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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Supreme Court reworks the test for dismissal for delay in administrative proceedings: *Abrametz v Law Society of Saskatchewan*, 2022 SCC 29

FACTS: The Law Society of Saskatchewan learned of apparent irregularities in Mr. A's trust account, and started an audit in 2012. In the investigation, several financial irregularities came to light. In October 2014, the auditor submitted a final trust report to the Law Society, and in October 2015, the Law Society formally commenced regulatory proceedings against A. Those proceedings ended only in January 2018, when Mr. A pleaded guilty to four of the seven allegations.

While awaiting penalty, Mr. A applied to stay the disciplinary proceedings, arguing that the delay amounted to an abuse of process. The Law Society's Hearing Committee dismissed that application and rendered its penalty decision on January 2019, in which it disbarred Mr. A without a right to reapply for readmission until January 1, 2021.

Mr. A successfully appealed the decision to the Saskatchewan Court of Appeal. The Court of Appeal held that the proceeding should have been stayed because of delay. It held that

significant periods of the delay were not explained, and could not be justified by either the scale or complexity of the proceedings, or Mr. A's conduct. The Law Society obtained leave to appeal to the Supreme Court of Canada.

DECISION: Appeal allowed (*per* Wagner CJ and Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer and Jamal JJ; Côté J dissenting). A majority of the Supreme Court held that the standard of review was correctness, and the decision of the Hearing Committee dismissing the stay application was correct.

On the standard of review, Justice Rowe, writing for the majority, noted that the case originated in a statutory appeal, not a judicial review application. In *Vavilov*, the Supreme Court held that, where a *statutory appeal* lies from an administrative decision, the court should use appellate standards of review (i.e. correctness for questions of law, and palpable and overriding error for questions of fact and questions of mixed fact and law except where there is an extricable legal question). Therefore, when questions of procedural fairness arise through a statutory appeal mechanism, they are subject to the appellate standards of review. This does not affect earlier decisions from the Court regarding judicial review applications on procedural fairness grounds.

In dissent, Justice Côté disagreed that *Vavilov* should be extended in this way. She pointed out that the discussion in *Vavilov* itself focused on substantive review, not procedural fairness. In her view, the standard of correctness should continue to apply to all procedural fairness issues.

Next, the majority considered the delay issue. It reaffirmed *Blencoe v British Columbia (Human Rights Commission)*,[1] where the Supreme Court had held that delay in administrative proceedings can lead to a stay where the delay is inordinate and amounts to an abuse of process. Delay would amount to an abuse of process where it undermines the fairness of the hearing, e.g. if memories had faded or witnesses had become unavailable. The majority held that there would also be an abuse of process where inordinate delay caused significant prejudice. In *Abrametz*, there was no claim of unfairness, so only the second branch of *Blencoe* was in play. The majority held, further, that even if there was inordinate delay and significant prejudice, the delay would still have to meet the test for abuse of process, which required that the delay be manifestly unfair or otherwise bring the administration of justice into disrepute.

Prejudice is a question of fact. Examples include significant psychological harm, stigma attached to the individual's reputation, disruption to family life, loss of work or business opportunities, as well as extended and intrusive media attention. Delay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute.

In dissent, Justice Côté interpreted *Blencoe* differently. In her view, inordinate delay alone

[1] 2000 SCC 44, [200] 2 SCR 307.

would be an abuse of process and could justify a remedy short of a stay; significant prejudice was not required. Significant prejudice was only required to obtain a stay of proceedings.

The majority and dissent agreed that a stay is a "last resort" remedy for the "clearest of cases", one that should be granted only if other lesser remedies could not mitigate the prejudice caused by the delay. Among these remedies are costs, a reduction in sanction, or even a court order for *mandamus*. Ultimately, a tribunal must ask: "would going ahead with the proceeding result in more harm to the public interest than if the proceedings were permanently halted?" A stay may be granted only if the answer is "yes."

The key disagreement between the majority and dissent was therefore not on the test for a stay, but rather on the test for an abuse of process justifying any remedy at all: the majority said that significant prejudice was required, and a further consideration of whether the delay was an abuse of process. The dissent said that no prejudice or further assessment of abuse was required.

The majority declined to overhaul *Blencoe* and replace it with a bright-line test in the style of *R v Jordan*, which sets out presumptive ceilings under s. 11(b) of the *Charter* for pre-trial delay in criminal cases.[2] Unlike under *Jordan*, prejudice of one kind or another will continue to be required before a stay is granted. In a countervailing contrast to *Jordan*, delay will be considered from when *the investigation begins*, not only when formal administrative proceedings begin. Recall that, under *Jordan*, the s. 11(b) clock starts to run only when charges are laid.

The majority upheld the Hearing Committee's conclusion that a stay was not appropriate. The delay was long but not inordinate, and there was no significant prejudice to Mr. A.

Justice Côté, in dissent, would have upheld the Court of Appeal's decision granting a stay. On the facts of this case, the delay grossly exceeded the time requirements of this case; it was plainly inordinate and, as a result, abusive. This inordinate delay caused serious prejudice to Mr. A and his employees.

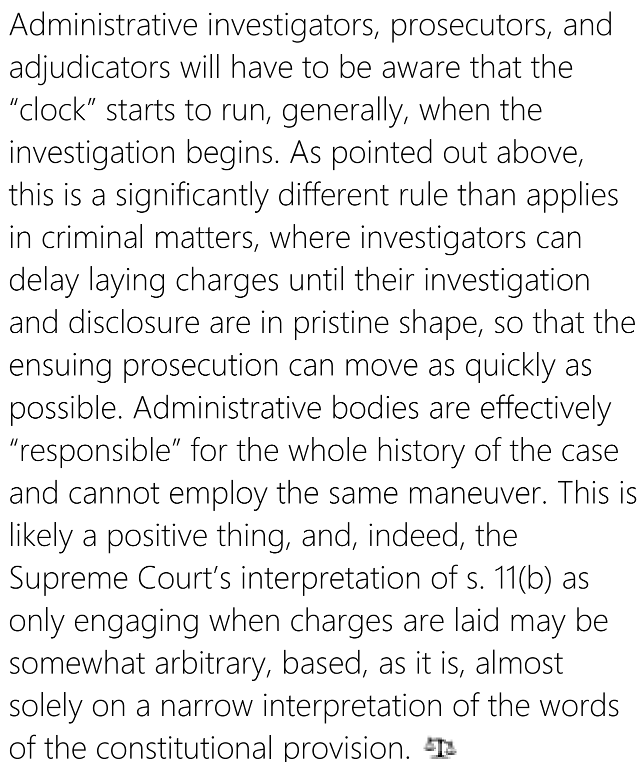
COMMENTARY: In this case, as with many others, it is hard to predict how the doctrinal statements by the Supreme Court will play out in cases "on the ground." On one hand, the majority's reasons appear to entrench a heightened standard for abuse of process for delay in administrative cases, under which both significant prejudice and manifest unfairness are required to obtain a remedy of any kind. Judging from this, remedies for delay short of a stay of proceedings will become more difficult to obtain. This is certainly the view of the dissent of Justice Côté. Although all the justices agreed that stays should be granted only in the "clearest cases", the need for significant prejudice and manifest unfairness to obtain any remedy at all may not motivate administrative bodies to avoid unduly prolonged proceedings.

On the other hand, however, the very existence of a case about administrative delay, after almost 22 years of silence from the

[2] 2016 SCC 27, [2016] 1 SCR 631.

Supreme Court, may itself have an impact. It may bring the issue of delay to the forefront of the minds of counsel who practise before administrative tribunals, and of those who sit on such tribunals. It also lays out a menu of remedial options, many of which seem on their face to call for much less by way of justification than the "ultimate" remedy of a stay of proceedings. In this way, *Abrametz* may breathe new life into delay litigation, even though, on the surface, it seems to make the test more demanding.

Administrative investigators, prosecutors, and adjudicators will have to be aware that the "clock" starts to run, generally, when the investigation begins. As pointed out above, this is a significantly different rule than applies in criminal matters, where investigators can delay laying charges until their investigation and disclosure are in pristine shape, so that the ensuing prosecution can move as quickly as possible. Administrative bodies are effectively "responsible" for the whole history of the case and cannot employ the same maneuver. This is likely a positive thing, and, indeed, the Supreme Court's interpretation of s. 11(b) as only engaging when charges are laid may be somewhat arbitrary, based, as it is, almost solely on a narrow interpretation of the words of the constitutional provision.



Concurrent first instance jurisdiction, a new category of correctness review: *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30

Facts: In 1997, Canada signed the WIPO Copyright Treaty, the purpose of which was to adapt international copyright rules to new and emerging technologies. The Treaty sets out various protections that member countries must provide to authors. Article 8 provides that authors of literary and artistic works shall enjoy the exclusive right to make their works available to the public in such a way that members of the public may access the works from a place and at a time chosen by them. In 2012, Parliament added s. 2.4(1.1) to the *Copyright Act* to implement the Treaty. Subsection 2.4(1.1) amends s. 3(1)(f) of the *Copyright Act* by clarifying that "communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public".

In the context of proceedings to set a tariff for online music services, the Copyright Board concluded that s. 2.4(1.1) deems the act of making works available to be a distinct protected and compensable activity. This meant that two royalties would be payable when a work is distributed online: (1) when it is made available online and (2) when the work is actually streamed or downloaded. On judicial review the Federal Court of Appeal overturned the Board's decision. It concluded that Parliament did not intend to create a new compensable "making available" right, and that, properly interpreted, s. 2.4(1.1) did not subject downloads and streams to two

royalties. The artist collectives appealed to the Supreme Court.

At issue was the applicable standard of review. The Federal Court of Appeal discussed whether the correctness standard—which applied prior to the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*[3]—ought to apply. However, the Court noted that the jurisprudence was uncertain after *Vavilov* and since the Court did not receive submissions on the issue, it applied the standard of reasonableness and found the Board's decision unreasonable.

Decision: Appeal dismissed (*per* Wagner CJ and Moldaver, Côté, Brown, Rowe, Kasirer and Jamal JJ; Karakatsanis and Martin JJ concurring).

Justice Rowe, writing for the majority, began the standard of review discussion by noting that, prior to *Vavilov*, decisions of the Board on the scope of rights under the *Copyright Act* were reviewed on the correctness standard.[4] Correctness was considered appropriate because the Board and courts have concurrent first instance jurisdiction over some aspects of the *Copyright Act*: infringement actions, which come before the courts, require interpretation of the scope of rights under the Act; and in setting tariffs the Board may need to decide the scope of rights. The pre-*Vavilov* cases concluded that the correctness standard was appropriate in light of this shared jurisdiction—it minimized the risk of conflicting statutory interpretations and gave effect to legislative intent.

Vavilov overtook prior jurisprudence on the standard of review. It recognized five categories for correctness review, none of which include situations of concurrent administrative and court first instance jurisdiction. However, *Vavilov* did not foreclose the possibility of new correctness categories being recognized in rare and exceptional circumstances where applying reasonableness would undermine legislative intent or the rule of law in a manner analogous to the five correctness categories affirmed in *Vavilov*. According to the majority, the situation in this case (i.e. where courts and an administrative body have concurrent first instance jurisdiction over a legal issue in a statute) is one of the rare and exceptional circumstances where it is appropriate to recognize a new category for correctness review.

This result accords with legislative intent. By enacting a statute that gives concurrent first instance jurisdiction to courts and administrative bodies, the legislature has made a decision to expressly involve the courts.

This category of correctness review also promotes the rule of law. Applying reasonableness to the Board's interpretation of rights in the *Copyright Act* create two legal inconsistencies. First, it subjects the same legal issue to different standards of review depending solely on whether the issues arises before the Board or the courts. Second, it can

[3] 2019 SCC 65
[4] This category of correctness was first recognized in *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 ("***Rogers***")

lead to conflicting statutory interpretations. *Vavilov* addressed potential for inconsistent decisions within an administrative body; conflicting interpretations between the courts and an administrative body raise different concerns. The reasonableness standard of review cannot deal adequately with an inconsistency in statutory interpretation between courts and administrative bodies. In any event, this correctness category can be defined with precision and situations of concurrent first instance jurisdiction over a legal issue in a statute are rare.

Justice Rowe concluded the discussion of standard of review by observing that when the *Vavilov* majority wanted to reject the possibility of a certain correctness category, it did so expressly. Concurrent first instance jurisdiction was not discussed in *Vavilov*.

Having found that the correctness standard applied, Rowe J conducted an analysis of s. 2.4(1.1) and concluded that the Board's interpretation was incorrect. (A discussion of the copyright law issues of the case is beyond the focus of this Newsletter).

Justice Karakatsanis for the minority would have applied the reasonableness standard of review. She noted that the *Vavilov* majority set out a "holistic revision of the framework" anchored in a strong presumption of reasonableness, which could only be rebutted in five situations—none of which arises in this case. Justice Karakatsanis criticized the majority for undermining *Vavilov*'s promise of certainty and predictability by creating a new correctness category only three years after that case was decided. The majority in *Vavilov* conducted a thorough review of the relevant jurisprudence—including *Rogers*—and did not adopt this as a correctness category.

The minority considered that the Court's reasons in *Vavilov* address all of the situations in which a reviewing court should depart form the presumptive reasonableness standard. The possible identification of new categories of correctness was expressly reserved for situations the Court could not realistically foresee. The Court's own precedent in *Rogers* is not a set of circumstances that was unforeseeable. Instead, the Court chose not to make concurrent first instance jurisdiction a correctness category and in doing so, it overturned *Rogers* on the standard of review issue.

For the minority, a new correctness category of concurrent first instance jurisdiction cannot be justified on the basis of the rule of law or legislative intent. A binding and material precedent (from a court) will limit what is reasonable in the circumstances. Indeed, recognising a sixth correctness category flouts *stare decisis* principles and therefore runs directly *counter* to the rule of law. The *Copyright Act* gives no clear signal of legislative intent regarding the applicable standard of review. Parliament did not explicitly prescribe a standard nor provide a statutory appeal mechanism—the absence of those clear signals is telling.

Justice Karakatsanis ended her discussion of standard of review with a note of caution: the majority's approach will open the door to endless litigation about possible exceptions to the reasonableness presumption and erode

that presumption in all standard of review cases. That is precisely what *Vavilov* aimed to avoid.

Commentary: When the Supreme Court released its decision in *Vavilov* in late 2019, the absence of any mention of the applicable standard of review in situations of concurrent first instance jurisdiction—the *Rogers* exception, as it was sometimes called—was notable. Administrative law enthusiasts were left to wonder: was it merely overlooked? Was it deliberately omitted because the treatment of the *Rogers* exception was so debatable that it might have fractured the seven-judge majority, which was critically important to the stability and longevity that *Vavilov* aspired to? Whatever the reason, it was clear that this issue would need to come back before the Supreme Court to resolve. Both Justice Rowe and Justice Karakatsanis cited passages from *Vavilov* supporting their view that *Vavilov* does—or does not—allow for this sixth category of reasonableness. The ambiguity almost seems intentional.

The issue was the first time the Supreme Court needed to decide, based on the first principles laid out in *Vavilov*, whether to recognise a sixth correctness category. Justice Karakatsanis might have the better read of some comments in *Vavilov* discouraging the recognition of new correctness categories—after all, given the recency of *Rogers*, the *Vavilov* majority surely must have turned their minds to concurrent first instance jurisdiction; if they intended that to be correctness category, they could easily have said so. But at the level of applying the principles, Justice Rowe's reasons are persuasive.

A reasonableness standard raises rule of law concerns—one could go as far as saying it would be illogical. As Justice Rowe notes, the same issues of interpretation regarding the scope of rights under the *Copyright Act* may come before the Federal Court at first instance (in infringement proceedings) and the Board (in tariff-setting proceedings). In an appeal from a decision of the Federal Court, the Federal Court of Appeal would apply a correctness standard. In a judicial review application from the Board, the Federal Court of Appeal[5] would need to defer. And the rule of law cannot tolerate the law meaning one thing in the courts but something different before the Board. *Vavilov* recognises that under the reasonableness standard an administrative body needs to consider binding precedents—but does not prohibit departures from such precedents, provided the departure is explained.

Rule of law considerations seem to carry the day in justifying this new correctness category. The legislative intent rationale is less convincing. Justice Rowe explains that a situation of concurrent jurisdiction is analogous to a legislated standard of review or statutory appeal mechanism because it reflects a legislative intent to "involve" the courts. However, he doesn't make it clear: involve the courts *in what*? A statutory appeal mechanism makes the court part of the *administrative scheme*. Concurrent jurisdiction sets up parallel schemes for interpreting the scope of rights in

[5] Which has first instance jurisdiction in judicial review applications regarding Copyright Board decisions pursuant to s. 28(1) of the *Federal Courts Act*.

the Act; it doesn't make the courts *part of* the administrative scheme.

In any event, the concurrent first instance jurisdiction category is a clear and principled, if not inevitable, evolution of the principles set out in *Vavilov*. Justice Rowe rightly notes that the circumstances in which it will arise can be defined with precision and will be rare. Justice Karakatsanis' suggestion that the majority has completely reversed course on *Vavilov* and the courts will be inundated with a flood of arguments for new correctness categories seems somewhat far-fetched—but illustrates why it would have been best had this issue been decided in *Vavilov*.

Applying the reasonableness standard post-*Vavilov* to decisions of the Labour Relations Board: *Turkiewicz (Tomasz Turkiewicz Custom Masonry Homes) v Bricklayers, Masons Independent Union of Canada, Local 1*, 2022 ONCA 780

Facts: In January 2001, T and his brother incorporated a company, Brickpol, to carry on a bricklaying and masonry business. Brickpol signed voluntary recognition agreements with three unions, binding it to a collective agreement that required Brickpol to hire union members to perform bricklaying/masonry work, pay those members certain wage rates, and remit money to the Unions for pension and benefit contributions.

T was injured in a car accident in 2007. As a result, he had to declare personal bankruptcy. In 2008 Brickpol notified the unions that it was no longer performing work covered by the collective agreement. Brickpol was dissolved in 2010. In 2017, T registered TTCMH as a sole proprietorship. The unions learned that T was performing bricklaying/masonry work under the registered business name of TTCMH. He did not hire union members to perform the work.

The unions filed a grievance against Brickpol and TTCMH alleging they had violated the collective agreement by failing to apply its terms to the work TTCMH was performing. The unions then referred the grievance to the Ontario Labour Relations Board for arbitration. The unions also filed an application with the OLRB seeking a declaration that Brickpol and TTCMH are related employers pursuant to s. 1(4) of the *Labour Relations Act, 1995*.[6]

In a first decision the Board concluded that Brickpol and TTCMH are a single employer within the meaning of s. 1(4) of the LRA. The Vice-Chair was satisfied that the two businesses are, or were, carried out under the common control and direction of T, and that they are related businesses that serve the same markets and perform work for the same type of clients.

In a second decision the Board determined that because of the first decision and an earlier arbitration award (which found Brickpol was bound by a certain collective agreement), TTCMH was bound by the collective agreement.

In a third decision the Board found that TTCMH's bricklaying and masonry work was "clearly bargaining unit work" and it did not

[6] SO 1995, c 1, Sched A.

matter whether T may have performed all the work on his own. The Board awarded damages to the unions, having determined the appropriate hourly rate and finding that TTCMH completed 600 hours of bargaining unit work.

T brought judicial review applications in respect of all three decisions. The Divisional Court granted the applications and quashed the Board's decisions. The Divisional Court declined the remit the matter to the Board for a new hearing. The unions sought and were granted leave to appeal.

Decision: Appeal allowed (*per* Gillese, Trotter and Harvison Young JJA).

Following *Vavilov*, the reasonableness standard applies when reviewing the Board's decisions. The Court of Appeal began its analysis by summarising the directives set out by the *Vavilov* majority on the proper application of the reasonableness standard. It then moved on to apply those directives.

The first step is to focus on the Board's decisions and reasons to see if they are internally rational and logical. The second step is to consider whether the decisions are untenable in some way given the factual and legal constraints that bore on them.

Focusing on the three decisions, the Court found no flaw in the overarching logic in any of them. Each decision was based on reasoning that is rational and logical. In the first decision, the undisputed facts showed that the preconditions in s. 1(4) for making a related employer declaration were met: two separate businesses (Brickpol and TTCMH) are or were carried on under the common control and direction of T, and the two businesses are related in that they serve the same markets and perform work for the same type of clients. The Board exercised its discretion to make the declaration because the unions' collective bargaining rights were being eroded when T resumed bricklaying and masonry work through TTCMH on a non-union basis.

As for the second decision, based on the arbitration award and the findings and declarations in the First Board decision, the Board concluded that TTCMH is bound by the collective agreements which bound Brickpol. In so concluding, the Board noted that s. 1(4) applies to associated or related businesses whether or not those businesses operate simultaneously.

On the third decision, the work TTCMH performed was bargaining unit work. TTCMH was bound by the collective agreement obligations that Brickpol had undertaken. Its failure to use union members to do the work constituted a violation of the collective agreement and, accordingly, the unions were entitled to damages. The unions provided a reasonable calculation of the value of the lost bargaining unit work, which the Board accepted.

The Court then considered whether the decisions were untenable in light of the relevant factual and legal constraints. The Board identified and addressed the evidence before it and the parties' submissions. The three decisions also reflect that the Board understood T's personal circumstances and

considered the potential impact of the decisions on him. The Act gives the Board exclusive jurisdiction to exercise the powers conferred on it and contains a strong privative clause. The Board is a highly specialised tribunal with considerable expertise, placing it in an elevated position to interpret its home statute. Subsection 1(4) gives a broad discretion to the Board to make a related employer declaration where the preconditions are met. It was for the Board to assess and evaluate the evidence before it when determining if the preconditions had been met and, if they were met, to decide how to exercise the discretion s. 1(4) confers on the Board. A consideration of the factual and legal constrains showed nothing untenable about the Board's decisions and offered no basis for judicial intervention.

In concluding that the Board's declaration under s. 1(4) was unreasonable because the Board did not analyse "whether a related employer declaration would serve a labour relations purpose", the Divisional Court erred in applying the reasonableness standard. The Board was satisfied that the preconditions were met and that the unions' collective bargaining rights were being eroded because TTCMH was performing bargaining unit work on a non-union basis. It is clear the Board exercised its discretion to grant the declaration for that labour relations purpose even though it did not use that precise phrase.

The Board reasonably addressed the length of the hiatus between Brickpol's dissolution and TTCMH's registration.

The Divisional Court further erred by making findings of fact that the Board did not make and failing to remit the matter back to the Board. A "very high and extraordinary threshold" must be reached for a court to refuse to remit the matter to the tribunal.

Commentary: This decision is notable in illustrating the Ontario Court of Appeal's approach to applying *Vavilov*. It is situated in a context with deep roots of deference: a challenge to a discretionary decision of the Labour Relations Board, a highly specialised and sophisticated tribunal. The decision was released alongside another Court of Appeal decision from the same panel concerning another Labour Relations Board decision: *Enercare Home & Commercial Services Limited Partnership v UNIFOR Local 975.*[7] In that case, too, the Court of Appeal allowed the appeal, found the Divisional Court had erred in its application of the reasonableness standard, and restored the original Board decision.

The meat of the decision in *Turkiewicz* is rather brief—just 18 short paragraphs in which the Court considers the two steps in of reasonableness review. The Court repeatedly emphasizes the discretionary nature of the jurisdiction to make a related employer declaration and the expertise of the Board. Such an approach was arguably appropriate in this case given the issues. However, post-*Vavilov* one would expect a deeper discussion of the decision under review in most contexts.

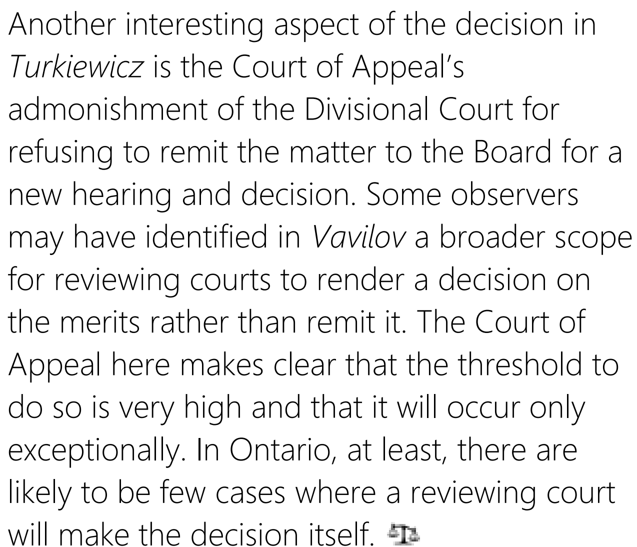
Vavilov teaches that although expertise does not justify deference, it can play a role in the

[7] 2022 ONCA 779

application of the reasonableness standard—a decision maker's specialized expertise may inform their interpretation of the relevant legislation—but aside from noting the Board's expertise, the Court of Appeal's decision does not explain how that expertise factors into the review of the decision.

Expertise was also front and centre in the Court's companion decision In *Enercare*. In that case, however, the Court was perhaps more direct about the nature of the reviewing court's error, explaining that part of the problem was the "Divisional Court measured the Board determination against its view of the legislation and its analysis of the OLRB jurisprudence" rather than focusing on whether the Board's determination was reasonable (para 90). The Court of Appeal explained that this effectively amounted to deciding the underlying statutory interpretation issues *de novo*, which is expressly prohibited by *Vavilov*.

Another interesting aspect of the decision in *Turkiewicz* is the Court of Appeal's admonishment of the Divisional Court for refusing to remit the matter to the Board for a new hearing and decision. Some observers may have identified in *Vavilov* a broader scope for reviewing courts to render a decision on the merits rather than remit it. The Court of Appeal here makes clear that the threshold to do so is very high and that it will occur only exceptionally. In Ontario, at least, there are likely to be few cases where a reviewing court will make the decision itself.



Regulations to be reviewed on reasonableness standard instead of *Katz* methodology: *Innovative Medicines Canada et al v Attorney General of Canada*, [2022 FCA 210]

Facts: The appellants challenged portions of a regulation on the basis that they went beyond the scope of the regulation-making power in the *Patent Act*.[8] The challenged regulations, among other things, impact how the Patented Medicines Prices Review Board determines whether the price of a patented medicine is excessive under s. 85 of the *Act*, including by changing the list of comparator countries for which pricing information must be filed. The respondent argued that the regulations fell within the scope of Governor in Council's authority under s. 101(1) of the *Patent Act* to specify the "information… that shall be provided to the Board" in order for the Board to carry out its mandate.

In a judicial review application before the Federal Court, the impugned regulations were upheld as valid on the basis that the Governor in Council's decision to enact them was reasonable. The applicants appealed that decision.

Decision: Appeal dismissed (*per* Stratas, Locke and Woods JJA).

Much of the Court's decision focused on how to assess the impugned regulations: under the reasonableness standard set out in *Vavilov*,[9] or

[8] RSC 1985, c P-4.

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

the more deferential methodology set out in *Katz*.[10] As the Court noted, the methodological choice matters. Under *Vavilov* reasonableness review, the appellants bear the onus of showing the decision is unreasonable, but there is no starting presumption of reasonableness. Under *Katz*, however, the appellants must overcome a presumption that the regulations are valid—and that presumption can be overcome only if the regulations are "irrelevant", "extraneous" or "completely unrelated" to the "statutory purpose". In the words of the Federal Court of Appeal, the *Katz* posture of review is "hyperdeferential".

Following the Court's prior decision in *Portnov*,[11] the Court determined that it would apply the *Vavilov* reasonableness standard, rather than *Katz*. In so doing, it summarized the state of the jurisprudence on the '*Vavilov* versus *Katz*' issue. Courts in British Columbia have followed *Portnov* and "considerable academic commentary" favours the view that *Vavilov* has overtaken *Katz*. At the same time, the Alberta Court of Appeal has declined to follow *Portnov* and has instead applied *Katz* to the review of regulations passed by the Governor in Council.

Applying the reasonableness standard to the impugned regulations in this case, the Court of Appeal found the decision to change the list of comparator countries was based on a reasonable interpretation of the regulation-making power in s. 101(1) of the *Patent Act*. On an analysis of the text, context and purpose of that provision, the regulation-making authority conferred on the Governor in Council is broad. That authority, reasonably construed, supports the change to the list of comparator countries.

Reasonableness also requires that a reviewing court be able to discern a reasoned explanation for the decision. Here, that explanation—modernization of the tools the Board uses to police the excessive pricing of patented medicines—can be discerned from the Regulatory Impact Analysis Statement.

Commentary: *Innovative Medicines* is yet another chapter in the ongoing saga regarding how to review regulations. A clear split exists at the appellate level as between the Federal Court of Appeal (*Vavilov* approach) and the Alberta Court of Appeal (*Katz* approach). That alone should entice the Supreme Court to eventually grant leave in a case squarely raising this issue.

There is a good argument that the Federal Court of Appeal's approach lies on more solid jurisprudential footing. As the Court notes in *Innovative Medicines*, the notion that a separate regime of judicial review applies to regulations sits uneasily with *Vavilov*'s express warning that earlier case law (such as *Katz*) remains good law only to the extent it is consistent with *Vavilov*. It is also difficult to reconcile with the Supreme Court's recent decision in *Abrametz* (reviewed elsewhere in this newsletter), which confirmed that the *Vavilov* methodology to determine the standard of review applies to procedural as

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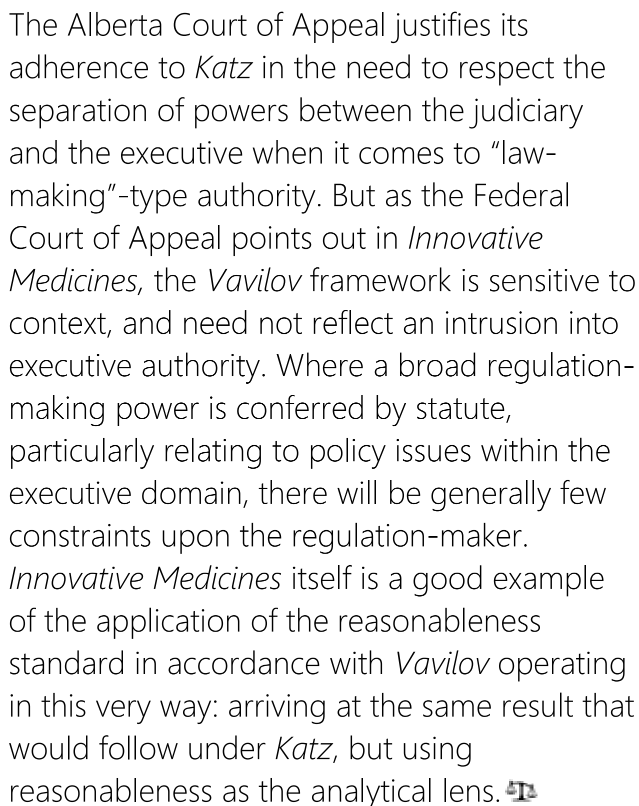
[10] *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64

[11] *Portnov v Canada (Attorney General)*, 2021 FCA 171. This decision was the subject of a case review in Issue No. 30 of this newsletter.

well as substantive decisions—and lends further credence to the conclusion that *Vavilov* indeed applies to *all* administrative decisions.

Against this backdrop, maintaining a distinct *Katz* regime for regulations tilts against the Supreme Court's continued effort to try to eliminate unnecessary complexity, confusion and incoherence in administrative law. Indeed, at the level of first principles, a regulation is not fundamentally different than a by-law, order-in-council, administrative rule or administrative ruling—in the sense that all of these instruments reflect the product of administrative decision-making and create compulsory obligations impacting individual(s). Can it really be said that regulations are in a category by themselves, deserving of hyper-deferential review?

The Alberta Court of Appeal justifies its adherence to *Katz* in the need to respect the separation of powers between the judiciary and the executive when it comes to "law-making"-type authority. But as the Federal Court of Appeal points out in *Innovative Medicines*, the *Vavilov* framework is sensitive to context, and need not reflect an intrusion into executive authority. Where a broad regulation-making power is conferred by statute, particularly relating to policy issues within the executive domain, there will be generally few constraints upon the regulation-maker. *Innovative Medicines* itself is a good example of the application of the reasonableness standard in accordance with *Vavilov* operating in this very way: arriving at the same result that would follow under *Katz*, but using reasonableness as the analytical lens.



Patients have no standing to challenge regulator's request for records in an investigation: *Kilian v College of Physicians and Surgeons of Ontario*, 2022 ONSC 5931 (Div Ct)[12]

Facts: Dr. K is a member of the College of Physicians and Surgeons of Ontario. After receiving complaints from third parties that Dr. K was improperly providing COVID-19 vaccine exemptions, the Registrar of the College recommended an investigation into Dr. K's conduct, believing on reasonable and probable grounds that Dr. K had engaged in professional misconduct or was incompetent. The College's Inquiries, Complaints and Reports Committee ("ICRC") approved the appointment of investigators.

The investigation revealed Dr. K had made further public statements about COVID-19 and vaccines, as well as details on further exemptions she was signing for individual patients. As part of the investigation, Dr. K was asked to provide a complete list of patients for whom she had provided COVID-19-related exemptions, a complete list of patients for whom she had prescribed certain medications, and the medical records for all of these patients. Dr. K refused to provide this information.

Shortly after the investigation was approved, the ICRC considered the information gathered to date and made an interim restrictions order under s. 25.4(1) of the *Health Professions*

[12] Stockwoods LLP was counsel to the respondent in this proceeding. The views expressed in this article are those of the author and not those of the client.

Procedural Code (being schedule 2 to the *Regulated Health Professions Act, 1991*[13]), prohibiting Dr. Kilian from providing any COVID-related exemptions to her patients.

In the wake of the restrictions order, College investigators followed up again with Dr. K for patient records and information — and, yet again, Dr. K refused. College investigators also gathered information showing that further COVID exemptions had been provided under Dr. K's name through an online website. Dr. K was provided with an opportunity to address these exemptions, but did not do so by the deadline. In an email sent after the deadline, she explained that the exemptions had been provided automatically through the website and that this was an administrative error.

The ICRC convened again. Based on the information before it, including Dr. K's continued refusal to cooperate in the investigation, the ICRC suspended Dr. K's certificate. Dr. K did not ask the ICRC to reconsider its decision and to make representations in respect of the suspension decision, despite her ability to do so. (Separately, the College commenced proceedings under s. 87 of the *Code* for an order directing Dr. K to comply with her obligation to provide records to investigators.)

Dr. K brought an application for judicial review of (i) the College's decision to investigate; (ii) the interim restrictions order; and (iii) the interim suspension. Several of Dr. K's patients also sought to join Dr. K as applicants in the proceeding to challenge these decisions, by adding their names as applicants on the same application that Dr. Kustka was bringing. These patients argued that they had standing as applicants primarily on account of their privacy rights being engaged by the production of records to the College for the purposes of its investigation. The College brought a motion to quash the patients' application for want of standing, which was heard together with Dr. K's application.

Decision: Application dismissed; motion to quash patients' application granted (*per* Swinton, Lederer and Le May JJ).

Dr. K's patients did not have either private or public interest standing to challenge the College's decisions.

With respect to private interest standing, there is no statutory basis for patient standing in these circumstances. Nor do the patients satisfy the common law test for private interest standing. Any finding of private interest standing would be contrary to the statutory purpose. College investigations are an important way of investigating potential professional misconduct or incompetence, and considering patient files is a key element of those investigations. Granting standing here would disrupt professional regulation, including by creating an entitlement to standing for thousands of patients whose charts are obtained each year in connection with an investigation, since there is nothing unique about these patient applicants. These patients do not have a direct legal interest in the proceedings between the College and Dr. K just because their medical records may be examined. Nor do they have an interest

[13] SO 1991, c 18.

because of the supposed loss of personal autonomy caused by the inability to obtain COVID vaccine exemptions.

With respect to public interest standing, the three factors from *Downtown Eastside* (the leading Supreme Court of Canada case on public interest standing) militate against standing in this case.[14] One, the patient applicants do not have a real stake or genuine interest in the outcome. Two, they fail to raise a serious justiciable issue in challenging the investigation decision because they have no reasonable expectation of privacy against a medical regulator accessing patient records, and there is no interference with bodily autonomy under s. 7 of the *Canadian Charter of Rights and Freedoms*. Finally, there is no need for the patient applicants' proceeding: the review of these decisions is being pursued by Dr. K, who is the party directly affected by them. Accordingly, the application to quash the patients' application is granted.

With respect to Dr. K's application, the standard of review is reasonableness, as all three decisions she seeks to challenge apply the *Code* to the information in the record.

Dr. K's challenge to the College's decision to investigate her conduct is premature. There are no exceptional circumstances here, including the existence of a s. 87 application.

The interim restrictions order was reasonable. Such orders must be based on evidence of probable harm to patients. The ICRC decision outlines, in detail, the evidence collected up to that point as a result of the investigation. In brief, the ICRC concluded that Dr. K was providing COVID exemptions for what appeared to be ideological reasons, to individuals who were not her patients, and that this conduct exposed or was likely to expose those individuals to harm or injury.

The suspension decision was also reasonable. It was based on additional information, including evidence that Dr. K had provided additional exemptions after being served with the interim restrictions order, and evidence that Dr. K had failed to cooperate with the CPSO's investigation by refusing to turn over patient records, raising concerns about Dr. K's governability.

Finally, the Court granted the College's motion for a publication ban over people who had made complaints to the College about Dr. K, and other doctors who had worked with her.

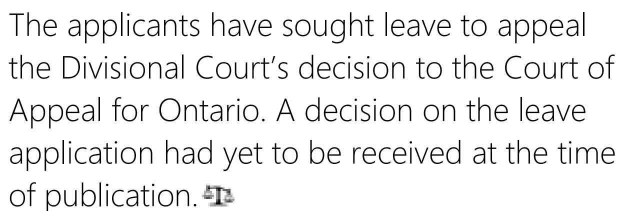
Commentary: This case is notable for its treatment of the issue of patient standing. Up until now, Ontario courts had not squarely grappled with whether a patient could be granted standing as applicants in a judicial review application brought by a regulated health professional to challenge a regulatory investigation and/or interim orders restricting that professional's ability to practise. The reasoning in *Kilian* shuts the standing door quite firmly—at least in circumstances where patients are claiming their privacy rights are engaged because a regulator seeks to obtain and review their records.

[14] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45

Indeed, while Ontario courts have long acknowledged that regulators have a right to obtain confidential patient information, *Kilian* is perhaps the clearest and strongest statement against patients having the right to interfere in that process. The Court's statement that the patients "fail to raise a serious justiciable issue, because they have no reasonable expectation of privacy against a medical regulator accessing patient records" (para 56) leaves little room for doubt. It should provide all regulated health colleges with a degree of comfort that patient attempts to interfere in these circumstances will be unsuccessful.

The result in *Kilian* is sensible, based both on principle and on practical considerations. The Court's careful consideration of the overall legislative scheme and purpose—including those limited scenarios in which the *Code* does grant patient standing—supported the outcome here. So too did the Court's concern that granting patient standing would interfere in the ability of the College to conduct its investigative and regulatory oversight functions.

The applicants have sought leave to appeal the Divisional Court's decision to the Court of Appeal for Ontario. A decision on the leave application had yet to be received at the time of publication.



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