

2020 Administrative Law Update

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Vavilov

The “New” Framework for Judicial Review



Plus ça change, plus ç'est pareil?

The Facts

- Alexander Foley was born in Canada. Held a Canadian birth certificate and passport
- But unknown to him, his parents were deep cover Russian spies
- In 2010, when Alexander was 16, his parents are arrested in the US, plead guilty and are deported to Russia

What becomes of Alexander?

- Is he a Canadian citizen (can he renew his Canadian passport)?
- Citizenship automatically granted to persons born in Canada unless: either parent was “a representative or employee in Canada of a foreign government.”
- Were A’s parents “representatives a foreign government”?
 - Yes? He is not a citizen
 - No? Alexander is a citizen

Canadian Registrar of Citizenship

- Parents were “illegals” or unofficial agents of the Russian state, no official status.
- However, exception applied to unofficial representatives of Russia → Citizenship recalled

Questions on Judicial Review

- What is the appropriate standard of review of the Registrar's decision?
- Did the decision meet that standard?

Decisions Below Showcase Problems with Existing Framework

- Federal Court: standard of correctness, the Registrar's interpretation of the Act is correct.
- FCA: standard of reasonableness
 - Majority : Registrar was unreasonable
 - Dissent : Registrar was reasonable

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Rethinking SoR: Here come the Supremes



Questions for Supremes

- How to determine the appropriate standard
- How to apply the standard (what does reasonableness mean anyway?)
- Other issues plaguing the jurisprudence post-*Dunsmuir* (reasons, procedural fairness, remedial discretion)

How to determine the SoR?

- Presumption of a reasonableness standard
 - affirmation of what had been happening anyway
- **Rationale:**
 - Respects the legislative intent to delegate to administrative decision-maker (not the courts)
 - Simplicity, predictability, uniformity in approach

Departing from the presumption: when does correctness apply?

- **Exception #1:** Where legislation provides for a different standard
 - Legislation says review on correctness standard
 - Legislation creates a right of appeal: appellate standards not JR standards apply (SCC reverses earlier decisions in *Capilano*, etc.)

Rule of Law and Correctness

- **Exception #2:** Where the rule of law requires a standard of correctness.
 - SCC lists three exceptions: “at this time”
 - our list “complete”
 - creation of any new exceptions in the future would be “exceptional”

Exception 2(a): Constitutional questions

- division of powers
- aboriginal treaty
- unwritten constitutional principles

Exception 2(b): General questions of law of central importance to the legal system

- The most expandable exception: A new can of worms? Or just reopening the can we already have?
- Vavilov cautions against reliance on previous jurisprudence, but courts continue to interpret the exception narrowly
- Bank of Montreal v. Li, 2020 FCA 22

Exception 2(c) Issues engaging jurisdictional lines between two or more administrative tribunals

- For example, does a federal or a prov tribunal have jurisdiction? a labour arbitrator or a human rights tribunal?
 - NOT a return to early distended notion of “jurisdiction” as anything the review court disagrees with.
 - NOT if persistent discord within a single admin body’s jurisprudence

Questions for the Supremes

- How to determine the appropriate standard
- **How to apply the standard (what does reasonableness mean anyway?)**
- Other issues plaguing the jurisprudence post-*Dunsmuir* (reasons, procedural fairness, remedial discretion)

What does it mean to be reasonable?

- Pre Vavilov: Courts effectively asked “what is the right answer here?” then assessed the range of reasonable outcomes based on proximity to correct decision.
- Post Vavilov: a **reasonableness review should focus on the legality, rationality and fairness of the administrative decision-making in question.** It is not about deciding the matter anew

Hallmarks of a Reasonable Decision

- Based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law.
- It does not have “sufficiently serious shortcomings that are central to the decision”
- It can be justified in relation to the constellation of law and facts that are relevant to the decision → a single standard

Hallmarks of an Unreasonable Decision

- **Internally incoherent**
 - Conclusions/generalizations without analysis
 - not rational or logical chain of analysis
- **Untenable in light of relevant facts and law**
 - not based on the evidence
 - inconsistent statutory or common law, with principles of statutory interpretation
 - unresponsive to the submissions of the parties

Questions for Supremes

- How to determine the appropriate standard
- How to apply the standard (what does reasonableness mean anyway?)
- **Other issues plaguing the jurisprudence post-*Dunsmuir* (reasons, procedural fairness, remedial discretion)**

Reasons

- Procedural fairness question, are reasons required?
 - No: assess decision based on the record, context. (for ex municipal by-laws)
 - Yes: reasons are the starting point for assessing the decision

Where reasons are required

- Dunsmuir: bullet point justice, courts could infer what the decision-maker meant to say
- Vavilov:
 - Reasons need to meaningfully grapple with key issues (submissions, evidence, past decisions)
 - Intelligible and rational
 - Court unlikely to infer an argument or evidence was considered unless that is demonstrated by the reasons.

Remedial Discretion

- Pre-Vavilov: must be remitted back to the administrative decision-maker → court may not impose remedy
- Post Vavilov: where evident that a particular outcome is inevitable → court may impose remedy
- Courts seem reluctant so far to embrace this “new” power.

Procedural Fairness

- In the past, some debate about what standard of review applied to matters of procedural fairness.
- Vavilov not super clear on this, but seems
 - Procedural fairness falls outside the Vavilov framework
 - SCC decision in Baker applies, was the procedure fair according to those criteria

Practical considerations

- Need for reasons? Make sure yours address the key issues, evidence, past decisions (if you are deviating from them).
- Increased focus on rational, intelligible reasons.
- Not about the length of the decision: brevity is still good, concisely and meaningfully engage with the main issues.

Judicial Reviews of Appeal Decisions

Wawanesa and Nation Rise



Wawanesa Mutual Insurance Co. v. Renwick, 2020 ONSC 2226

- Deals with the standard of review of an internal appeal where reasons were held to be inadequate
- Appeal from FSCO arbitrator to the Director's Delegate (on a question of law), then judicially reviewed in Divisional Court
- Presumption of reasonableness applies and the adequacy of reasons is not a question of central importance to the legal system after *Vavilov*
- Question is whether Director's Delegate's appeal decision is reasonable
- "Whether reasons are adequate is not a question that is amenable to a single and determinate answer. Thus, while delivering adequate reasons plays a central role in the administration of justice, whether reasons are adequate is not a general question of law of central importance to the legal system as a whole that would attract the standard of correctness."

Key Takeaway

Internal appellate decisions get deference under this interpretation of *Vavilov*. The fact the internal appellate decision maker is applying a general appeal principle like adequacy of reasons will not make the correctness standard apply.

Nation Rise Wind Farm Limited Partnership v. Minister of the Environment, Conservation and Parks, 2020 ONSC 2984

- Judicial review of the Minister's decision, on appeal, to overturn a decision of the Environmental Review Tribunal
- Appeal from the ERT lies to the Minister on a question that is not a question of law
- Minister overturned a decision of the ERT allowing a major wind energy project on the basis that it was likely to cause serious and irreversible harm to the maternity colonies of:
 - Big Brown bats
 - Hoary bats
 - Little Brown bats



Standard of Review

- Standard of review of the Minister's decision was reasonableness

BUT....

- Minister was unreasonable in considering issues on appeal not raised before ERT and not raised by the parties
- Presume the Legislature intended an appeal to the Minister to mean the same as an appeal in the courts, citing *Vavilov*
- Minister was also unreasonable in applying the wrong legal test: applied precaution principle rather than the test of whether there would be harm

Key Takeaways:

- After *Vavilov*, appeals to other administrative decision makers are expected to be conducted under the same principles as appeals to courts, even when the decision maker is a minister.
- Suggests that internal appeals should involve the same principles as a court appeal.
- A political decision maker is expected to apply the same legal analysis under *Vavilov* as a Tribunal and reasons will be held to the same standards.



Applying the
Correctness Standard:
the Example of
Professional Discipline

Al-Ghamdi v. College of Physicians and Surgeons in Alberta, 2020 ABCA 71

- Member judicially reviewed a decision of the College Discipline Committee for finding that he had engaged in professional misconduct.
- There was a statutory right of appeal in this case, so the court applied the appellate standards of review. On the issue of whether “disruptive behaviour” can constitute professional misconduct, the court said:
 - This is a question of statutory interpretation reviewed for correctness. On the other hand, whether the specific conduct that is the subject of the proceedings constitutes unprofessional conduct involves an assessment of the facts against that legal standard, and is a mixed question of fact and law. (para 12).
- The court then applied a standard of palpable and overriding error to determine if the acts committed by the Member amounted to professional misconduct. The court construed this question as one of mixed fact and law. Interestingly, the court noted that “[d]eciding whether a particular act meets the expected standard of professional conduct engages the expertise of the Hearing Tribunal and the Review Panel” (para 20).

Zuk v. Alberta Dental Assn. and College, 2020 ABCA 162

- Standard of review for sanctions imposed by professional disciplinary bodies remains reasonableness; correctness standard where there is an error in the legal test or extricable question of law
- Is the court saying palpable and overriding error and reasonableness are the same thing?

Houghton v. Association of Ontario Land Surveyors, 2020 ONSC 863 (Div. Ct.)

- Member appealed decision of the Discipline Committee to revoke his licence on the basis of various unethical regular practices in doing his work and lack of likelihood they would change
- Counsel for Houghton argued that the court should develop a less deferential interpretation of “palpable and overriding error” in appeals from tribunals so the standard in statutory appeals is less deferential than reasonableness in judicial reviews. The court found that the *Housen v. Nikolaisen* standard applies, which does not “draw meaning” from a comparison to reasonableness. (para. 15)
- Court found that the decisions about whether conduct of member was professional misconduct, including whether one of the member’s practices failed “to maintain public trust and confidence in the profession” were questions of mixed fact and law to which the palpable and overriding error standard applied (paras. 45, 48, 58, 63, 65, 70)
- On penalty, deferential standard applied – “no error in the statement of the relevant principles nor in the application of those principles to the facts” (para.86)

See also:

- *Planet Energy (Ontario) Corp. v. Ontario Energy Board*, 2020 ONSC 598
- *Miller v. College of Optometrists of Ontario*, 2020 ONSC 2573, at para. 79
- *Schoelly v. College of Massage Therapists of Ontario*, 2020 ONSC 1348
- *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98

Key Takeaways

- At least for now, “palpable and overriding error” and “reasonableness” are different (in Ontario)
- Courts seem to be giving a broad definition to “questions of mixed fact and law” such that they include defining what is professional misconduct
- *Vavilov* may not result in much difference in the deference given to professional regulators
- expertise may come in at the stage of classifying the question and examining the reasons

Smith J v Canada (AG), 2020 FC 629.
Federal Court applies *Vavilov* in judicial review.



Facts

- Justice Smith, a judge of the Ontario Superior Court, applied for a leave of absence to take a temporary appointment as Interim Dean of Lakehead University's Law School.
- His appointment was approved by his Chief Justice, and the federal Minister of Justice indicated she "had no concerns" with his taking of leave when consulted by the CJ

Facts (cont'd)

- Smith J's appointment attracted the attention of the Canadian Judicial Council
- On its own accord, it began an inquiry into Justice Smith
- This process ultimately concluded that Smith J had contravened the *Judges Act* and failed in his "ethical obligations as a judge to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office."

Smith J applies for judicial review

- Justice Smith applies for judicial review
- The Attorney General of Canada is, by default, named Respondent.
- The AGC agreed with Smith J that the CJC's interpretation of the relevant provisions of the *Judges Act* were unreasonable.

CJC needs to be in the “room where it happens”

- CJC initially granted leave to intervene on the issue of its jurisdiction on consent
- Default position in FC judicial reviews:
 - Administrative decision-maker is not an automatic party to judicial review
 - Scope of intervention generally limited to jurisdiction and explaining the record
- October 2019 order expands scope of intervention – CJC may defend its decision on the merits, within the parameters set out in Ontario (Energy Board)

Court applies *Vavilov*

- All parties agreed that the relevant standard of review is reasonableness
- This accords with the standard adopted for review of CJC decisions in previous cases, but is a departure from the early standard of patent unreasonableness from *Moreau-Bérubé*

What does reasonableness mean?

- Reasonableness analysis starts with the reasons (para 56)
- In reviewing statutory interpretation provided by the Board: (para 58)
 - “modern principle” of statutory interpretation applies
 - Administrative decision maker’s interpretation must accord with text, context and the purpose of provision
 - There may be occasions where there is but one, reasonable interpretation
- “consideration of expertise” is folded into the presumption of reasonableness (citing *Vavilov*, at para 64)

Unreasonable, unreasonable and unfair

CJC's interpretation of *Judges Act* unreasonable: (Para 95 and see also paras 112-115)

- not in keeping with the modern principle of interpretation ... ignores some words of the provision
- fails to properly consider the legislative history of the provision; fails to properly consider the context in which the provision is found; and it fails to properly consider all of the evidence of Parliamentary intention
- As such, the reasoning is flawed and leads to an unreasonable conclusion on interpretation

NB: Zinn J concludes that this is one of the situations where there is only one “reasonable interpretation” of s. 55 of the *Judges Act*

Unreasonable, unreasonable and unfair (cont'd)

- CJC's decision on breach of ethics also unreasonable
- Fails the Yukon test (paras 122-131)
 - CJC exaggerated the extent of public coverage and
 - CJC's consideration of potential for litigation involving Justice Smith entirely speculative

Unreasonable, unreasonable and unfair (cont'd)

CJC process unfair: (paras 132-176)

- CJC misused disciplinary procedure in a manner that was excessive and unfair
- Particularly concerned by how approach consideration of the approval granted to Smith J and failure to inform Justice Smith of objections to the appointment

Remedy and aftermath

Remedy:

- Quashing of the two decisions of the CJC in respect of Smith J
- Declaration that Smith J's appointment did not breach judicial ethics or s. 55 of the *Judges Act*
- Requirement that CJC post a copy of the FC decision to its website and reference to it any instance the conduct of Smith J is mentioned on its website

No appeal:

- CJC issued press release indicating it would not appeal and would take steps to comply with the decision



Vavilov and the role of tribunals on judicial review ... more room to be in the room where it happens?

Refresh: Ontario (Energy Board) v. Ontario Power Generation Inc. 2015 SCC 44

- Resolved the two conflicting approaches to tribunal standing.
- Northwestern Utilities (stay out) and Paccar (come on in).
- Rejects categorical ban on tribunal participation
- (...) a discretionary approach provides best means of ensuring that the principles of **finality** and **impartiality** are respected without sacrificing the **ability of reviewing courts to hear useful and important information.**
(para 52)
- Factors ... Otherwise unopposed? Other parties with necessary knowledge and expertise available to fully make and respond to arguments? Nature of tribunal? (para 59)
- Tone critical.

Administrative diversity makes context critical. An invitation to inform? Vavilov at para 90

- The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. **These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt.** The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

Post Vavilov where can Tribunals particularly assist the reviewing Court to realize fully informed adjudication? See para 106

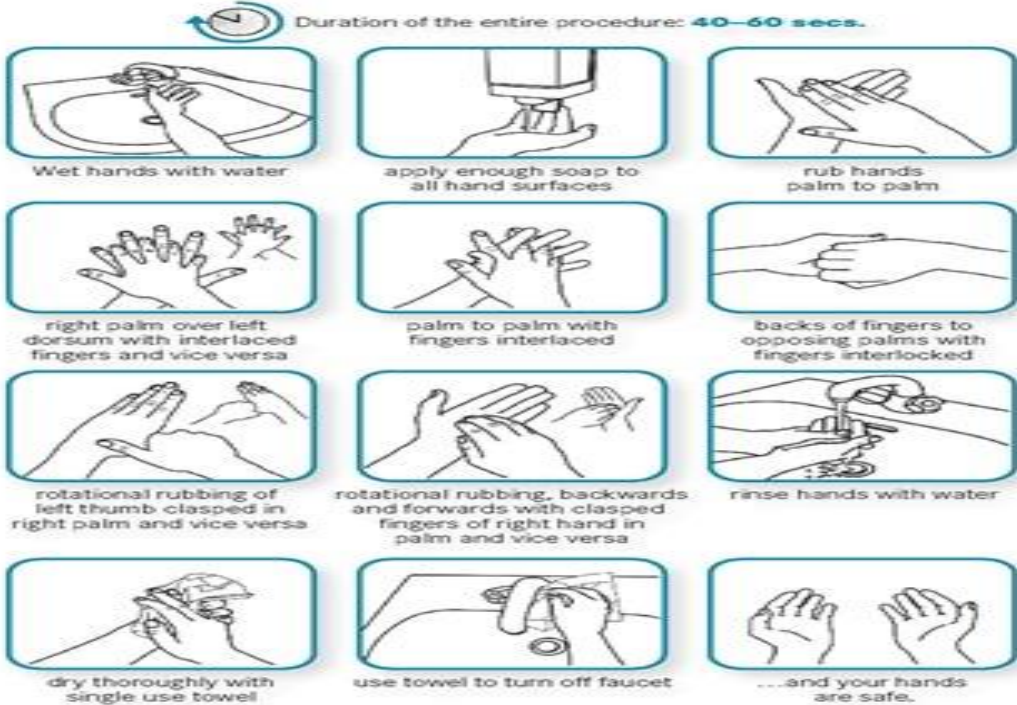
- Contextual factors identified in a Vavilovian reasonableness review where Tribunals can be helpful to the Court
 - the governing statutory scheme, other relevant statutory or common law,
 - the evidence before the decision maker and facts of which the decision maker may take notice,
 - the past practices and decisions of the administrative body
 - the potential impact of the decision on the individual to whom it applies

Jurisdictional Lines

- Figliola lessons learned - must not engage in review of another administrative decision maker's decision. Discourage forum shopping.
- But so many places where work of different tribunals rub against each other. Is the issue genuinely jurisdictional? What is a line anyway?
- Exception intended to be applied narrowly.
- Tribunal may have information and understanding of the contextual issues which may assist the Court on this point.

Law in the Time of Corona

How to wash and dry hands with liquid soap and water



Hearings in
the time of
COVID:
Guidance
from the
Ontario (and
Australian)
Courts



Capic v. Ford Motor Company of Australia Limited, [2020] FCA 486

- Issue was whether six-week trial with 50 witnesses scheduled to commence on June 15, 2020 should be adjourned because of COVID or proceed virtually
- Court ordered trial to proceed virtually
- Not ideal, but not unfair and justice cannot grind to a halt because of COVID
- Problems like internet connections, lack of witness computers, freezing, etc. can be overcome
- “Whilst I think this is a poor situation in which to run a trial I do not think it means the trial will be unfair or unjust”

Capic v. Ford Motor Company of Australia Limited, [2020] FCA 486

- “ My impression of those platforms has been that I am staring at the witness from about one metre away and my perception of the witness’ facial expressions is much greater than it is in Court. What is different—and significant—is that the video-link technology tends to reduce the chemistry which may develop between counsel and the witness.”
- “Under ordinary circumstances, I would not remotely contemplate imposing such an unsatisfactory mode of a trial on a party against its will. But these are not ordinary circumstances and we have entered a period in which much that is around us is and is going to continue to be unsatisfactory. I think we must try our best to make this trial work. If it becomes unworkable then it can be adjourned, but we must at least try.”

Arconti v. Smith, 2020 ONSC 2782

- Issue is whether a party should be required to conduct examinations for discovery for a “mini-trial” in a summary judgment motion by videoconference
- Strong reasons from Myers J. that emphasize that much of our reluctance to conduct hearings electronically stems from our unfamiliarity and discomfort with the technology
- Not a second best solution and cannot delay the process because of COVID-19

Arconti v. Smith, 2020 ONSC 2782

- “In my view, the simplest answer to this issue is, “It’s 2020”. We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.”
- “In my view, in 2020, use of readily available technology is part of the basic skillset required of civil litigators and courts. This is not new and, unlike the pandemic, did not arise on the sudden. However, the need for the court to operate during the pandemic has brought to the fore the availability of alternative processes and the imperative of technological competency.”

Arconti v. Smith, 2020 ONSC 2782

- “ I respectfully do not find the presence of any “due process concerns” inherent in the format of a video hearing. All parties have the same opportunity to participate and to be heard. All parties have the same ability to put all of the relevant evidence before the court and to challenge the evidence adduced by the other side. The only possible “unfairness” is a lack of comfort by one counsel that he or she will be at their best in presenting evidence and making arguments using technology.”
- “In my view, in 2020, use of readily available technology is part of the basic skillset required of civil litigators and courts. This is not new and, unlike the pandemic, did not arise on the sudden. However, the need for the court to operate during the pandemic has brought to the fore the availability of alternative processes and the imperative of technological competency.”

Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta, 2020 ABQB 359

- *Arconti* applied in Alberta and to a situation where there was an interpreter and video examinations were required

Even initially sceptical judges are changing their views

- *Miller v. FSD Pharma, Inc.*, 2020 ONSC 2253 (Morgan J.): “ I would not want to hold a hearing that in its very format raises due process questions for whichever party ends up being unsuccessful. ...I do not think it appropriate to compel the moving party to proceed under conditions where Plaintiffs’ counsel perceive that they may not be able to present the case as effectively as they would in person.”

Even initially sceptical judges are changing their views

- *Miller v. FSD Pharma, Inc.*, 2020 ONSC 3291 (Morgan J.): “ In the now two months since the courts restricted their operations and the six weeks since my last case conference endorsement in this matter, counsel and the judiciary have come to see remote hearings as a far more regularized part of the legal environment. While in my last endorsement I was wary of potential fairness concerns with a virtual hearing via Zoom or equivalent technology, I have become convinced that counsel and the courts have developed the ability to conduct these hearings in a way that minimizes any of the problems originally foreseen with them...There is nothing about a remote procedure, whether large, complex, and potentially final, or small, straightforward, and interim, that is inherently unfair to either side. This is particularly so now that the legal community has had time to digest the use of virtual hearing technology.”

Key Takeaways

- Courts are imposing videoconference hearings over the objections of parties
- The jurisprudence rejects the common reasons that are given in opposition to videoconference hearings:
 - Demeanour
 - Counsel communicating with juniors
 - Limits of technology
 - Fairness
 - Coaching of witnesses
 - Lack of solemnity

Law in the Time of Corona, Part II

**COURT IS IN
SESSION**



DO NOT ENTER

**The answer to your question
might be here:**

**IN YOUR
BEDROOM**

MAYBE LATER

IN THE WASH

**ASK YOUR
OTHER FATHER**

NO

A PIECE OF FRUIT

**I DON'T KNOW WHAT'S
FOR DINNER**

Act One: The Shutdown

- Suspension orders issued/directions as of mid/late March 2020
 - SCC (March 25, 2020), FC (Mar 17, 2020), FCA (Mar 16, 2020), Ontario SCJ (Mar 17, 2020), and OCA (Mar 17, 2020)
- (Virtually) all in-person hearings adjourned
- Most deadlines in matters suspended through to the end of the suspension period
- Provision made for matters to proceed if urgent
- Materials during suspension to be filed electronically, exemption from paper requirements

Act Two: This is the new normal

- Suspension orders renewed (April – June 2020)
- Continued suspension/adjournments of in-person hearings
- Resumption of case management conferences
- Where appropriate, matters to be scheduled/dealt with in writing, by teleconference or video-conference

Act Three: Baby steps towards reopening

- SCC holds first week of remote hearings (week of Jun 9, 2020)
- FC Direction (Jun 11, 2020)
 - Suspension period expires in Western and Atlantic Canada on June 15, 2020 (not in Ontario, QC and Territories)
 - Hearings not to be held before Mon, July 13, 2020
 - Hearings to resume via videoconference (or exceptionally by teleconference)
- FCA Direction (Jun 11, 2020)
 - Suspension continues, but will be lifted with respect to “Selected Files”
 - Selection based on a) age of file, b) situation in the region c) capacity of court staff d) urgency of file e) other considerations
 - Parties may bring motion to have files “Selected” or “De-selected”

A few observations:

- COVID-19 has forced everyone, including the courts to adapt in real-time
- It is not “business as usual” but we still must have “business, as usual”
- Expectation that the bar will be collaborative and adapt along with the court
- Courts have the ultimate say in the management of their own processes

“I’m ready for my close-up...”

Some practical tips for the virtual litigator:

- Learn how to use your new tools (Zoom, PDF-creators, etc.)
- Practice makes perfect
- Build in more time for preparation
- Build in more time for hearing/process
- Be kind
- Recognize that there are challenges *and* benefits to litigating virtually

The Next Act: What happens next?

Option One: Back to life as we knew it

- A return to default practices: In-person hearings, paper records

Option Two: Seizing an opportunity for change

- Examination and a more open questioning of default practices and adapting these for the longer-term
- Less in-person hearings, paperless records

Option Two: Seizing the opportunity

“It is ... beyond controversy that the COVID-19 pandemic has created extraordinary circumstances to which we must all adapt as best we can.”

- Roberts JA, *4352238 Canada Inc v SNC-Lavalin Group Inc.*, 2020 ONCA 303,

“one positive aspect ... is the chance, or the opportunity, to use more technology for the justice system in Canada.”

- Wagner CJ (June 9, 2020)



Becoming Nimble

Alternatives to in person hearings and assessing credibility remotely

Videoconference Hearings are Nothing New

- Immigration Refugee Board since early 2000, including credibility: *X (Re)*, 2004 CanLII 56771 (CA IRB)
- Courts too, including in criminal context, where highest degree of fairness required: for ex: *R. v. Gibson* (2003) B.C.J. No. 812 (B.C. Supreme Court)

Along comes COVID-19

- Should administrative tribunals flock to Zoom? Can we do our work by videoconference?
- Factors to consider:
 - Delays and access to justice
 - Procedural fairness and credibility

Ontario labour decisions since COVID

- Overwhelmingly requiring matters to proceed by videoconference, even over counsel's objections.
- Ontario arbitrators, labour board saying we can assess credibility remotely.
 - Demeanour: we can assess by video, we have the technology
 - All other credibility factors can also be assessed remotely

Some examples

- *TTC v ATU, Local 113*, 2020 CanLII 28646
- *Labourers' International Union of North America v Archer Traffic Control Inc.*, 2020 CanLII 30896 (OLRB)
- *Lakeridge Health Corporation v ONA*, 2020 CanLII 31785
- *Toronto District School Board v Ontario Secondary School Teachers' Federation*, 2020 CanLII 32260

Examples from other provinces

- International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union No. 725 v Technical Workforce Inc., 2020 CanLII 27334 (AB LRB) → early April, decision not to proceed
- J.D. c. Tribunal administratif du Québec, 2020 QCCS 1658 (CanLII) → proceed by videoconference with consent of parties

Practical Tips

- Directions to counsel: exchange of documents in advance of matter, electronic book of documents with numbered pages, ideally with hyperlinks
- Directions to witnesses (oral or written order): No recording, room alone with closed door/alternative, no use of electronic device (other than to testify), camera and microphone must remain on, no documents before them other than exhibits

"Alice, turn your video on. No, it's the button on the bottom. Not that one, over to your left FFS. Jan, you're on mute. UNMUTE YOURSELF!"



Adjudicator's survival guide to videoconferencing

- Make sure you are comfortable with the videoconferencing platform (services available)
- Internet connection (consider cable)
- Dry run with counsel to make sure everyone is comfortable
- Announcing yourself before entering a breakout room
- Gallery vs. Individual view, instructions re muting and turning off video, "pin" the speaker
- Take breaks and step away from your computer
- Accommodating parties' and counsel's needs: start time, breaks, etc.

Resources

- OLMAA : Tripartite Guidelines for Videoconference Labour Mediation and Adjudication in Ontario
- *Rovi Guides, Inc. v. Videotron Ltd.* 2020 FC 637, Federal Court provides directions document submission and witness testimony.
- <http://www.conference-des-arbitres.qc.ca/documents/files/communique-de-la-conference-7-coronavirus-covid-19-21-mai-2020.pdf>

AUDI
ALTERAM
PARTEM



Canadian Association of Refugee Lawyers v MCI, 2019 FC 1126

- CARL challenges use of 4 jurisprudential guides issued by Chairperson to members of the Immigration and Refugee Board (IRB).
- Court identifies the following factors to consider in assessing whether guide likely to improperly influence IRB members:
 - the nature of the language establishing the expectation,
 - whether it is made clear that each case must be adjudicated on the basis of its specific facts,
 - the extent of monitoring of compliance, and
 - whether a reasonable apprehension arises that adverse consequences would likely result if the guide is not followed (see para 2)

Court recognises value of jurisprudential guides and confirms guides may address issues of fact

- consistent with the broad objective of dealing with all proceedings as informally and quickly as the circumstances permit, so long as this is not contrary to considerations of fairness and natural justice. (para 71)
- not limited to issues of mixed fact and law - “jurisprudence” contemplates decisions issued by a Court in respect of factual issues, as well as issues of law and of mixed fact and law. (para 79)

Guides fetter discretion

- To the extent that any of the guides do or did in fact pressure members to either adopt factual conclusions **or provide a reasoned justification for not doing so**, I agree that this would constitute an improper encroachment on their adjudicative independence.
- Court says one guide is ok but three are not.
- Because the statement of expectations which accompanied them says:

(...) members “are expected to apply Jurisprudential Guides in cases with similar facts or provide reasoned justifications for not doing so.”

What Court says was wrong (paras 93, 134 137, 139)

- (...) limits are reached at the point where an administrative guideline or other tool goes beyond simply drawing attention to factual information or encouraging Board members to take it into account, and instead requires, induces, pressures, or coerces them to make or to follow particular factual findings.
- there was “no evidence that Board members would face sanctions or other adverse consequences for not applying any of the impugned JGs, common experience would suggest that at least some Board members would feel pressured by such repeated statements of expectation from their superiors regarding how they should conduct themselves”.
- The problem was that “at least some (...) members would feel pressured to adopt the factual determinations in the JG” because the policies to be considered were not clearly identified as non-binding.

Key takeaways

- Jurisprudential guides are a useful tool to promote consistency in decision making
- Same facts should mean same result
- BUT must make very clear that the decision maker is completely free to depart from the guide based on the particular facts of the case before her. Pressure may be found in repeating or articulating expectations.
- Members departing ought to anticipate Vavilovian reasons review if decision proceeds to FC Must provide logical and intelligible reasons to explain the result

Shuttleworth v Ontario (SLASTO), 2019 ONCA 518

- Shuttleworth involved a challenge to SLASTO's decision review process and the involvement of the executive chair in that process.
- The member changed her decision after the decision was reviewed. (Unidentified whistleblower supplied copies of drafts to Shuttleworth's counsel)
- Nothing on the record to confirm the member did not expressly agree to review by the EC.
- There was no written decision review policy in effect.
- The Court found that these circumstances gave rise to a reasonable apprehension that adjudicators were compelled to consult (at para. 33).

What was wrong here? (at para 39)

- The absence of a formal policy protecting the adjudicator's right to decline to participate was significant in an environment where the procedure manual made no reference to the voluntariness of review by the executive chair and [staff counsel]'s own evidence was that adjudicators were expected to participate in the review process. While [counsel]'s evidence was that there was no means to compel adjudicators to participate, he did not give evidence that SLATSO communicated to adjudicators that they were free not to have their drafts reviewed by the executive chair. The principal safeguard the appellants point to is the executive chair's inability to lawfully compel the adjudicator to change her mind. However, *Consolidated-Bathurst* establishes that this is not a sufficient safeguard.

What was wrong here? (at para 50)

- EC's imposition of review breached the SCC's rules articulated in Consolidated Bathurst, Tremblay and Ellis-Don. Rejects argument that EC did not impose the review on the adjudicator because counsel forwarded the decision to her.
- "The fact remains that, by deciding to provide comments on the decision without seeking the adjudicator's permission, the executive chair imposed the review on the adjudicator."

Key takeaways

- Best practice – written policy on peer reviews.
- Confirm that review is voluntary and identify limits of review – (facts? Review issues of law and policy? Only review for coherence and clarity? Review for consistency?)
- Consider whether Chair or other person with power to recommend reappointment should review drafts. If yes, what is the scope of chair review?

Ethics and Adjudication

- Just a couple more comments about Smith



Back to Smith v Canada

- The CJC found:
- (...) Justice Smith has an ethical obligation as a judge to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office. There were also reputational risks to Justice Smith and to the Ontario Court of Justice associated with lending their support to the Faculty of Law at Lakehead during a time of crisis.
- In the circumstances facing Justice Smith in 2018, notwithstanding his genuine desire to help the Faculty of Law at Lakehead, his decision to accept an appointment as Interim Dean (Academic) at the Faculty of Law was ill-advised.

CJC's findings based on ...

- (...) the underpinning for this conclusion was: (1) media reports that the former Dean had threatened litigation; (2) the possibility of litigation should the Law Society of Ontario remove the Law School's accreditation; (3) "extensive" media reports "which included allegations of a failure on the part of Lakehead to fulfill the Faculty of Law's Indigenous mandate and some criticism of Justice Smith's appointment from Indigenous leaders;" and (4) that prior to accepting the appointment, the CJC Executive Director informed Justice Smith that it could be a matter for the CJC's consideration.

Court rejects because ...

- Court found Justice Smith had the consent of his Chief Justice and the Minister of Justice to accept the appointment.
- Justice Smith confirmed he would recuse himself from any litigation related to the former Dean or the University. Cites Yukon – little likelihood such conflicts would arise. Court finds litigation concerns “entirely speculative and unworthy of consideration”.
- Again citing Yukon – CJC failed to examine whether Justice Smith’s conduct unnecessarily exposed him to criticism or attack on the basis of **an informed public exercising mature judgment**.
- Media coverage was “exaggerated”
- The association of a judge with any extra-judicial organization will, to some degree, bolster its reputation, status and public confidence. It is for precisely that reason that law schools seek to have judges teach. If that were the test, then no judge could ever join or participate in any extra-judicial civic, religious, or charitable organization. (at para 130)

Key Takeaways

- Read Yukon. Re-read Yukon.
- Easy to speculate when doing your risk analysis. Be sure you are working with facts.
- Consider whether safeguards or restrictions short of absolute refusal will protect against or limit any conflict.