ISSUE No. 30 • SEPTEMBER 2021

ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

CO-EDITORS: **ANDREA GONSALVES** & **JUSTIN SAFAYENI**

IN THIS ISSUE

CONTRIBUTORS


Karen Bernofsky


Spencer Bass


Dragana Rakic
Guest Co-Editor

Approach to reasonableness review after *Vavilov*: *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157

Facts: AP developed a patented medicine, Soliris, which AP now manufactures and markets. The Patented Medicine Prices Review Board started proceedings into whether Alexion priced Soliris excessively contrary to the *Patent Act*[1], and concluded that it did. The Board ordered AP to forfeit excess revenues it had earned between 2009 and 2017.

In finding that AP had priced Soliris excessively, the Board relied upon the fact that the list price of Soliris was higher than the price in one of the seven countries used for comparison purposes.

AP applied for judicial review. The Federal Court dismissed the application, finding that the Board decision was entitled to significant deference and was reasonable. AP appealed.

Decision: Appeal allowed (per Stratas, Webb and Rennie JJ.A.). Board's decision quashed and the matter remitted for redetermination.

[1] RSC 1985, c P-4

On behalf of the unanimous panel of the Federal Court of Appeal, Stratas JA explains that the Supreme Court's decision in *Vavilov*[2] (which was released after the Federal Court's decision in this case) changed the law substantially by requiring that reviewing courts be able to discern a reasoned explanation for administrators' decisions. *Vavilov* now requires the Court to ask if there is a sufficient reasoned explanation in support of the Board's decision. If not, then the decision is unreasonable and must be quashed.

Vavilov teaches that a reasoned explanation has two related components: (i) adequacy, and (ii) logic, coherence and rationality. Of those, adequacy is the most challenging. To assess adequacy, reviewing courts should look at the decision maker's express reasons, read holistically and contextually in light of the record and with due sensitivity to the applicable administrative regime. Silence in the reasons on a particular point is not necessarily a fundamental gap warranting court intervention. The reasons, read alone or in light of the record, might lead the reviewing court to find that the decision maker must have made an implicit finding. The evidentiary record, the submissions made, the understandings of the decision maker as seen from previous decisions cited or that it must have been aware of, the nature of the issue before the decision maker and other matters known to the decision maker may also supply the basis for a conclusion that the decision maker made implicit findings. A reviewing court may connect the dots on the page where the lines, and the direction in which they are headed, may be readily drawn.

A reasoned explanation may be inadequate if the decision maker does not say enough to assure the parties that their concerns have been heard. The reviewing court must understand the substance of the decision, and why the decision maker ruled the way it did, in order to assess meaningfully whether the decision maker met minimum standards of legality. In cases where the impact of the decision on an individual's rights and interests is severe, it may be necessary that the administrator show it has understood and grappled with the consequences of its decision.

However, reviewing courts must not apply the requirement of a reasoned explanation in a way that transforms reasonableness review into correctness review.

Reasonableness under *Vavilov* also requires an assessment of whether the outcome reached is acceptable and defensible. The approach is a contextual one that considers the various legal and factual constraints acting upon decision makers.

There is an intimate relationship between reasoned explanations and outcomes. In some cases, the decision maker might not have supplied a reasoned explanation in support of the outcome reached because one is not possible on the wording of the empowering legislation. The inadequacy of the reasoning is a problem; but the bigger problem may be that the decision maker is trying to reach an

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

unreasonable outcome. In many cases, the two are different sides of the same coin. As a practical matter, imposing a requirement on a decision maker to ensure that a reasoned explanation is discernable forces it to think through the problem, grapple with it, and decide it on its merits.

In this case, a reasoned explanation for some key portions of the Board's decision cannot be discerned. But that may be just part of the unreasonableness problem in this case. It may be that the Board was trying to reach an outcome that, on the facts and the law ,was not reasonably open to it. So at times in this analysis, the failure to discern a reasoned explanation closely relates to the possible unreasonableness of the outcome the Board was trying to reach. In other words, in the analysis that follows, the requirements of a reasoned explanation and an acceptable and defensible outcome will often overlap.

Subsection 85(1) of the *Patent Act* empowers to Board to decide "whether a medicine is being or has been sold at an excessive price in any market in Canada". It sets out five relevant factors, one of which is "the prices at which the medicine and other medicines in the same therapeutic class have been sold in countries other than Canada". If, after considering the factors, the Board is unable to determine whether a price is excessive, it may also consider "the costs of making and marketing the medicine" and any other factors it considers relevant (s. 85(2)).

The Board has enacted guidelines to assist in applying s. 85. The guidelines are non-binding guidance, not law. The Board can depart from the guidelines but any departure must be reasonable, at least in the sense of not being inconsistent with a reasonable interpretation of s. 85. There also must be a reasoned explanation for any departures from the guidelines.

Alexion's main argument to the Board was that the Board's decision to require the price of Soliris in Canada to be below the price in all seven comparator countries was contrary to s. 85, in that it elevated one factor above all others. This submission raises the concern of whether the decision maker stayed within the powers given by its governing legislation, reasonably interpreted. The Board obfuscated on this point, making it impossible for a reviewing court to know whether the Board exercised powers it does not lawfully have. In so doing, the Board put itself beyond review.

The Board seems to have decided that it could determine the matter based on the factors in s. 85(1), such that it could not resort to s. 85(2). Yet the Board went on to consider the issue of cost under s. 85(2).

A more fundamental concern is that the Board has misunderstood its mandate Parliament under s. 85. At a minimum, a reasoned explanation is missing. Authorities have repeatedly stressed that the excessive pricing provisions in the *Patent Act* are directed at controlling patent abuse, not price-regulation. Yet the Board suggested in its reasons that its mandate was to ensure reasonable pricing, not to prevent abusive pricing. Section 85 speaks of "excessive" pricing, not "reasonable" pricing. The Board did not grapple with the concept of "excessive pricing" and there were signs in its

reasons that it pursued a general price regulation mandate. It also departed from the guidelines (which normally refer to the highest international price as a key comparator) without explaining the departure. While s. 85 gives the Board a very wide discretion, discretion always is subject to the limits imposed by the authentic meaning of the legislation granting it and must always remain within those limits.

The Board's decision is unreasonable and cannot stand.

Commentary: This decision offers useful and practical guidance to lower courts and litigants on the conduct of reasonableness review under *Vavilov*. *Alexion* does not change or develop the law after *Vavilov* so much as it provides a helpful distillation of how reasonableness review should work. Justice Stratas explains how the two aspect of reasonableness review — whether the decision maker has provided a sufficient reasoned explanation for the decision, and whether the outcome reached is defensible and acceptable — are interconnected. In some cases, a reviewing court might not discern a reasoned explanation in the decision maker's reasons because the outcome reached is not defensible and acceptable having regard to the wording of the relevant legislation.

In some cases, while the outcome itself *might* be defensible and acceptable, the decision may still fail to satisfy the reasonableness standard if the decision maker does not explain the decision adequately and with a rational, coherent, logic chain of analysis. For Stratas JA, this represents a development in the law as a result of *Vavilov*. No more are reviewing courts expected or permitted to 'cooper up' a decision by looking for reasons that "could be offered". If the reasoned explanation cannot be found in the decision itself—read holistically and contextually in light of the record and with due sensitivity to the applicable administrative regime—then the decision is unreasonable and must be quashed, even if a reasoned explanation *might* exist somewhere out there.

Litigants challenging administrative decisions in judicial review applications may find this decision helpful in framing and focusing their reasonableness arguments. Parties should concentrate their arguments on the deficiencies in the decision-maker's own reasons—with respect to both their adequacy and the flow of logic—to show why the reasons given are not a reasoned explanation. And where the argument is reasonably available, litigants should also be prepared to explain—as was the case before *Vavilov*—why the outcome cannot be supported on a reasonable interpretation of the legislation, having regard to the legal and factual constraints of the case.

For courts conducting reasonableness review, the Federal Court of Appeal's decision helps orient the analysis in a way that mitigates the risk of disguised correctness review. By showing reviewing courts *how* to keep the analysis on the administrator's own reasons throughout, *Alexion* helps advance *Vavilov*'s direction that "the focus of reasonableness review must be on the decision actually made by the decision maker, including both the

decision maker's reasoning process and the outcome".[3]

Finally, *Alexion* offers helpful guidance for adjudicators and administrative decision makers. Justice Stratas explains that "imposing a requirement on an administrator to ensure that a reasoned explanation is discernable forces it to think through the problem, grapple with it, and decide it on its merits." Decision makers in certain administrative regimes (for example, professional discipline bodies) may be tempted in some situations to announce their decisions "with reasons to follow". This may not be inherently problematic — provided the decision maker has conducted a robust and full deliberation process and worked through the reasons to an outcome before announcing it, leaving only the task of putting those reasons into a formal written form. However, often it is the process of writing reasons that reveals deficiencies and gaps in the reasoning pathway. The reasons, and the outcome itself, may not crystallize until the task of writing reasons is complete. In complex, contested matters it is usually most prudent for the decision maker(s) to reserve their decision and announce the outcome through reasons that are complete, coherent and logical, and which they drive the outcome—rather than the other way around. This process best ensures that the decision can withstand judicial scrutiny on both aspects: providing a reasoned explanation, and a defensible outcome.

[3] *Vavilov*, para 83

Vavilov, not *Katz*, applies to review of regulations: *Portnov v. Canada (Attorney General)*, 2021 FCA 171.

Facts: The *Freezing Assets of Corrupt Foreign Officials Act*[4] is designed to allow Canada to assist foreign states in respect to requests from those states to freeze assets of specific individuals. Section 4 of the Act provides that once certain statutory prerequisites are met, the Governor in Council can issue an order or regulation restricting or prohibiting dealings with certain property held by designated individuals.

Ukraine made a request to Canada for assistance in freezing assets on the basis that there was widespread and rampant corruption and misappropriation of state funds by former president Viktor Yanukovich and his senior officials and close associates. In 2014, the Governor in Council passed regulations under the Act designating 18 individuals — including P — and restricting their dealings with certain property for up to 5 years (the "2014 Regulations").

Section 6 of the Act allows for an extension of regulations made under section 4. On the day before the 2014 Regulations expired, the Governor in Council relied on section 6 to order such an extension (the "Extending Order"), while also amending the 2014 Regulations to remove two individuals (not P) (the "2019 Regulations").

P brought an application for judicial review to quash the Extending Order and the 2019

[4] S.C. 2011, c. 10.

Regulations, arguing that all of the statutory criteria for a section 4 order must necessarily be met again before that order can be extended under section 6 of the Act. The Federal Court dismissed his application.

P appealed, seeking to have the Federal Court of Appeal apply the correctness standard of review on the basis that the appeal raised questions of central importance to the legal system as a whole.

Decision: Appeal dismissed (per Nadon, Stratas and Rivoalen JJ.A.)

Writing for a unanimous court, Stratas J.A. concluded that reasonableness is the appropriate standard of review. A question of central importance to the legal system as a whole is a narrow exception to the presumptive standard of reasonableness review. To assess whether it applies, the real essence and essential character of P's case must be assessed. P's appeal was based on a question of statutory interpretation, which should be analyzed through the prism of reasonableness. It does not transcend the Act, nor does it engage any constitutional or quasi-constitutional principle.

With respect to how reasonableness review applies to regulations, the "hyper-deferential" approach from *Katz Group Canada Inc v. Ontario (Health and Long-Term Care)*[5] — in particular, the presumption that regulations are valid and *Katz*'s direction that this presumption can only be overcome if the regulations are irrelevant, extraneous or completely unrelated to the statutory purpose — has been "overtaken" by *Canada (Minister of Citizenship and Immigration) v. Vavilov*.[6]

In substance, regulations, like administrative decisions and orders, are nothing more than binding legal instruments that administrative officials decide to make. The proper framework for reviewing regulations must be the one we use to review the substance of administrative decision-making. That framework is *Vavilov*, which was intended to be sweeping, comprehensive and holistic revision of the choice of standard analysis, and which instructs us to conduct reasonableness review of all administrative decision-making — including regulation-making — unless one of three 'correctness review' exceptions apply.

The other two main principles flowing from *Katz* — that the party challenging the validity of regulations bears the burden of proof and that, to the extent possible, regulations should be interpreted so that they accord with the authorizing legislation — remain good law.

Applying *Vavilov*'s standard of reasonableness (and not *Katz*'s "presumption of validity" approach), Stratas J.A. noted that in the absence of express written reasons for the decision at issue, "reasoned explanations" could be found in the legal instruments being issued (i.e. the 2019 Regulations and the Extending Order), prior related legal instruments (i.e. the 2014 Regulations), and any associated Regulatory Impact Analysis Statements (which were prepared and provided to the Governor in Council). These

[5] 2013 SCC 64.

[6] 2019 SCC 65.

sources show that the Governor in Council viewed s. 6 of the Act as permitting an extension of regulations if circumstances suggest the extension is necessary and consistent with the purposes of the Act. Requiring all of the preconditions of s. 4 of the Act to be met before regulations can be extended would frustrate these purposes. The Governor in Council's approach also finds support in the text of s. 6 and the context of the Act. If extending a regulation requires the same steps as making the regulation, then s. 6 would be unnecessary. P has failed to show the Governor in Council was oblivious to the essential elements of text, context and purpose.

More broadly, contextual considerations suggest the Governor in Council's decision whether to make an order under s. 6 is relatively unconstrained, as it requires relying on factually suffused determinations and drawing upon the Governor in Council's access to sensitive communications and its expertise in international relations.

Commentary: A lingering question in the wake of *Vavilov* was whether Vavilovian reasonableness review would overtake the approach to judicial review of regulations set out in *Katz*. As far as the editors of this newsletter are aware, *Portnov* marks the first appellate decision to answer this question in the affirmative.

The reasons Stratas J.A. provides for discarding *Katz* in favour of *Vavilov* amount to a forceful endorsement of form over substance: if at the end of the day, an administrative decision has been made that impacts the rights or interests of the applicant, then why should the decision in the form of a "regulation" attract so much more deference than an order or other form of decision?

The consequences of this shift in approach may prove to be significant. The *Katz* framework — which includes a starting presumption that can only be overcome in a few, narrow ways — leaves little room for meaningfully challenging the substance of a decision based on the generally applicable principles of reasonableness review. For example, it is difficult to fit arguments relating to a deeply flawed statutory interpretation analysis, or a failure to consider relevant evidence, into the limited categories of situations that *Katz* and its progeny contemplate as a basis for quashing a regulation Under the *Portnov* approach, however, all of these arguments (and others) would be fair game, just as they would for any other kind of administrative decision.

At the same time, as *Portnov* itself demonstrates, reviewing courts may lean on the "context" of the regulation-making process to apply a more generous berth of reasonableness in such cases than when reviewing other types of decisions made by administrative tribunals or decision makers. Here, for example, Stratas J.A. cites the position and experience of the Governor in Council in characterizing the decision as a factual and policy-laden one, which influences the assessment of reasonableness. This kind of reasoning may resonate even more forcefully in the case of regulations that apply to the public at large, rather than those singling out a particular person or entity for consequences.

It remains unclear the extent to which other courts will adopt the *Portnov* approach. As it stands, according to a series of recent Divisional Court decisions, the law in Ontario remains that *Katz* — and not *Vavilov* — governs the review of regulations.[7] In fact, the Divisional Court has expressly rejected the notion that *Vavilov* has overtaken *Katz*, offering the view (pre-*Portnov*) that "[t]here is no support for this argument in *Vavilov* or in any decision since its release."[8] Whether Stratas JA's detailed justification for preferring Vavilovian review of regulations will impact the approach in Ontario and other jurisdictions remains to be seen. A continued split between Ontario and the federal courts on this issue would make it ripe for Supreme Court guidance.

Zero-tolerance rule for sexual relationships between regulated health professionals and patients upheld: *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482

Facts: Under Ontario's *Health Professions Procedural Code*[9] (the "*Code*"), members of regulated health professions are guilty of professional misconduct if they commit "sexual abuse" against a patient, defined under the *Code* to include any physical sexual relations with a patient. Since 2013, this prohibition on sexual relations with a patient may be subject to a narrow spousal exception, but only if the college of a regulated health profession, with the approval of the government, has made a regulation permitting members to provide treatment to their spouses. "Spouse" is defined for this purpose narrowly to include only a person to whom the member is married or with whom the member has been cohabiting in a conjugal relationship for at least three years. Where no exception applies, and a member commits sexual abuse of a patient that includes certain enumerated conduct, including sexual intercourse, revocation of the professional's certification of registration is a mandatory penalty.

T was a member of the College of Dental Hygienists of Ontario (the "College") who was prosecuted for committing sexual abuse against a patient. The facts were not dispute. In 2013, T began providing dental hygiene treatment to a platonic friend, M. In 2014, T and M entered into a sexual relationship and T stopped treating M because he understood he was not permitted to do so.

In April 2015, however, a colleague told T (incorrectly) that the rules had changed and dental hygienists were now permitted to treat their spouses. T thereafter treated M on seven occasions in 2015 and 2016 while they were engaged in a sexual relationship; the last three of these treatments occurred after T and M married. In August 2016, another member of the College complained after seeing a Facebook post by M expressing her gratitude to T for treating her.

---

[7] See, for example, *TDSB v. Ontario*, 2021 ONSC 4348 (Div. Ct.), at paras. 19-24; *Friends of Simcoe Forests Inc. v. Minister of Municipal Affairs and Housing*, 2021 ONSC 3813 (Div. Ct.), at paras. 26-27; *Hudson's Bay Company ULC v. Ontario*, 2020 ONSC 8046, at paras. 37-39.

[8] *Hudson's Bay Company ULC v Ontario*, 2020 ONSC 8046, at para. 39.

[9] Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18.

While the College had proposed a regulation permitting members to treat their spouses sometime before April 2015, the regulation was not submitted to the government for approval until October 2015, and did not come into force until October 2020 — and therefore, was not in force when T provided treatment to M in 2015 and 2016.

The Discipline Committee of the College found T guilty of professional misconduct and revoked his certificate of registration. The Divisional Court dismissed T's appeal. T appealed to the Court of Appeal.

Decision: Appeal dismissed (per Feldman, MacPherson, Juriansz, Huscroft and Jamal JJ.A.).

In the Court of Appeal, T argued that the revocation of his certificate of registration was an "absurdity" in the circumstances and invited the Court of Appeal to revisit its case law to remedy this result. A five-member panel was convened to allow T to challenge two of the Court's decisions: *Leering v. College of Chiropractors of Ontario*[10] and *Mussani v. College of Physicians and Surgeons of Ontario*[11]. The five-member panel upheld both decisions and dismissed T's appeal.

In *Leering*, the first decision T sought to challenge, the Court had held that sexual abuse under the *Code* is established by the concurrence of practitioner–patient relationship and a sexual relationship. The Court rejected T's arguments that *Leering* should be revisited to give disciplinary colleges the discretion to consider whether treatment of a spouse amounts to "actual sexual abuse" in the circumstances of a particular case, as well as his argument that concerns about exploitation do not arise where a spousal relationship predates a practitioner–patient relationship.

The Court found that replacing the *Code*'s bright-line rule with a standard that would require discipline committees to assess the nature and quality of individual practitioner-patient sexual relationships was unsupported by the text of the *Code* and would frustrate its purpose to protect patients by establishing a clear, easy-to-understand prohibition. The Court also rejected T's argument that the legislature had "overruled" *Leering* by amending the *Code* to authorize colleges to enact spousal exception regulations, holding that the amendment instead acknowledged the decision while permitting colleges to mitigate the strictures of the bright-line rule in narrow circumstances, if they considered it appropriate. Because the spousal exception was not in place for dental hygienists in 2015–2016, it did not excuse T's conduct.

In *Mussani*, the second decision T sought to challenge, the Court had held that the penalty of mandatory revocation for sexual abuse does not infringe either s. 7 or s. 12 of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal affirmed *Mussani*, including its holdings that neither liberty nor security of the person interests were engaged by revocation; that, in any event, the *Code* was in accordance with the principles of fundamental justice; and that revocation does not constitute punishment or

[10] 2010 ONCA 87.
[11] 2004 CanLII 48653 (Ont. C.A.).

treatment for the purposes of s. 12 of the *Charter*. The Court further rejected T's argument that the requirements to permanently note of the details of a sexual abuse finding on a member's record and to publicize those findings (added after *Mussani*) engages the right to security of the person.

Commentary: The decision in this closely watched appeal leaves no doubt that what constitutes "sexual abuse" under the *Code* is to be determined by the application of a bright-line rule rather than a case-by-case assessment of the nature and quality of a practitioner-patient sexual relationship — and that where certain types of abuse are found, revocation must follow. Not only did the five-member panel unanimously affirm that the bright-line rule is both mandated by the *Code* and constitutionally compliant, but it did so notwithstanding the sympathetic circumstances of T's case. In contrast to *Mussani* (where the discipline committee found the member's sexual relationship with a patient betrayed her trust and disgraced the profession) and *Leering* (where the discipline committee found the member abused his power over a patient), the discipline committee in T's case concluded their decision by expressing their sympathy for T's personal circumstances and their "sincere[] hope to see [him] again as an active member of the dental hygiene profession."

The Court of Appeal's decision also acknowledges that the *Code* has been updated since *Mussani* and *Leering* to mitigate some of the strictures of the bright-line rule (while keeping it in place). In particular, the Court noted that the regulations have been amended to remove the provision of minor or emergency treatment from the prohibition on treatment concurrent with a sexual relationship, and the ability of individual colleges, as of 2013, to adopt regulations permitting spousal exceptions.

However, the Court also emphasized two important limitations of the spousal exception, even where it is in force in respect of members of a particular college. First, the term "spouse" has a narrow and specific meaning under the *Code* that requires either marriage or cohabitation in a conjugal relationship for at least three years before a sexual relationship fits within its scope. Second, the spousal exception only applies to conduct that occurs after the exception comes into force. Thus, the College's spousal exception could not excuse T's conduct because it was not in force at the relevant time; even if had it been in force, however, it would not have excused those instances of treatment that occurred before T and M were "spouses" within the meaning of the *Code*.

Reasonableness review where Tribunal distinguishes precedents: *Society of United Professionals v. New Horizon System Solutions*, 2021 ONCA 503

Facts: The Society represents, and is the bargaining agent for, certain employees of NWSS. NWSS provides IT services to a single client, Ontario Power Generation, pursuant to a Master Services Agreement (the "MSA"). The MSA contains a non-disclosure covenant.

In March 2018, NWSS proposed a reduction of seven positions in accordance with the terms

of its collective agreement. NWSS explained that the reduction related to its requirement to further reduce costs under the MSA.

The Society requested disclosure of the MSA in order to adequately represent the affected employees. NWSS denied the request and refused to disclose the MSA.

In May 2018, the Society gave notice to bargain a new collective agreement. It again requested a copy of the MSA, this time for the purposes of the bargaining process. NWSS once again refused to disclose the MSA.

The Society filed an unfair labour practice application to the Labour Relations Board (the "Board"). It argued that NWSS's refusal to disclose the MSA constituted both interference with its obligations to represent the employees affected by the proposed reductions, in violation of s. 70 of the *Labour Relations Act, 1995*[12] (the "*Act*"), and a violation of NWSS's duty to bargain in good faith under s. 17 of the *Act*.

In a series of decisions, the Board largely dismissed the Society's application. It found that NWSS was not required to disclose the entire unredacted MSA. Ultimately, it only required NWSS to disclose certain parts of the MSA that were directly related to staffing levels and pricing, employee duties, and pension obligations and liabilities.

The Divisional Court dismissed the Society's application for judicial review, holding that the Board's decision was reasonable.

The Society appealed to the Court of Appeal.

Decision: Appeal dismissed (per Rouleau, Hoy, and van Rensberg JJ.A.)

There was no dispute that the standard of review was reasonableness.

Writing for a unanimous panel, Hoy J.A. found that the Board's decision that NWSS did not interfere with the Society's representation of the employees under s. 70 was justified in light of the existing jurisprudence and the facts of the case, and was therefore reasonable.

The Board interpreted s. 70 of the *Act* as only requiring disclosure of confidential business documents that are at least "directly and concretely connected" to specific information about employees or entitlements under a collective agreement. The Board's interpretation of s. 70 did not frustrate its purposes, nor was it unreasonably narrow. The Board properly considered the two leading cases relevant to lack of disclosure by employers under s. 70: *Hotel & Restaurant Employee CAW Local 448 National Automobile, Aerospace, Transportation and General Workers' Union of Canada v. The Millcroft Inn Ltd.*[13] ("*Millcroft*") and *Bernard v. Canada (Attorney General)*.[14] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[15] the Supreme Court held that relevant precedents will act as a "constraint" on what a decision maker can reasonably decide. Here, the Board appropriately distinguished *Millcroft* and

[12] S.O. 1995, c. 1, Sch. A.

[13] 2000 CanLII 12208 (Ont. L.R.B.).
[14] 2014 SCC 13.
[15] 2019 SCC 65.

Bernard, which both dealt with disclosure of contact information of employees. According to these precedents, for the non-disclosure to constitute interference, the information sought must be necessary for the union to carry out its representational duties. As the Board concluded that access to the MSA was not necessary for the union's representation of the employees, its decision was consistent with these precedents.

Further, the Board's finding that the information in the MSA was not necessary for the Society's representation of its members was reasonable. This was a factual finding that was fully justifiable in light of the record before the Board.

The Board's interpretation of s. 17 of the *Act* was also reasonable. The Board concluded that whether an employer is required to disclose confidential business information during the bargaining process in order to fulfill its duty to bargain in good faith depends on the proposals made by the party holding the otherwise confidential information. Any disclosure obligation turned on whether the unredacted MSA sought was necessary to comprehend a bargaining position. The Board's decision that most of the MSA was not necessary for the purpose (aside from certain sections) was consistent with its own jurisprudence under s. 17 and justifiable in light of the history and context of the particular proceedings.

Finally, the Board did not act unreasonably in accepting counsel for NWSS's representations that particular provisions of the MSA did not fall within the categories that the Board ordered to be disclosed. When the Board's decision is read in light of the history and context of the proceedings – including the material that the Board had before it from the entire dispute and the urgency of the decision – the decision was reasonable.

Commentary: The Court of Appeal's decision does not contain a detailed or novel discussion of the principles underlying the reasonableness standard of review; the review of these principles is brief and consists largely of references to *Vavilov*. However, the case is a useful illustration of how reasonableness review is conducted in the post-*Vavilov* era, particularly where a party's basis for arguing substantive unreasonableness arises from a tribunal's purported failure to follow past precedent.

In *Vavilov*, the Supreme Court explained that "[a]ny precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide" and that "[a]n administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted".[16] This case demonstrates that *Vavilov*'s 'justification' requirement when it comes to departing from precedent is not necessarily a particularly onerous bar — at least when it comes to distinguishing factual situations. The Court of Appeal briefly examined prior decisions relied on by the appellant and accepted that the Board's decision was ultimately consistent with

[16] *Vavilov*, at para. 112.

the underlying principles of the cases and identified material factual differences. Applicants on judicial review will need to do more than simply point to cases that reached different results, particularly where the administrative body already considered and distinguished those precedents.

The decision also provides a further data point in the ongoing debate within the courts as to whether *Vavilov* mandates a more "robust" form of reasonableness review. In another recent case — *Ontario Nurses' Association v. Participating Nursing Homes*[17] — the Court of Appeal stressed that *Vavilov* does not permit the reviewing court to interpret the statute at issue *de novo* and that "the focus of the analysis is on why the Tribunal's decision is unreasonable, not what this court would have decided in the Tribunal's place" (para. 46). In his dissenting decision, Huscroft J.A. (with Strathy C.J. concurring), added that "the essential nature of reasonableness review has not changed" as a result of *Vavilov* (para. 104). The dissent criticized the majority for not demonstrating sufficient deference to the administrative decision maker. The different opinions in the *Ontario Nurses' Association* case can be seen as highlighting the disagreement, at least in practice, over how "robust" reasonableness review should be post-*Vavilov* — even though the ostensible position in Ontario remains that the degree of robustness in reasonableness review has not increased post-*Vavilov*.[18]

The Court of Appeal's decision in *Society of United Professionals* reflects a classic, reasons-first, deferential posture, consistent with the view that *Vavilov*'s conception of "robust" reasonableness review does not signal a more aggressive posture for reviewing courts. The focus of the decision is on the reasons given by the Board. The Court did not first determine how it would have decided the matter, interpreted the key provisions of the *Act*, or interpreted the relevant precedents. With respect to factual determinations, the Court was quite 'hands-off', offering only a brief analysis before confirming that the Board's determinations were justifiable in light of the record. In the end, *Society of United Professionals* reflects exactly what many would say is the proper approach to reasonableness review.

Decision to "jump" a joint submission on penalty upheld: *Sammy Vaidyanathan v. College of Physicians and Surgeons of Ontario*, 2021 ONSC 5959 (Div. Ct.)

Facts: V, a member of the College of Physicians and Surgeons (the "College"), was required to attend a hearing before the College's Disciplinary Committee (the "Committee"), after the College alleged that he had demonstrated incompetence and engaged in misconduct.

At the hearing, the parties filed an Agreed Statement of Facts and Admission (Liability), containing admissions regarding numerous

[17] 2021 ONCA 148.

[18] See: *Trillium Heath Partners v. Canadian Union of Public Employees, Local 5180*, 2021 ONSC 1045 (Div. Ct.); *Correa v Ontario Civilian Police Commission*, 2020 ONSC 133 (Div. Ct.), at para. 54; *Radzevicius v Workplace Safety and Insurance Appeals Tribunal*, 2020 ONSC 319 (Div. Ct.), at para. 57.

instances of professional misconduct spanning over a period of almost ten years. The parties also filed an Agreed Statement of Facts and Admission (Penalty), in which they agreed that a number of considerations were relevant to the issue of penalty. Based on these considerations, the parties made a partially joint submission on the appropriate penalty: they agreed that V's out-of-hospital prescribing privileges for controlled substances should be restricted and that his in-hospital prescribing practices need not be restricted, but disagreed on the appropriate length of time V should be suspended from practice.

The Committee reserved on the issue of penalty. Following the hearing, the Committee's independent counsel wrote to the parties to ask why their joint submission did not include a restriction on V's in-hospital prescribing privileges. The parties responded that the restriction was not necessary because the College's public safety concerns were addressed by an existing undertaking.

The Committee continued to have concerns about the proposed penalty and reconvened the hearing to clarify aspects of the parties' submissions on penalty, including specific issues regarding the proposed prescribing restrictions. At this hearing, the panel members repeatedly raised concerns about the prescribing issue and expressed concerns that the joint submission was disproportionate to V's severe clinical deficiencies.

In its penalty decision, released after the second hearing, the Committee imposed a 12-month suspension. It also rejected the joint submission that V's in- and out-of-hospital prescribing privileges should be treated differently and concluded instead that a full prohibition on the prescribing of controlled substances, regardless of the practice location, was necessary to protect the public.

V appealed the Committee's decision to the Divisional Court arguing, among other things, that the Committee erred by departing from the joint submission on penalty.

Decision: Appeal dismissed (per Tzimas, Kristjanson, and Favreau JJ.).

The Divisional Court rejected V's argument that the Committee erred by departing from the parties' joint submission regarding V's prescription privileges. The Committee demonstrated an understanding of the implications of a joint submission and did not take its departure from that submission lightly, as reflected in its request for supplementary written and oral submissions from the parties on penalty and its reasons for decision.

First, the Committee correctly set out in its reasons the threshold for departing from a joint submission: that it could only do so where doing otherwise would bring the administration of justice into disrepute or would otherwise not be in the public interest.

Second, the Committee explained why a full prohibition on the prescription of controlled substances (rather than the partial prohibition suggested by the parties) was the *only* way to protect the public.

Third, the Committee addressed how acceptance of the parties' joint submission

would be contrary to the public interest and would bring the administration of justice into disrepute. The Divisional Court concluded that the "extensive explanation and pronounced rejection of the joint submission, demonstrated in clear and cogent terms that the Committee understood and considered the 'undeniably high threshold' for its departure from a joint submission".

The Divisional Court also rejected V's argument that the Committee's departure from the joint submission was procedurally unfair. V was given notice of the Committee's discomfort with the joint submission and offered the opportunity to address the Committee's concerns. First, the Committee wrote to the parties regarding its concerns about the joint submissions. Then, at the reconvened hearing, Committee members expressed their concerns that the proposed joint penalty would not protect the public and gave the parties an opportunity to respond. Despite these signals from the Committee, neither of the parties suggested any alternative remedies or other approaches to allay the Committee's concerns. While V argued in the Divisional Court that that the complete prohibition on his prescribing controlled substances would amount to a revocation of his license, he did not make this argument before the Committee – which the Divisional Court found he could and should have done.

After concluding that the penalty imposed was not disproportionate or clearly unfit, the Divisional Court dismissed the appeal.

Commentary: This decision affirms the high threshold for "jumping" joint submissions on penalty, but it also gives guidance on what will be sufficient to meet this high bar. When an administrative decision-maker intends to depart from a joint submission, it will be preferable for them to make their concerns known to the parties and permit them an opportunity to respond before they reach a final decision. If the decision maker's concerns regarding the joint submission are not resolved, the decision maker should make explicit in their decision how adopting the joint submission would bring the administration of justice into disrepute and/or otherwise not be in the public interest.

This decision also serves as an important reminder to counsel to be conscious of any expressions of concern from decision makers regarding joint submissions on penalty. Where such expressions of concern are made, counsel should address them, including by clearly addressing the (in)appropriateness of potential alternative penalties the decision maker may impose — otherwise, counsel may not get another opportunity to argue why an alternative to the joint submission is inappropriate in the circumstances.

Subsequent *de novo* process can cure serious procedural fairness flaws: *Bastien v. University of Toronto*, 2021 ONSC 4854 (Div. Ct.)

Facts: While he was a medical student, B — like all students in his program — was evaluated for "professionalism" during his clerkship rotation in a hospital setting. During the last year of his clerkship, B's clerkship director, Dr. SB, raised concerns about what she described as B's "professionalism lapses".

Dr. SB indicated that she would be bringing B to the Faculty of Medicine's Board of Examiners for a professional assessment.

Five days before the Board of Examiners meeting, on the Friday before it was set to occur, B was advised, for the first time, of the time and date of the hearing, and of the fact that he could deliver a written response to the allegations being made. B was not told of the specific issues that were going to be raised with the Board. The day before the Board's meeting, B was advised by Dr. SB about four specific complaints she would be bringing to the Board. B addressed these issues in a letter he submitted to the Board.

The Board's process involved a presentation by Dr. SB, which referred to a list of alleged lapses by B. The list included not only the four complaints that had been relayed to B, but two further complaints that B did not know would be considered. B was not given any opportunity to appear during the Board's meeting; his participation was limited to his written submissions.

The Board determined that "[h]aving demonstrated lapses in his professional behaviour", B should "be referred for remediation in professionalism".

B appealed the Board's decision to the Faculty of Medicine Appeals Committee (the "FMAC"). Before the FMAC, B was represented by counsel, had full notice of the six complaints against him, and had the right to call evidence and examine witnesses and to present arguments. The FMAC considered the procedural fairness of the Board of Examiners process, as well as whether the Board's decision could be supported based on the evidence before it. The FMAC did not rely on findings made by the Board. After stating that it had considered "all the evidence" before it, the FMAC concluded that the Board's decision was appropriate and that applicable procedures were followed.

B sought a further appeal to the Academic Appeals Committee, which again focused mainly on procedural unfairness before the Board. The Committee received all material that was before the FMAC, a new affidavit from B and certain stipulated facts, and written and oral submissions from counsel. The Committee concluded the FMAC findings were reasonable and dismissed the appeal.

B brought an application for judicial review, alleging a lack of procedural fairness in the process adopted by the Board of Examiners.

Decision: Application dismissed (per Backhouse, Lederer and Kristjanson JJ.).

The Divisional Court held that the FMAC process amounted to a hearing *de novo*. Even if the Board of Examiners process resulted in a denial of procedural fairness, the FMAC process met the requirements of procedural fairness. The FMAC considered the appropriateness of the Board of Examiners' decision based on extensive evidence and so stood in the Board's shoes. B had every opportunity to fully present his case before the FMAC and did so with legal representation. Having concluded that the FMAC hearing was *de novo* and procedurally fair, the Court concluded that B's application — one rooted

solely in the alleged unfairness of the process before the Board of Examiners — could not succeed.

That being said, the Court did find that the Board of Examiners did make mistakes in its process. While that process may have been designed to be relatively informal, some procedural protections are so fundamental that they cannot be ignored. In particular, the notice provided to B was not sufficient or proper. He was only given five days' notice of the proceeding. He was only given notice of four specific complaints against him the day before the Board of Examiners' meeting; he was given no notice at all of the two additional complaints considered by the Board of Examiners. In the absence of the FMAC proceeding and decision, which "cured" the error and satisfied the requirements of procedural fairness, the Court warned that these deficiencies with respect to the notice provided would have been enough to set aside the findings of the Board of Examiners.

Comment: This case is an important reminder that even major flaws at an early stage of an administrative process — here, an initial proceeding before the Board of Examiners that clearly failed to meet the basic requirement of adequate notice — may be remedied at a subsequent stage of that same administrative process. In particular, a full *de novo* hearing may go a long way towards curing significant defects that took place beforehand. It follows that when assessing whether to launch an application for judicial review based purely on an argument of procedural unfairness early in the process, the impact of later stages must always be examined carefully. If those later stages are found to remedy the earlier instances of procedural unfairness, an applicant may be left without a remedy, as occurred in this case.

This case is also notable for its functional approach to determining whether a "*de novo*" hearing has, in fact, occurred. The FMAC process was not expressly framed as being *de novo*. Indeed, as B argued, aspects of how the FMAC characterized its own decision can be read as suggesting that it was reviewing the process and reasons of the Board of Examiners, rather than conducting an entirely fresh review of the complaints made against B. In reaching the opposite conclusion, the Divisional Court relied on the process that unfolded before the FMAC, the substance of the FMAC's analysis and — importantly — the fact that the FMAC did not rely on findings made by the Board. This approach reflects the reality that reviewing courts are likely to look at substance over form when it comes to determining whether a *de novo* hearing has occurred such that it may be capable of remedying procedural unfairness at an earlier stage in the process.

CO-EDITORS

Andrea Gonsalves
416.593.3497
andreag@stockwoods.ca

Justin Safayeni
416.593.3494
justins@stockwoods.ca

THE NEWSLETTER

The Stockwoods Administrative & Regulatory Law Case Review is a quarterly newsletter published by lawyers at Stockwoods LLP, a leading litigation boutique practising in the areas of administrative/regulatory, civil and criminal law.

To sign up to receive this newsletter via email, contact alicec@stockwoods.ca. The newsletter can also be viewed and downloaded on the firm's website at www.stockwoods.ca.

For more information about the issues and cases covered in this edition of the newsletter, or to find out more about our firm's administrative and regulatory law practice, please contact Andrea Gonsalves, Justin Safayeni or another lawyer at the firm.