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Reasons: Where It Begins and Ends

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When regulatory decisions are challenged in court, the starting point is the decision-maker's reasons. Recent case law from the Supreme Court of Canada reminds us just how important reasons are in the review of administrative decisions.

Mason v. Canada

On September 27, 2023, the Supreme Court released its decision in *Mason v. Canada* ("***Mason***").[1] In this case, the Immigration Appeal Division (the "**IAD**") determined that two foreign nationals who had been charged with violent offences were inadmissible to Canada under the *Immigration and Refugee Protection Act*.[2] The issue was whether the violent offences in question (attempted murder in one case and intimate partner violence in another) related to "national security". Specifically, the applicants argued that the offences must be more than ordinary violent acts and require a national security connection. The stakes for these individuals were high as being rendered inadmissible on security grounds would likely result in deportation.

The IAD reviewed the governing legislation and held that the applicable legislative provisions did not require a connection between the violent offences and a threat to national security for a finding of inadmissibility. The Federal Court disagreed, taking issue with, among other things, the IAD's interpretation of the *Immigration and Refugee Protection Act*. The Federal Court of Appeal restored the decision of the tribunal, finding that the IAD's decision, and specifically, its interpretation of the legislation was "reasonable". The Supreme Court, however, overturned the decision of the Federal Court of Appeal, holding the IAD's decision was unreasonable.

In *Mason* the Supreme Court tackled a number of issues including the question of standard of review. It confirmed "reasonableness" remains the presumptive standard of review even in the immigration context where the Federal Court certifies a "serious question of general importance" for determination by the Federal Court of Appeal. But, beyond the standard of review and the specific intricacies of the case, the Supreme Court said many important things about reasons:

- The Supreme Court emphasized that, following its earlier decision in *Canada (Minister of Citizenship and Immigration) v Vavilov* ("***Vavilov***")[3], judicial review on a reasonableness standard must begin with the decision-maker's reasons. Judicial review, the Court reminds us, is a "reasons-first" exercise.[4] The Supreme Court was critical of the approach of both lower courts: the Federal Court adopted its own freestanding interpretation of the legislation and then evaluated the administrative decisions against that interpretation; the Federal Court of Appeal began its analysis with a "lay of the land", reviewing the context and purpose of legislation *before* turning to the administrative decision-makers' reasons.
- The Supreme Court also emphasized, again following its earlier decision in *Vavilov*, that reasons must be responsive to the parties' submissions. Reasons are the primary way that an administrative decision maker demonstrates that it listened to the parties. In this case, the IAD failed to address two important points of statutory context that the applicant had raised. While reasons may "implicitly" address parties' submissions, the Supreme Court found, in this particular case, the IAD's failure to address "core planks" in the applicant's argument while addressing various other points, cast real doubt as to whether the IAD was alert and sensitive to the two key arguments raised by the applicant.[5]

- Finally, the Supreme Court emphasized, once again following its earlier decision in *Vavilov*, that reasons take on a heightened importance where the stakes are high. The Supreme Court reminded administrative decision-makers that its reasons must demonstrate that it has considered the consequences of the decision and that those consequences are justified in light of the facts and law. In this case, the interpretation of the provision in issue affected whether the two applicants may be subject to deportation proceedings. The IAD's reasons had to reflect these stakes.[6]

Ultimately, in *Mason*, the Court concluded there was only one reasonable interpretation of the legislation, and it was not that proffered by the IAD. The decision of the IAD could not stand.

The Importance of Reasons is Not New

The Supreme Court's focus on reasons is certainly not novel. *Mason* reaffirms the existing hallmarks of a reasonable decision which include justification, transparency, and intelligibility, and makes clear that a reasonable decision must be justified given the facts and law relevant to a decision. Importantly, where the decision is challenged, a reviewing court should consider both the outcome and the reasoning process of the decision-maker.

While reasonableness is not a line-by-line treasure hunt for error, the reviewing court must be able to trace the decision makers' reasons without encountering any fatal flaws in its overarching logic.[7]

Reasons Should Address Central Arguments

Not surprisingly, the principles articulated in *Vavilov* and emphasized in *Mason* have played out in the judicial review of regulatory decisions.

Take the 2022 decision of the Divisional Court in *Young v College of Nurses of Ontario* ("***Young***").[8] In that case, Ms. Young, a nurse, was the subject of an investigation arising from issues related to her clinical documentation, her lack of familiarity with new or complicated equipment and errors in fluid balance calculation. Following an investigation, the College's Inquiries Complaints and Reports Committee (the "**ICRC**") issued her a caution finding there was sufficient information to support the allegation of a "consistent lapse" in her practice which "exposed patients to significant risk of harm".[9]

The judicial review also involved a second matter pertaining to Ms. Ghafur, a nurse who was subject to an investigation arising from deficiencies in her clinical documentation and her failure to appropriately manage labour. In that matter, the ICRC issued her a caution regarding documentation, medication, and professional standards, and required her to complete a specified continuing education and remediation program.

In both these cases, the nurses raised a concern that delay in the investigation compromised their ability to respond, and that they had been practising without complication or incident since the incidents in question.

In Ms. Young's case, she also submitted that her practice at the time of the incidents in question had been directly and adversely impacted by her mental health disability. She made submissions based on the *Human Rights Code* and how it ought to be considered in disposing of the investigation.

Of course, ICRC is a screening committee. It does not make findings of fact or law. However, upon review, the Divisional Court found that the decision was unreasonable because it failed to address the central arguments – delay and, in one case, human rights considerations- that had been raised by the nurses in their responses to the investigation. In the absence of reasons, the Court could not ascertain whether the ICRC rejected the nurses' submissions or whether they did not consider them.

Notably, the Court did not conclude that the remedial dispositions were not available to the ICRC. Rather, the concern animating the decision was that the Court was unable to determine whether the ICRC turned its mind to the nurses' response.[10]

Are the Reasons Responsive Enough?

Mason reminds us to ensure central arguments raised by registrants are addressed in decision-makers reasons. But when has the decision-maker addressed those arguments sufficiently?

The Divisional Court provided some guidance on this in the 2022 decision of *Pitter v. College of Nurses of Ontario and Alviano v. College of Nurses of Ontario* ("***Pitter***").[11] In that case, two nurses were cautioned by the ICRC and required to undergo specified continuing education and remediation programs, following an investigation into their social media and public commentary related the COVID-19 pandemic. Among other things, the nurses posted support for conspiracy theories that linked COVID-19 vaccinations to cancer, Bill Gates, and the ability for government to track and control vaccinated citizens.

On review before the Divisional Court, the nurses argued that the decisions of the ICRC were unreasonable because the ICRC did not undertake a robust analysis of their right to freedom of expression protected by the *Charter.*

The nurses' challenge was unsuccessful. The Divisional Court upheld the ICRC's decision, noting the ICRC did consider their *Charter* arguments with the required sufficiency and in accordance with the appropriate legal framework (i.e. the *Doré*/*Loyola* analysis). The nurses' submissions before the ICRC on the potential *Charter* infringement comprised only a small portion of their argument. In both cases, the ICRC specifically acknowledged that members enjoy a right to free expression. Although the ICRC ultimately found it was appropriate to take remedial action, it did so only after taking into account the nurses' rights to free expression and having engaged in the required balancing exercise.

In upholding the decision, the Divisional Court found that a detailed analysis of *Charter* implications was not necessary given the remedial nature of the decision and the fact that the ICRC did not hear witnesses or receive sworn evidence. The Court found no fault in the reasons of the ICRC.

What are the Stakes?

The sufficiency of reasons was also considered by the Divisional Court in the recent decision in *Peterson v. College of Psychologists of Ontario* ("***Peterson***").[12] This case involved Jordan Peterson – a controversial public figure and registered psychologist. The ICRC ordered Dr. Peterson to complete a specified continuing education and remediation program after finding that comments he made in public forums were "degrading, demeaning, and unprofessional" and posed the risk of undermining public trust in the profession.[13]

Mr. Peterson sought judicial review alleging that the ICRC, in requiring him to undergo remediation, had failed to engage in a robust balancing required under the *Doré*/*Loyola* framework. Moreover, he argued that the ICRC's decision was unreasonable in that it did not meet the standards of justification, transparency and intelligibility that were required, having regard to the facts and legal rights at stake.

In *Peterson*, much like *Pitter*, the Divisional Court found that the ICRC had applied the framework outlined in *Doré*. On the question of the sufficiency of reasons, the Court stated that the scope and extent of the ICRC's reasons must be considered in the context of its role as a screening committee. The stakes before the ICRC are not as high as they are before discipline panels. A reasonableness review under *Vavilov* is "expected to reflect the stakes of the decision." Relying on *Pitter*, the Court went on to state that where a decision has a particularly harsh consequence to the individual, there is a higher onus on the decision-maker to explain its decision. The corollary is that where, a screening committee requires a remedial and educative response to a member's conduct, a reasonableness review permits less detailed reasons.

Screening committees do not perform adjudicative functions akin to courts. Regulatory bodies are comprised of experts in the field, not judges or lawyers. The Divisional Court affirmed that in this context, the reasons of administrative decision-makers must not be assessed against a standard of perfection. Reasons need not include *all* arguments raised, nor should it be expected or required that administrative decision-makers "deploy the same array of legal techniques that might be expected of a lawyer or judge".[14] Of some comfort, the Divisional Court emphasized that the focus on sufficiency of reasons should not be inappropriately used as a tool to reduce deference and respect for the role and decisions of expert administrative bodies, having regard to the context in which those decisions are made and their consequences for the individual.[15]

Take-aways for Decision-Makers

Where does this leave regulatory bodies going forward? While there is ample support for the notion that reasons do not need to be perfect, it is important to bear in mind that sometimes, whether a decision stands or falls will come down to the reasons.

Here are some considerations when preparing reasons arising from this discussion. Decision-makers should ask themselves:

1) Have the reasons addressed the parties' submissions? While not every throw-away line in a detailed submission requires a treatise, decision-makers should ensure to give sufficient consideration to central arguments. Reviewing courts are less likely to accept that these arguments were considered implicitly.

2) Assuming the reasons do address the registrant's submissions, do they address the submissions sufficiently? In answering this, consider the stakes:

- What is the nature of the decision being made? Is the decision remedial in nature? Or disciplinary? It is burdensome or relatively minor?
- Is the decision implicating a member's ability to practice the profession or is it of an educational or remedial nature?

Generally speaking, the higher the stakes the more exacting the reasons.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

[1] *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 (**"*Mason*"**).

[2] *Immigration and Refugee Protection Act*, SC 2001, c 27.

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

[4] *Mason* at para 60.

[5] *Mason* at para 97.

[6] *Mason* at para 81.

[7] *Vavilov* at para 102.

[8] *Young v. College of Nurses of Ontario*, 2022 ONSC 6996.

[9] *Young* at para 6.

[10] *Young* at para 44.

[11] *Pitter v. College of Nurses of Ontario and Alviano v. College of Nurses of Ontario*, 2022 ONSC 5513 ("***Pitter***").

[12] *Peterson v. College of Psychologists of Ontario*, 2023 ONSC 4685 ("***Peterson***").

[13] *Peterson* at para 3.

[14] *Peterson* at para 35.

[15] *Peterson* at para 74.

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