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Professional Regulation Newsletter

Winter 2020

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Supreme Court of Canada makes significant changes to the Standard of Review for decisions of administrative tribunals

In *Canada (Minister of Citizenship and Immigration) v. Vavilov* ("*Vavilov*"), 2019 SCC 65, the Supreme Court of Canada recently re-examined the principles of judicial review and in so doing, made significant changes as to how courts will review the decisions of administrative tribunals.

Background

The *Vavilov* decision centred around a young man ("V") who was born in Canada to parents who were posing as Canadians under assumed names. In reality, V's parents were Russian spies. In 2010, the parents were arrested in the United States and charged with espionage. They pled guilty and were returned to Russia.

In 2014, the Canadian Registrar of Citizenship canceled V's certificate of Canadian citizenship. V applied for judicial review of the Registrar's decision. The Federal Court upheld the decision, but the Federal Court of Appeal overturned it on the basis that it was unreasonable. The Minister of Citizenship and Immigration appealed to the Supreme Court of Canada, which prompted this re-examination of the principles of judicial review.

Decision of the Supreme Court of Canada

The Court dismissed the appeal but in so doing, a majority of the Court confirmed that the standard of review which should apply to decisions of administrative tribunals will now begin with a presumption that the deferential "reasonableness" standard will apply in all

cases. However, the presumption of a reasonableness standard of review can be rebutted in two types of situations:

1. Where the legislature indicates that a different standard will apply; and

2. Where the rule of law requires that the more stringent "correctness" standard be applied.

For the first situation, the majority explained that the legislature may indicate a different standard of review by specifying the applicable standard in the legislation itself, or by including a statutory right of appeal in the legislation.

Where there is a statutory right of appeal, the majority interpreted this to mean that the legislature has chosen to subject the administrative body to appellate oversight, and that it therefore expects the courts to scrutinize the administrative body's decisions on the appellate standard of review. This means that where there is a statutory right of appeal, questions of law (e.g. questions regarding statutory interpretation or the scope of a decision-maker's authority) will be reviewed on the more stringent "correctness" standard, while questions of fact or of mixed fact and law will be reviewed on the more deferential standard of "palpable and overriding error".

As well, the majority explained that the rule of law will also require the "correctness" standard be applied in cases involving constitutional questions, general questions of law that are of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies. In all of these circumstances, the rule of law requires consistency for which a final and determinate answer is necessary.

Where the presumption cannot be rebutted, the "reasonableness" standard will continue to apply. The Court sought to clarify how this standard is to be applied, emphasizing that the determination of what is "reasonable" in any given case will vary depending on the factual and legal context, the governing statutory scheme, other relevant statutes or common law, the principles of statutory interpretation, the facts and evidence before the decision-maker, the submissions of the parties, the past practices and decisions of the administrative tribunal, and the potential impact of the decision on the individual to whom it applies.

Conclusion and Key Takeaways

Perhaps the most significant effect of the Court's decision in *Vavilov* in the professional discipline context will come from the majority's decision concerning statutory rights of appeal. Prior to *Vavilov*, courts may have applied the more deferential "reasonableness" standard to questions of law despite the existence of an appeal clause. However, now that the majority in *Vavilov* has interpreted the existence of such clauses to be a determinative indicator of appellate standards of review, administrative tribunals with appeal clauses will now be subject to the more stringent "correctness" standard on questions of law, and deferential the "palpable and overriding error" standard on questions of fact or of mixed fact and law. This could potentially lead to the overturning of statutory interpretations that were previously upheld under the more deferential "reasonableness" standard.

While it remains to be seen how the "palpable and overriding error" standard will be applied compared to the previously used "reasonableness" standard, the importation of appellate standards of review into an area formerly governed by administrative law principles exposes administrative tribunals to an entirely different body of case law on judicial review.

Accordingly, administrative tribunals in the professional discipline context should review their governing legislation to determine if their decisions are subject to a statutory right of appeal. If they are, this could result in

courts showing less deference to their decisions and even overturning statutory interpretations from previous cases that were upheld under the "reasonableness" standard.

Christopher Wirth, Partner
Alex Smith, Associate

— KC —

Sweeping Changes Proposed to the Regulation of Health Professionals in British Columbia

In light of a recent consultation paper issued by the Steering Committee of the British Columbia Legislature on Modernization of Health Professional Regulation (the "Steering Committee") dramatic changes may soon be underway for the regulation of health professionals in British Columbia.

Background

In March 2018, as a result of significant adverse publicity concerning the College of Dental Surgeons of British Columbia (the "College"), British Columbia's Minister of Health appointed Harry Cayton, a leading professional regulation expert, to undertake an inquiry into the College. Mr. Cayton's report (the "Cayton report") was made public in April 2019 and suggested approaches to modernize British Columbia's overall health professions regulatory framework. The Cayton report highlighted deficiencies with the current framework, including issues related to governance, transparency, and the complaints and discipline processes of the health regulatory colleges. The Cayton report also found that the current regulatory model allowed for the promotion of the interests of the professions over the interests of the public, which resulted in a lack of public trust in regulators.

In response to the Cayton report, the Minister of Health established a bi-partisan Steering Committee of the legislature to provide advice on an approach to modernize the regulatory framework for health professionals. The Steering Committee published its consultation paper in November 2019 after receiving submissions from the public.

The proposed changes

The key recommendations made by the Steering Committee were:

- A reduction in the number of health regulatory colleges from 20 to 5 in order to increase public protection and improve efficiency and effectiveness of regulation, while establishing sub-committees within multi-profession regulatory colleges in order to ensure clinical expertise;

- The creation of a new independent oversight body to oversee the regulatory colleges, with a multitude of responsibilities including: defining and monitoring performance standards for colleges, reviewing registration and complaint investigation decisions, publishing guidance on improving the regulatory system, establishing core elements of ethical and professional practice standards, drafting model bylaws and overseeing the process for amending bylaws, making recommendations on board member appointments, holding a single register of regulated health professionals, and collecting fees;

- The complaints and adjudication process should be simplified by the creation of independent discipline panels separate from the regulatory colleges' complaints investigation processes, enabling regulatory colleges to make public comments about actions taken to resolve complaints, and imposing time limits for stages of the investigation process;
- The improvement of governance by appointing regulatory college board members through a competency-based process, reducing the size of the boards,

and by compensating board and committee members fairly and consistently; and

- Enable regulatory colleges to share information, between each other and with other agencies, where necessary for public safety and protection.

It now remains to be seen how and to what extent the Steering Committee's recommendations will be adopted or implemented by the British Columbia government.

Takeaways

These proposed changes may be an important indication of the possibility of similar future regulatory reforms in other provinces and highlight the importance for regulatory colleges to focus on promoting transparency, accountability and the interests of the public.

Christopher Wirth, Partner
Shamim Fattahi, Articling Student

— KC —

Evidence obtained in violation of Charter rights, may still be admissible

In *College of Veterinarians of Ontario v. Choong*, 2019 ONSC 946, the Divisional Court (the "Court") set aside a decision of the Discipline Committee of the College of Veterinarians (the "College") which had excluded evidence obtained in violation of the member's s. 8 rights under the *Charter of Rights and Freedoms* (the "*Charter*"), as the analysis of the public interest is different between criminal and professional disciplinary proceedings and consequently evidence excluded in a criminal matter will not necessarily be excluded in a disciplinary hearing.

Background

Dr. Derek Choong ("Dr. Choong") was criminally charged with accessing, possessing and/or distributing child pornography. The Crown later withdrew the charges concluding that the evidence was obtained by the police in violation of Dr. Choong's s. 8 rights under the *Charter* and was thus inadmissible.

The College commenced a disciplinary proceeding against Dr. Choong and sought to rely on the same evidence. Dr. Choong brought a motion before the Discipline Committee to exclude the evidence on which the parties filed an Agreed Statement of Facts in which they agreed that Dr. Choong's s. 8. *Charter* rights had been violated in the following ways:

(a) The police had obtained subscriber information in relation to the IP address from Rogers without first obtaining a search warrant;

(b) The police did not have a sufficient basis to conclude that the residential address was the physical address where the internet service was being used as opposed to simply the address of the subscriber; and

(c) The police failed to adequately explain how they obtained the Globally Unique Identifier information and whether it was publicly broadcast or involved a search of the computer.

Given this agreed upon breach, the only issue was whether the evidence should be excluded under s. 24(2) of the *Charter* which required the Discipline Committee to consider whether it should exercise its discretion to exclude the evidence based on a balancing of the following factors set out by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32 (the "*Grant* factors"):

(i) The seriousness of the *Charter* infringing state conduct;

(ii) The impact of the breach of the *Charter* on protected interests of the individual; and

(iii) Society's interest in adjudicating the case on its merits.

With respect to the first factor, the Discipline Committee characterized the first breach as a good faith *Charter* breach as at the time the breach occurred the law did not require prior judicial authorization to obtain subscriber information. However, the Discipline Committee found the second breach was serious and rejected the College's position that it is reasonable to infer that the subscriber of an internet account uses the internet from the address that he has registered with the internet service provider. The Discipline Committee did not find the third breach to be serious, however, it noted that it aggravated the seriousness of the police misconduct.

With respect to the second factor, the Discipline Committee concluded that the breach significantly impacted Dr. Choong's rights as the search was of his personal devices which attracts a high expectation of privacy. With respect to the third factor, the Discipline Committee found that society's interest in adjudicating the case on the merits was not sufficient to outweigh the first two factors that favoured exclusion.

Accordingly, a three member majority of the Discipline Committee held the evidence was inadmissible. Two dissenting members would have dismissed Dr. Choong's motion. Without the evidence, as the College had no other evidence to support the allegations, the Discipline Committee dismissed them. The College appealed.

Divisional Court Decision

On appeal, the Court found that the Discipline Committee's decision was unreasonable because the only requirement for obtaining a search warrant is that there be reasonable grounds to believe that the police will find evidence related to the offence under investigation in that location.

The Court also noted that the Discipline Committee's analysis of the third *Grant* factor was unreasonable as the Discipline Committee found that the Crown had withdrawn the charges based on the same *Charter* breaches and stated there was not a greater societal interest in a professional discipline proceeding compared to a criminal proceeding. However, the Court noted that the Discipline Committee did not know how the *Grant* factors were balanced by the Crown and a criminal court did not rule on this issue. The Court also noted that evidence excluded in a criminal trial is not necessarily also excluded in a civil or administrative proceeding.

Accordingly, the Court set aside the decision and returned the matter to the College for a new hearing before a different panel of the Discipline Committee to decide the motion to exclude the evidence using the *Grant* factors. Subsequently, Dr. Choong sought leave to appeal to the Court of Appeal but his motion for leave was dismissed, May 29, 2019 ONCA (M50223). Dr. Choong further sought to obtain leave to appeal from the Supreme Court of Canada, which also dismissed his application for leave to appeal, February 6, 2020 (38818).

Christopher Wirth, Partner
Alana Spira, Articling Student

— KC —

Appeals Committee Decision Quashed When Chairperson Had Previously Presided At Pre-Hearing Conferences

In *Gogek v. Real Estate Council of Ontario*, 2020 ONSC 486 (Ont.Div.C.), the Divisional Court quashed a decision of the Appeals Committee of the Real Estate Council of Ontario ("RECO"), which had denied an extension of time for Brian Gogek ("Mr. Gogek"), to perfect his appeal of a decision of RECO's Discipline Committee.

Background

Mr. Gogek is a real estate agent and a member of RECO. RECO's Discipline Committee concluded that Mr. Gogek had engaged in conduct which violated RECO's code of ethics.

Mr. Gogek filed a Notice of Appeal of this decision to the RECO Appeals Committee (the "Appeals Committee") but failed to perfect his appeal by the applicable deadline. He then moved before it for an extension of time to do so.

The Appeals Committee subsequently dismissed his motion and terminated his appeal. However, the Chairperson of the Appeals Committee was an individual who had also presided over pre-hearing conferences in Mr. Gogek's matter before the Discipline Committee.

Mr. Gogek then sought judicial review of the Appeal Committee's decision refusing his motion for an extension of time and terminating his appeal.

Decision of the Divisional Court

Before the Division Court, RECO conceded that the fact that the chairperson of the Appeals Committee who had heard the matter had presided at pre-hearing conferences in Mr. Gogek's matter before the Discipline Committee meant that he had been denied the right to procedural fairness and as a result the Appeals Committee's decision had to be set aside.

Mr. Gogek then asked the court to substitute its own decision for that of the Appeals Committee and to grant him an extension of time to perfect his appeal.

However, RECO asked that the court remit the matter to the Appeals Committee for it to re-consider the issue of Mr. Gogek's motion for an extension of time and advised the court that RECO would not contest the motion in which circumstances the Appeals Committee would grant it.

RECO further submitted that the court did not have the discretion to make Mr. Gogek's requested order in a situation where a tribunal's decision is quashed due to lack of procedural fairness.

While traditionally where a court quashes a decision of an administrative tribunal, it remits the matter back to be dealt with by the tribunal, the Supreme Court of Canada in its recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), held that:

> Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose…..

Accordingly, given RECO's position, the court concluded that the outcome of Mr. Gogek's motion before a properly constituted Appeals Committee was inevitable and that his request for an extension would be granted. In light of this, the Division Court quashed the Appeals Committee's decision and declined to remit the matter to the Appeal Committee, instead granting Mr. Gogek's motion for an extension of time to perfect his appeal.

Takeaways

It is important that a tribunal ensure that members presiding on a matter have had no prior involvement in it matter which would impune the tribunal's decision. In that regard, members who have presided over pre-hearing conferences should not be further involved in the matter.

Christopher Wirth, Partner

— KC —

Divisional Court Finds Application Moot Because Investigation Did Not Lead To Disciplinary Action

In *Cuhaci v College of Social Workers (Ontario),* 2019 ONSC 1801, the Divisional Court (the "Court") found that an application for judicial review was moot because a complaint had not been referred to the Discipline Committee by the Ontario College of Social Workers (the "College") Investigations, Complaints and Report Committee ("ICRC") and the fact that the ICRC's decision and investigation would remain on the applicant's record was not enough to create a live controversy requiring adjudication.

Background

Ms. Cuhaci, a registered member of the College was also a qualified parenting co-ordinator, mediator and arbitrator.

In 2015, Ms. Cuhaci was appointed to act as a parenting co-ordinator, mediator and arbitrator for a custody and access dispute. The issues in the custody and access dispute included allegations that the father had alienated his teenage daughter from her mother.

An expert report from a psychologist was provided and found that the child was a victim of moderate to severe parent alienation. Two separate psychologists recommended that the child live with her mother and work toward a shared parenting arrangement.

Ms. Cuhaci then issued an interim arbitration decision on September 4, 2015 finding that the child was to reside primarily with her father with monthly visits to her mother. In coming to her decision, Ms. Cuhaci claimed that she had consulted the expert psychologists and that her decision was consistent with their findings.

On April 6, 2016 the College received a complaint from the child's stepfather, who was the long-time partner of the child's mother. The complaint alleged that Ms. Cuhaci had not properly considered the experts' reports and that her attitude toward the mother and her husband was dishonest, manipulative and arrogant.

On April 28, 2017, the ICRC decided not to refer the complaint to the Discipline Committee but did find that there was some ambiguity in Ms. Cuhaci's decision arising from her statement that her decision did not contradict the expert reports even though the reports suggested that the child be placed with her mother. As a result, the ICRC provided Ms. Cuhaci with advice that she reflect on the Committee's comments and make efforts to ensure that her professional communication is clear and unambiguous. The ICRC also noted that this would remain in her file and may be considered in any future complaints.

Ms. Cuhaci then brought an application for judicial review to the Court seeking to quash the ICRC's decision.

Divisional Court Decision

The Court found that the issue was clearly moot and decided not to exercise its discretion to consider the issue finding that the inclusion of the ICRC's investigation on Ms. Cuhaci's record with the College was not enough to overcome the doctrine of mootness as even if the record may affect future proceedings, the investigation was complete and there was no longer any jeopardy to Ms. Cuhaci's licence, nor were there any restrictions on it.

Key Takeaways

A decision not to refer a complaint to the Discipline Committee will generally not be subject to judicial review as any attempt to do so will likely be found to be moot.

Christopher Wirth, Partner
Cameron Taylor, Articling Student

— KC —

Divisional Court Finds ICRC Fundamentally Misconstrued Facts and Evidence

In *Montour v. Health Professions Appeal and Review Board*, 2019 ONSC 3451, the Divisional Court set aside a decision of the Inquiries, Complaints and Reports Committee ("ICRC") of the College of Surgeons and Physicians of Ontario (the "College") on the basis that it had fundamentally misconstrued the facts and made conclusions that were not supported by the evidence.

Background

A patient was taken to the Brantford General Hospital (the "Hospital") on the morning of April 17, 2015 from a suspected overdose of medication for chronic back pain. Although not on site at the Hospital, Dr. Montour became the patient's responsible physician at around 5:00 p.m. that day.

Dr. Montour was paged 6 times throughout the night and given updates on the patient's condition and events occurring at the Hospital. Although the patient had initially experienced some pain and a worsening of symptoms, contemporaneous medical notes taken by Hospital staff and Dr. Montour indicated that the patient was given medication, continuously monitored, and her condition improved and remained stable for the rest of the night. Although the medical record indicated that the patient was resting comfortably, the patient's family became increasingly concerned that she was in pain and demanded that she be transferred to another hospital.

The patient later complained to the College about Dr. Montour's failure to examine her in person. The ICRC ordered Dr. Montour to appear before it for a caution, noting that it had grave concerns about her failure to appear at the Hospital to examine the patient in person after being repeatedly called about the patient's "deteriorating condition", "crushing pain", and "progressive neurological changes" throughout the night.

Dr. Montour appealed the ICRC's decision to the Health Professions Appeal and Review Board (the "Board"), which upheld it. Dr. Montour then brought an application for judicial review to the Divisional Court.

Divisional Court Decision

The Court found that the ICRC's decision was unreasonable because its findings that the patient experienced increasing pain and a deteriorating physical condition throughout the night were not borne out by the medical records. Contrary to the ICRC's findings, the medical records suggested that the patient's condition had improved and stabilized. Although Dr. Montour was paged 6 times throughout the night, many of these calls were not about the patient's condition, but rather about the complaints of the patient's family. Given that the contemporaneous medical records were inconsistent with the ICRC's findings, the court found that it was unreasonable for the ICRC to have concluded that Dr. Montour should have attended at the Hospital to assess the patient in person.

The Court also found that the ICRC misinterpreted the expert evidence. The only expert who provided an opinion concluded that Dr. Montour acted appropriately, but recommended that she work on her communication skills and consider attending in person at the Hospital even when it is not medically necessary to do so, if only to reassure the patient's family. The Court held that the ICRC unreasonably misinterpreted this opinion to mean that it was medically necessary for Dr. Montour to have attended at the Hospital and assessed the patient in person, and that by not doing so her conduct fell below the standard of care.

The Court concluded that the ICRC's decision was unreasonable and should be set aside because it had misconstrued the

facts in a manner inconsistent with the contemporaneous medical records.

Key Takeaways

In order to make fair and impartial decisions, an administrative tribunal must ensure that its findings are grounded in the accepted facts and evidence before it. Tribunal members should be cautious to avoid misinterpreting the facts and evidence or importing their own judgments, opinions, or expertise into their decisions. A tribunal that makes findings that are inconsistent with the facts and evidence before it risks having its decisions overturned on judicial review.

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