 SCC 42.

*Wilson v British Columbia (Superintendent of Motor Vehicles)*.[5] If legislation is inconsistent with the *Charter*, it is of no force or effect to the extent of that inconsistency, but before that conclusion is reached, it may be defended on the basis that it is a reasonable limit on the *Charter* right at stake. The interpreter should not preclude a finding of inconsistency with the *Charter* (or the attendant consequences) by interpreting the legislation so as to avoid that inconsistency. The exception is for legislation that is genuinely ambiguous.

Genuine ambiguity is rare. It arises only where the legislature has failed to specify between two meanings that are semantically possible. Ambiguity can ordinarily be resolved by using the tools of statutory interpretation—read in context, the legislature's intended meaning willy usually be the only plausible meaning, and the meaning that must be adopted. In those rare circumstances where the legislature's intention cannot be inferred, it is sensible to adopt the interpretation that conforms to *Charter* values over the one that does not. To the extent that *Taylor-Baptiste* suggests that *Charter* values have a role in play in statutory interpretation in the absence of ambiguity, it is inconsistent with *Bell ExpressVu* and should not be followed.

The application of *Charter* values is often problematic because of the failure to appreciate the difference between concepts such as rights and values. Those two terms are not interchangeable. The *Charter* is an exhaustive statement of the rights and freedoms it protects. In contrast, there is neither a list of *Charter* values nor a canonical formulation for them. They are, in general, *reasons for Charter* rights. The underlying reasons for protecting rights are broader than the rights themselves. Care must be taken in identifying and applying *Charter* values, lest they supplant the rights from which they are inferred.

In this case, there is no ambiguity in the relevant provisions of the Act. It was wrong for the Divisional Court to invoke *Charter* values in interpreting the Act so as to override the Tribunal's decision.

Commentary: This case is of interest for those who deal with pay equity obligations due to the majority's ruling on the applicability of proxy method to maintain pay equity. However, the case is highly notable to the wider administrative law audience for two reasons: the divergent approaches to reasonableness review demonstrated in the reasons of the majority and dissenting judges, and the dissent's conclusion that *Taylor-Baptiste* was wrongly decided.

The majority's reasons in *Vavilov* greatly advanced the law on substantive judicial review by offering detailed guidance on the application of the reasonableness standard. It gives parties and courts various tools to assess the reasonableness of a decision. Yet there has been legitimate debate about whether *Vavilov* did alter the reasonableness standard and whether that standard is now more "robust" than it was before. While many have hailed *Vavilov* as bringing much needed clarity to the law of substantive judicial review, the split on the Ontario Court of Appeal illustrates that

[5] 2015 SCC 47.

*Vavilov* has not eliminated all uncertainty and some challenges persist.

The reasons of the majority appear to be consistent with the guidance offered in *Vavilov*: they examine the Tribunal's reasons on the key issue and assess whether it is compatible with the purpose, scheme and plain wording of the Act. Of course, *Vavilov* requires that an administrative decision maker's interpretation of a statutory provision be consistent with the text, context and purpose of the provision.[6] The majority turned its mind to that very question and concluded that the Tribunal failed to consider pertinent aspects of the Act text, context or purpose. This analysis seems to reflect the very exercise that *Vavilov* calls for.

Yet the dissent rightly points out that *Vavilov* still calls for deference in reasonableness review and emphasizes the continued importance of the decision maker's expertise in the application of the reasonableness standard. As the Supreme Court noted in *Vavilov*: "In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision."[7]

[6] See paras 115-124.
[7] At para 93.

The split on the Court in *Ontario Nurses' Association* shows that there will continue to be reasonable disagreement about the application of the reasonableness standard in at least some cases. Given the length and detail of the reasons in *Vavilov*, it is unsurprising that lower courts may have different views on what elements of those reasons should be given greater prominence in a given case. A consensus has not yet emerged from the lower courts about whether *Vavilov* mandates a different and more "robust" form of reasonableness review than existed before, or whether it simply clarifies the application of the same pre-existing standard. This question might not be fully resolved until the Supreme Court speaks again on the issue. In the meantime, one can expect to see applicants continue to emphasize the passages from *Vavilov* that speak to "robust" review, while respondents rely on the repeated statements about deference and respect.

It is understandable, though somewhat disappointing, that after striking a 5-judge panel to consider the correctness of *Taylor-Baptiste*, in the outcome only two judges of the panel weighed in on the question. The dissent makes a very compelling case that *Taylor-Baptiste* was wrongly decided based on the precedent of *Bell ExpressVu* as well as the logic that *Charter* values should not be used to interpret legislation into conformity with the *Charter* when it might otherwise be found of no force or effect because it is inconsistent with a *Charter* right. Further, the dissent points out some of the lingering conceptual problems in applying *Charter* values as opposed to *Charter* rights.

In *Vavilov*, the Supreme Court expressly left for another day a potential reconsideration of its own jurisprudence on *Charter* values in review of administrative decisions. That jurisprudence has been subject to much criticism. The dissenting reasons in *Ontario Nurses' Association* are not quite the death-knell for *Taylor-Baptiste* or the application of *Charter* values in administrative law, but they suggest that it may be close to ringing.

## Uncertainty remains about application of *Vavilov* to legislated standard of patent unreasonableness: *Longueépée v. University of Waterloo*, 2020 ONCA 830

FACTS: L applied to the University of Waterloo for admission to the Faculty of Arts for the 2013 fall semester. L's grades at his previous university, Dalhousie, did not meet the University of Waterloo's minimum admission standards for transfer students. However, following his departure from Dalhousie, L was diagnosed with moderate traumatic brain injury and post-traumatic stress disorder — conditions that were undiagnosed and therefore unaccommodated during his time at Dalhousie. In light of L's extenuating circumstances, the University convened an Admissions Committee to consider L's application. L submitted a package of supplementary material to the University, including medical information, reference letters, writing samples and an outline of his experience and volunteer activities.

Ultimately, the University declined to extend L an offer of admission, citing his failure to meet the "minimum admission requirements".

L brought an application to the Human Rights Tribunal of Ontario ("HRTO") alleging that the University discriminated against him on the basis of his disabilities in refusing him admission. The HRTO dismissed L's application. The Vice Chair found that while the University's grades-based admission standard was *prima facie* discriminatory, the University had ultimately met both its procedural and substantive duty to accommodate L's disability by convening the Admissions Committee. The HRTO concluded that there was no information before that Committee that L had the ability to succeed at university (the basis of an admission decision) and that past grades were the best and only measure to evaluate a candidate's prospect of success. There was little evidence that the University considered whether L's supplementary materials demonstrated his ability to succeed at university. The HRTO accepted the University's position that these materials were irrelevant to the analysis of L's chances of success. The HRTO dismissed a motion for reconsideration.

The Divisional Court allowed L's judicial review application, and remitted the matter back to the University's Admissions Committee. Specifically, the Divisional Court concluded that because of the discriminatory effect of L's Dalhousie grades, the University was required to either assess L's application without recourse to those grades, or establish that to do so would result in undue hardship. Since the University failed to do either, it had failed in its duty to accommodate L's disability.

The University appealed.

DECISION: Appeal allowed in part, upholding the Divisional Court's ruling that the HRTO decision was unreasonable, but setting aside the decision to remit the matter to the Admissions Committee and instead remitting the matter back to the HRTO to fashion an appropriate remedy.

The Ontario Court of Appeal applied the reasonableness analysis articulated by the Supreme Court of Canada in *Vavilov*, which was released after the Divisional Court's decision but before the appeal was heard. Under this framework, the HRTO decision was found to be unreasonable both because (i) it contained an internal logical error and (ii) the Vice Chair made an implicit finding that the University would suffer undue hardship when that defence was not relied on by the University.

On the first point, once it was accepted that the University's minimum grade requirements for transfer students were discriminatory, one could not logically conclude that applying those same requirements to L constituted reasonable accommodation of his disabilities. Reasonable accommodation cannot be met by applying a discriminatory standard. Having accepted that L's grades were not reflective of his abilities, it was not rational to take those grades "at face value" and use them to predict his chances of future success for the purpose of admissions.

On the second point, in order to accept that the University met its duty to accommodate notwithstanding that it applied a discriminatory standard, one must implicitly find that to do otherwise would amount to undue hardship. The HRTO did so, stating that L's argument "would have the effect of requiring universities to complete an in-depth assessment of every application by every student with a disability" regardless of their past grades. The University neither put forward on nor led evidence on any sort of undue hardship argument, making the HRTO's decision unreasonable.

COMMENTARY: In addition to the University's appeal, the HRTO challenged the standard of review applicable to its decisions post-*Vavilov*. Relying on the Supreme Court's direction that the presumption of a reasonableness standard can be rebutted where the legislature has indicated that it intends a different standard to apply, the HRTO submitted that its decisions should be reviewed under the "patent unreasonableness" standard prescribed by the Human Rights Code.[8] That privative clause, which was enacted before the Supreme Court's decision in *Dunsmuir* but which came into force after *Dunsmuir*, has been interpreted to mean "reasonableness" as defined in *Dunsmuir* ever since the Divisional Court's decision in *Shaw*.[9] However, the HRTO argued that *Vavilov* "reanimated" a pre-*Dunsmuir* patently unreasonable standard for its decisions.

The Court of Appeal sidestepped this argument, stating that it would be "unwise and unnecessary" to undertake the standard of review analysis here and the issue should

[8] RSO 1990, c. H.19, s. 45.8 ("...a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.")
[9] *Shaw v. Phipps*, 2010 ONSC 3884 (Div Ct).

instead be decided in a case where the standard of review makes a difference in the outcome. As a result, there remains no guidance from Ontario's highest court on the issue of whether *Vavilov* intended to allow for a legislated "patently unreasonable" standard. The present state of Ontario law appears to be that such a legislated standard cannot exist: since *Vavilov*, the Divisional Court has rejected the HRTO's argument about the "patently unreasonable" standard on at least three occasions, applying reasonableness instead.

The Court of Appeal's decision to set aside the remedy ordered by the Divisional Court is also noteworthy. The University argued that following the Supreme Court's guidance in *Vavilov*, the most appropriate remedy would be to remit the matter to the decision maker (i.e. the HRTO) to fashion a remedy that would promote compliance with the Code. L argued that this case is one of the exceptional cases referred to by the Supreme Court in *Vavilov* where the outcome is inevitable. While the Court of Appeal agreed that the conclusion on the issue of discrimination was inevitable, the question of the most appropriate remedy was not inevitable — and so the HRTO ought to have the opportunity to weigh in. The Court of Appeal noted that the case was being decided in the "early post-*Vavilov* days", perhaps suggesting that as the jurisprudence matures, there may be more guidance as to when the appropriate remedy can more readily be decided at the review stage.
This decision ought to be read and understood in light of the strong caution in Lauwers J.A.'s concurring reasons, which stressed the historical autonomy of universities and the necessary limit to the executive and judicial oversight that can be imposed on them. A university's prerogative to set its admissions standards is a central feature of that autonomy. As such, Lauwers J.A. acknowledged the "difficult reality" that some applicants will still fall short of university admissions standards, even with accommodation. Both Lauwers J.A. and the majority decision of van Rensburg J.A. and Strathy C.J.O. specifically clarified that nothing in their reasons is intended to disparage grades-based admissions standards. The positive duty to accommodate does not entirely displace an applicant's obligation to demonstrate the capacity to succeed at university, and the tension between deference to the university's process and the duty to EEWaccommodate has to be worked out in each case on its facts.

## Test for examining *vires* of regulations not impacted by *Vavilov*: *Hudson's Bay Company ULC v. Ontario (Attorney General)*, 2020 ONSC 8046 (Div Ct)

**Facts:** In response to the COVID-19 pandemic, the respondent Ontario made a series of regulations restricting the operation of retail businesses, including O. Reg. 82/20 under the *Reopening Ontario (A Flexible Response to COVID-19) Act*[10], which provides that businesses in certain regions of Ontario are to be closed unless they are specifically listed in schedule 2 of the Regulation.
Pursuant to the Act and the Regulation, HBC was required to close sixteen of its stores.

[10] S.O. 2020, c. 17

HBC brought an application for judicial review challenging s. 2(1)3 of schedule 2 of the Regulation, which provides that "discount and big box retailers selling groceries" are permitted to open. HBC argued that this provision of the Regulation was *ultra vires*. According to HBC, the impugned provision creates an impermissible and irrational distinction between stores like Walmart (which were allowed to remain open) and HBC's own stores, since big box stores like Walmart sell the same lines of merchandise as HBC except that they also sell groceries. HBC sought an order allowing HBC's sixteen stores to re-open.

Decision: Application dismissed.

The principles for challenging a regulation as *ultra vires* were outlined in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*.[11] Regulations are presumed to be valid and, where possible, regulations should be construed in a manner that renders them *intra vires*. Courts are not to assess the policy merits of a regulation, or to decide whether it is necessary, wise or effective. The motives for making a regulation are irrelevant. Under-inclusiveness is not a valid ground for challenging a regulation as *ultra vires*.

Judicial review of a regulation is usually restricted to the issue of whether the regulation is inconsistent with the purpose of the enabling statute or whether a condition precedent was not met before the regulation was made. Regulations must be irrelevant, extraneous or completely inconsistent with the statutory purpose to be found *ultra vires*. It takes an egregious case to fall in this category.

*Vavilov* does not change the test for challenging regulations to review on a standard of reasonableness. The test and principles from *Katz* remain the governing framework.

In this case, the overall purpose of the Act is to provide a flexible approach to balancing the health and safety of Ontarians during the pandemic against the province's economic and business interests. The listed retailers allowed to open under schedule 2 of the Regulation on their face offer goods that are necessary, such as groceries and pharmaceuticals. It is clear, therefore, that the essential nature of a good or service is a factor underpinning the regulation. This restriction may be overly inclusive in the sense that it allows people to go to certain types of retail stores in certain regions to buy more than necessary goods but, on its own, this does not mean that the provision does not fall within the purposes of the Act. Such arguments go to the wisdom or the efficacy of a given measure.

One effect of the impugned provision seems to be permitting behaviour that is inconsistent with the broader policy goal of reducing community transmission. But it is not the role of the reviewing Court to make determinations about the efficacy or wisdom of policy choices within the scope of Cabinet's executive authority. Nor is it the Court's role to remove the "selling groceries" limitation and open up the exemption to all retailers. Legitimate policy choices might equally include narrowing or eliminating the exemption. These are

[11] 2013 SCC 64

decisions for the government, not the Court, to make.

On this application, HBC put forward extensive expert evidence aimed at demonstrating the unfairness and ineffectiveness of the impugned provision, while Ontario's record contained two relatively brief affidavits. HBC's evidence was irrelevant because the effectiveness or wisdom of a regulation is irrelevant. Determining the *vires* of a regulation is an exercise of statutory interpretation. Evidence may be helpful to understanding the factual context in which a regulation was made, but absent a statutory requirement to do so, governments have no obligation to provide evidence to justify the effectiveness of their policy choices.

Commentary: Not all courts share the Divisional Court's conclusion that despite *Vavilov*, reasonableness review does not apply when examining whether regulations are *ultra vires* their enabling statutes. Indeed, post-*Vavilov*, most other courts across the country that have considered the issue have assessed these kinds of questions through the lens of reasonableness review.[12] This approach is understandable: in *Vavilov*, the Supreme Court endorsed the view that reasonableness review applies "where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute".[13]

Because reasonableness is a flexible concept that is shaped by the context, the split between the law (as it stands) on this issue in Ontario and in other Canadian jurisdictions may be of little practical import. It is hard to see a meaningful difference between assessing the *vires* of regulations through reasonableness review, as opposed to a standalone application of the principles in *Katz*. Even if one adopts a reasonableness standard of review in such matters, the principles in *Katz* would continue to inform the assessment of what is required to satisfy that standard. As the Federal Court put it in one case, notwithstanding the fact that reasonableness review should apply, "in the context of a *vires* challenge, other Supreme Court precedents where statutory grants of authority were at issue remain relevant". The Federal Court went on to cite extensively from *Katz* for the relevant principles and largely relied on those principles in conducting its reasonableness analysis.[14]

One might expect the continued relevance of the principles from *Katz* (and other pre-*Vavilov* jurisprudence dealing with the *vires* of regulations on judicial review) to be particularly pronounced in circumstances where there are no 'reasons' for the regulations in question — which, of course, will be most cases. In such circumstances, *Vavilov*'s reasons-centric approach to reasonableness will be of little practical assistance to reviewing courts, and

[12] See, for example, *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101 at para. 39 (whether by-law falls within statutory authority of municipality); *Innovative Medicines Canada v. Canada (Attorney General)*, 2020 FC 725 at paras. 65-73 (*vires* of regulations); *TransAlta Generation Partnership v. Regina*, 2021 ABQB 37 at para. 46 (*vires* of regulations).

[13] 2019 SCC 65 at para. 66 (and para 67).

[14] *Innovative Medicines Canada v. Canada (Attorney General)*, 2020 FC 725 at paras. 65-73.

the guidance from cases like *Katz* will effectively set the boundaries of what constitutes a reasonable decision or outcome.

### Oral cautions are not penalties: *Geris v. Ontario College of Pharmacists*, 2020 ONSC 7437 (Div Ct)

**Facts:** G is a licensed pharmacist who was the "designated manager" of the pharmacy where he worked. Nine days after taking on this role, a pharmacist at G's pharmacy dispensed the wrong medicine to a pediatric patient, which resulted in the patient being taken to the hospital with serious symptoms. The error occurred when a pharmacy assistant added liquid medication to a reused bottle that already contained a different medication. The dispensing pharmacist who was supervising the assistant did not notice the error and dispensed the bottle.

G was not present at the pharmacy when the error occurred. After learning about the incident, he ensured that the matter was documented, sought to understand how the error occurred, implemented new policies, and apologized to the patient's family.

The matter came to the attention of the Ontario College of Pharmacists and the Registrar of the College appointed investigators to examine G's conduct. The Registrar's Investigation Report was disclosed to G and G provided his response. The matter then went to the College's Inquiries, Complaints and Reports Committee ("ICRC"), who considered the matter and released its decision on May 22, 2020.

The ICRC expressed serious concerns about how the error happened in the first place and found that the error should not have occurred. It concluded that G did not ensure that the pharmacy had robust policies in place regarding return to stock practices. Moreover, G did not ensure that pharmacy staff were adhering to processes to make sure that patients received the correct medication.

The ICRC also found that the new policies instituted by G, which allowed bottles that contained liquid medication to be reused, would create a risk of contamination. It stated that without different policies, the risk of a reoccurrence of the type of error that occurred remained high, particularly for liquid medications.

As a result, the ICRC decided to issue G an oral caution under s. 58 of the *Health Professions Procedural Code* and to require him to complete a remedial workshop.

G sought judicial review of the ICRC decision before the Divisional Court, arguing both that he was denied procedural fairness and that the ICRC decision was unreasonable.

**Decision:** Application dismissed.

G was not denied procedural fairness. The College's investigation was not inadequate because it failed to interview the pharmacy assistant to ascertain whether the contaminated bottle was restocked before or after G became the designated manager. This determination would not have affected the outcome because the dispensing error

occurred when G was designated manager and the ICRC took issue with the polices in place after G became designated manager and for which he was responsible.

Further, G was not prejudiced by delay in the College proceedings. G had never raised a concern over delay previously, nor did he point to any specific prejudice resulting from the delay. There was also a reasonable explanation for the delay because the College investigated the dispensing pharmacist first, and was only alerted to concerns about G's role through the course of this investigation.

G was not denied procedural fairness because he was not alerted to the fact that his post-incident policies were also under investigation. G was clearly aware of his need to address his response to the incident and referred to the policies that he instituted both during the investigation and in response to the Registrar's Investigation Report.

The ICRC's decision to issue an oral caution was reasonable. Contrary to G's arguments, the ICRC decision did not find G responsible for something that he could not control. Upon becoming designated manager, G acknowledged that he was aware of the policies and procedures in place at the pharmacy. Even if the contaminated bottle was restocked before G became designated manager, the insufficient policies regarding restocking containers continued on his watch when the actual dispensing error occurred. Finally, the ICRC was entitled to find that G's new policies remained insufficient.
The ICRC's decision was not too harsh. "Cautions and educational or remedial directions are not meant as sanctions or penalties but are meant to benefit the practitioner and the patients by avoiding future complaints of a similar nature" (para. 33). The educational and remedial nature of these orders is not altered by the fact that they are recorded on a public register. Further, it was not unreasonable for the ICRC to impose a more serious remedy on G than the dispensing pharmacist because the regime makes the designated manager responsible for the policies and practices of the pharmacy — which were lacking in this case. G was really asking the Court to re-weigh the factors underlying the ICRC's decision and that "is not the role of any court on judicial review, especially where remedy is concerned" (para. 41).

Commentary: Practitioners would do well to pay attention to the Court's comments regarding delay in the administrative body's decision as it relates to procedural fairness. Courts may well be skeptical of allegations of delay that are raised for the first time on judicial review. If delay is becoming an issue, then it is important to raise it early in the proceedings — including before the administrative body itself. Further, litigants cannot simply point to the mere lengthy passage of time as a bare assertion of a denial of procedural fairness. Parties must point to specific facts that would establish some form of prejudice resulting from the delay.

In addition, the Court's decision makes crystal clear that a caution is not a "penalty" *per se*, but rather a remedial measure meant to protect the public. This is still the case regardless of the fact that the caution may be

published by the disciplinary body and could therefore have a significant impact on a professional's reputation and career. The Court's reasons suggest a willingness to afford more deference to the ICRC's decision to issue a caution than may have been the case for a more serious remedy amounting to a true "penalty".

This approach is relevant for the review of decisions of professional disciplinary bodies with a variety of potential remedies, ranging from remedial measures meant to protect the public interest to more punitive measures to address professional misconduct. Of course, all remedies issued by professional regulatory bodies contain elements aimed at protecting the public (including revoking the licenses of individuals found to have committed professional misconduct). However, where practitioners are able to situate the particular remedy in their case on this scale may impact how heavily the reviewing court scrutinizes the body's reasons for imposing that remedy.

## Use of video testimony and prior transcripts under the SPPA: *Floria v. Toronto Police Service*, 2021 ONSC 842 (Div Ct)

**Facts:** In 2005, F was a constable in Traffic Services for the Toronto Police Service ("TPS"). S.T. and his brother G.T. were working for a marijuana grow-op. S.T. claims that in November 2005 he was kidnapped and tortured until his boss had paid his ransom. S.T., who knew F socially, reported this crime to F. Instead of reporting the crime to the TPS, F launched his own inadequate investigation into the alleged kidnapping. Just weeks later, F's acquaintance reported another kidnapping to him. Again, F did not report it to the TPS.

On learning of this conduct in 2007, the TPS issued a notice of hearing alleging professional misconduct, but those proceedings were adjourned while F responded to the criminal charges pending against him arising from the same events.

The disciplinary action proceeded again in 2013 after F was acquitted by a jury.

S.T. and G.T. were key witnesses at the disciplinary hearing, as they had been at the criminal trial, but they had left Canada after appearing at F's criminal trial— in part, out of concerns for their safety. The Hearing Officer allowed them to appear as witnesses at the hearing by video link. S.T. gave evidence by video conference. Before G.T. was able to give testimony, their mother unexpectedly died. Rather than cause further delay and expense, the Hearing Officer decided to rely on the transcript of G.T's evidence from the criminal trial.

The Hearing Officer concluded, amongst other findings of guilt, that F had brought discredit on the reputation of the TPS for failing to assist S.T. and report his kidnapping and for failing to report the second kidnappings. The hearing officer concluded that dismissal was an appropriate penalty for F's charges of discreditable conduct.

F appealed to the Ontario Civilian Police Commission (the "Commission"), but the appeal was dismissed. F then appealed the Commission's decision to the Divisional Court.

Decision: Appeal dismissed.

F was incorrect that the Hearing Officer had no authority to allow S.T. to appear as a witness by video link. The Hearing Officer did have the jurisdiction and authority to do so. That is because F's hearing was *not* an electronic hearing under section 1 of the *Statutory Powers Procedure Act*.[15] Under the SPPA an electronic hearing is "a hearing held by conference telephone or some other form of electronic technology allowing persons to hear one another". By contrast, the definition of "oral hearing" is "a hearing at which the parties or their representatives attend before the tribunal in person" [emphasis added]. F and his representatives were before the tribunal in person. Only S.T. was participating by video. As such, s.5.2 of the SPPA, which only allowed a tribunal to hold electronic hearings where it had enacted rules for same, did not apply to F's hearing.

F's argument that reliance on G.T's criminal trial transcript amounted to a breach of natural justice must also be dismissed. The Hearing Officer had authority to rely on the transcript under s. 15(1) of the SPPA, which allows a tribunal to "admit as evidence at a hearing, whether or not given or proven under oath or affirmation or evidence in court, any oral testimony and any document or other thing" that is relevant. After considering that the evidence was given under oath, cross-examined by F and was in a reliable transcript, the Hearing Officer concluded that this was sufficient to meet the test for threshold reliability and be admitted. F was relying on distinguishable decisions where the opposing party had no opportunity to cross-examine the witness on "absolutely key evidence". The same was not true here. Just because F was not able to cross-examine G.T. further on certain issues, did not make this a denial of natural justice.

Commentary: This decision is timely in light of the global pandemic that has caused so many administrative tribunals and decision-makers to rely on evidence given remotely. The SPPA still requires tribunals and other administrative bodies to enact rules allowing for electronic hearings where one or both of parties and or the members of the tribunal are not physically present. However, where a witness or witnesses are not present, this will not qualify as an "electronic hearing" under the SPPA, and the hearing will not be required to comply with the rules for an electronic hearing under s. 5(2) of the SPPA.

This decision also confirms that tribunals or decision-makers subject to the SPPA may rely on transcripts of witness examinations from previous proceedings — and that relying on such transcripts will not necessarily offend the principles of natural justice. The latter is particularly true where the witness was cross-examined during the previous proceedings, although the Court's decision suggests that the result may be different if the witness was not cross-examined on issues that are of central importance in the dispute in the current disciplinary proceedings.

[15] RSO 1990, c. S.22

### Decision set aside for lack of notice: *Sbrissa v. Ontario Association of Architects*, 2021 ONSC 2087 (Div Ct)

Facts: S practised architecture in Ottawa and had been a member of the Ontario Association of Architects ("OAA") since 1981. He lived and worked out of the McGee House, a 138 year old historic building. In the summer of 2018, the west wall of the building partially collapsed. The City of Ottawa issued an order to S to 'remedy an unsafe building'. A dispute then ensued between S and the City as to whether the building was unsafe and as to the appropriate method of repair.

At the time of the collapse, S's licence to practise architecture had been revoked by the OAA for nonpayment of his practice insurance premiums. After subsequently paying the required premiums, S applied for his licence to be reinstated but was notified that the Registrar of the OAA proposed to refuse reinstatement of his licence. The Registrar's Notice of Proposal specified two reasons for the refusal, which pertained to the wall collapse at McGee House and S's filing of documents with the City representing that the building was safe to occupy. At the hearing, however, the Registrar testified that her proposed refusal of S's licence reinstatement was based on her belief that S's conduct with respect to the building collapse violated the good character requirement in the *Architects Act*.[16] She also relied on S's disciplinary record and his record of delinquent payment of fees.

Following a hearing, the OAA's Registration Committee reinstated S's licence subject to certain terms but refused to reinstate his certificate of practice, thus curtailing his ability to provide independent architectural services to the public. Concerns about S's discipline history and prior revocations for nonpayment of fees and insurance premiums were central to the Committee's decision. These matters were not mentioned in the Registrar's Notice of Proposal. S appealed the Committee's refusal to grant him a certificate of practice.

Decision: Appeal allowed.

Since this was a statutory appeal, the Court applied the appellate standards of review according to *Housen v. Nikolaisen*[17]: 'correctness' for questions of law and 'palpable and overriding error' for questions of fact, or mixed fact and law found that it was not necessary to decide whether or in what circumstances the OAA may rely on repeated defaults in the payment of fees and insurance premiums to refuse re-instatement of a licence or certificate of practice. That matter was not referred to in the Notice of Proposal. In basing its decision on factors that were not considered by the Registrar in her Notice of Proposal, the Registration Committee committed an error of law. Section 25 of the Act provides that a hearing shall be "in respect of a proposal by the Registrar…". This is a clear indication that the hearing will address the subject matter or concerns identified in the Registrar's proposal.

[16] R.S.O. 1990, c. A.26, s. 13(1)(a)

[17] 2002 SCC 33

The Court explained that the lack of notice resulted in a failure of fairness and due process and prejudice to S who was not represented by counsel at the hearing and was placed in the position of dealing with these issues as they arose at the hearing. The lack of notice also effectively precluded S from making an informed decision as to the need to obtain legal representation.

The Court declined to order the OAA to issue to him a certificate of practice and instead remitted to the OAA the question of whether further proceedings, based on a proper notice of proposal, were necessary and justified in the circumstances.

Commentary: In a post-*Vavilov* era, the appellate standards of review from *Housen v. Nikolaisen* apply to statutory appeals from administrative decision-makers. Questions of law are reviewed for correctness without the court deferring to the administrative decision-maker.

Here, the Court concluded that the Registration Committee committed an error of law in conducting a hearing into the appellant's history of payment defaults and other administrative and conduct issues not referred to in the Registrar's Notice of Proposal. These actions violated the appellant's right to natural justice and deprived him of a fair hearing. Even prior to *Vavilov*, procedural fairness issues of this nature were reviewable on a correctness basis (often without any standard of review analysis), whether on judicial review or through statutory appeals.

The decision reiterates the fundamental importance of an individual receiving notice in order to meaningfully exercise the right to be heard—especially in a professional regulation context where the individual's conduct is put in issue. The outcome here illustrates the fatal consequence that may apply in instances where basic notice is denied.

This decision is an important reminder of the need, when interpreting professional discipline legislation, to balance fairness to professionals with the protection of the public interest. As the Court of Appeal for Ontario commented in *Abdul v. Ontario College of Pharmacists*,[18] para. 18: "while the discipline process against health professional must recognize the public interest involved, care must also be taken to accord that professional the full due process that the disciplinary legislation was intended to provide".

[18] 2018 ONCA 699.

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