One Year of *Vavilov*

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It is hard to believe that almost twelve months have passed since the Supreme Court of Canada handed down its decision in *Canada (Immigration and Citizenship) v Vavilov*.[1] It has been quite a year and – I write on the eve of the American presidential election as COVID-19-sweeps Europe back into lockdown – it ain't quite over yet. Canadian courts have remained busy despite the pandemic, mostly switching effortlessly to remote hearings. The flow of judicial review decisions has continued. At the time of writing, *Vavilov* has been cited almost 1,500 times.

Unusually, for a year in review paper, there is very little 'new' jurisprudence from the Supreme Court. *Vavilov's* 'big bang' is the event around which Canadian administrative law has revolved for the last twelve months.

In this paper, I set out the framework established in *Vavilov* and analyze the operationalization of its key components.

There are two components to the *Vavilov* framework: the reasonableness standard; and the rules for selecting the standard of review. In this paper, the reasonableness standard is discussed first, the selection of the standard of review second, because some of the issues relating to the selection of the standard of review cannot be adequately understood without prior knowledge of the content of the reasonableness standard. Moreover, reasonableness is the presumptive standard of review, subject to exceptions based on "institutional design" and the "rule of law", so it makes sense to begin with explaining its content.

The last issue addressed in this paper is remedial discretion, a subsidiary part of the *Vavilov* framework but one which, nonetheless, is likely to be significant in many cases.

One preliminary comment is in order. The goal of *Vavilov* was to simplify and to clarify. The majority simplified the selection of the standard of review and clarified the application of the reasonableness standard. In addressing difficult issues which arise in applying the framework, judges should pay careful attention to the goals of simplification and clarification. Keeping these goals in mind is the best way to ensure that the *Vavilov* framework is as workable and durable as its creators intended.

[1] 2019 SCC 65 [*Vavilov*]. See generally, Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) 33 *Canadian Journal of Administrative Law & Practice* 111 (and the other contributions to the same volume); John Evans, "View from the Top: the New Law on Standards of Review", *Brown and Evans, Judicial Review of Administrative Action* (supplement, 2020); David Mullan, "Judicial Scrutiny of Administrative Decision Making: Principled Simplification or Continuing Angst?" (2020) 50 *Advocates' Quarterly* 423. See further the analyses of Professors Flynn, Ford and Liston, collected at Paul Daly, "Guest Posts from the West Coast", *Administrative Law Matters*, 27 April 2020, available online: <https://www.administrativelawmatters.com/blog/2020/04/27/guest-posts-from-the-west-coast/>.

Applying the Reasonableness Standard

Methodology

As the *Vavilov* majority acknowledged, in its previous decisions the Supreme Court had provided "relatively little guidance on how to conduct reasonableness review in practice".[2] It made up for this in *Vavilov*, setting out a detailed methodology which is bound to be welcomed by first-instance judges required to apply the reasonableness standard (especially in the provinces, where judicial review is a relatively small proportion of the workload of the superior courts).[3] In their hard-hitting concurring reasons, Abella and Karakatsanis JJ. charged the majority with "reviv[ing] the kind of search for errors that dominated the pre- *C.U.P.E. v N.B. Liquor Corporation* era".[4] Although there are some differences of detail, and some internal tensions in the majority's articulation of a new methodology for reasonableness review, on balance the majority is right that the dissent's approach is not "fundamentally dissimilar".[5]

On the key propositions underpinning the methodology of reasonableness review, all nine judges were in fact *ad idem*: reasonableness review is robust; reasons are fundamental to the legitimacy of administrative decision-making; unreasonableness must be demonstrated by the applicant; reasonableness review should begin with the reasons given by the administrative decision-maker; reasonableness review is contextual; and reasonableness review should be conducted with a healthy appreciation that "'[a]dministrative justice' will not always look like 'judicial justice'":[6]

- "Reasonableness review is…a robust form of review";[7]
- "where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts";[8]
- "The burden is on the party challenging the decision to show that it is unreasonable";[9]
- "a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem…A principled approach to reasonableness review is one which puts [the decision-maker's] reasons first";[10]
- "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";[11] and

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[2] *Vavilov, supra* note 1 at 73.
[3] See, for example, the remarkable episode described in *Olineck v Alberta (Environmental Appeals Board)*, 2017 ABQB 311 at para 15-33, where the parties were sent away by the judge to read academic literature on reasonableness review before making further submissions on the application of the standard to the decision at issue.
[4] *Vavilov, supra* note 1 at 199.
[5] *Ibid* at para 75.
[6] *Vavilov, supra* note 1 at 92.
[7] *Ibid* at para 13. See the concurring reasons at para 294.
[8] *Ibid* at para 81. See the concurring reasons, at para 291, 296.
[9] *Ibid* at para 100. See the concurring reasons at para 312.
[10] *Ibid* at para 83-84. See the concurring reasons at para 306, 313.
[11] *Ibid* at para 90. See the concurring reasons at para 292-293.

- "In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision".[12]

In addition, the majority insisted that where reasons are defective, a reviewing court is not "to fashion its own reasons in order to buttress the administrative decision".[13]

Having set out the methodology of reasonableness review, the majority went on, at some length, "to consider two types of fundamental flaws" but emphasized that these flaws are simply "a convenient way to discuss the types of issues that may show a decision to be unreasonable",[14] that is, where "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency".[15] First, the absence of "reasoning that is both rational and logical",[16] such as reasons which "fail to reveal a rational chain of analysis", ones which "read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point",[17] or ones which "exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise".[18] Plainly, these are intended as examples which *illustrate* a general point — the absence of logic and reason — and not as a set of categories into which dubious administrative decisions can be pigeonholed by reviewing courts.[19] As a conceptual matter, there is not much else to say about this type of fundamental flaw. The action is, mostly, going to be in respect of the second type.

Second, a decision must be "justified in relation to the constellation of law and facts that are relevant to the decision".[20] The majority emphasizes that it is impossible to "catalogue" all the considerations which will be relevant to the constellation of particular individual cases but sets out a set which will "generally be relevant":

> …the governing statutory scheme; other relevant statutory or common law [including international law]; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies.[21]

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[12] *Ibid* at para 93. See the concurring reasons at para 297-299.
[13] *Ibid* at para 96.
[14] *Vavilov*, *supra* note 1 at para 101.
[15] *Ibid* at para 100.
[16] *Ibid* at para 102.
[17] *Ibid* at para 103.
[18] *Ibid* at para 104.
[19] On this point, see generally Hasan Dindjer, "What Makes an Administrative Decision Unreasonable?" (2020) 84 *Modern Law Review* (forthcoming). For examples, see *Syndicat des copropriétaires des Tours de la Rivière - Phase II c. Tribunal administratif du travail*, 2020 QCCS 3004; *Kazembe v Canada (Citizenship and Immigration)*, 2020 FC 856; *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968.
[20] *Vavilov, supra* note 1 at para 105.
[21] *Ibid* at para 106.

That these "elements" are not intended as "a checklist for conducting reasonableness review",[22] clearly emerges from the ensuing discussion where the formulation "may be unreasonable" is repeatedly employed. And, of course, they must be read against the clear guidance set out by the majority (and accepted by the concuFrring judges) on the inherently deferential methodology of reasonableness review.

In what follows, I focus on these legal and factual constraints as elaborated by the Supreme Court in *Vavilov*.

Deference

The methodology of *Vavilovian* reasonableness review is inherently deferential. "*Vavilov* does not constitute a significant change in the law of judicial review with respect to the review of the reasons of administrative tribunals".[23] Indeed, on the whole, the methodology of reasonableness review set out in *Vavilov* is inherently deferential. Of course, reasonableness review is robust and no page of the record will be left unturned, but judicial analysis *must* begin with the reasons for the decision and *respect* the expertise of the administrative decision-maker, with intervention *only* to be countenanced if the decision is *demonstrated* to be unreasonable. This is the essence of deference.

Canada Post Corp. v Canadian Union of Postal Workers,[24] handed down a day after *Vavilov*, is instructive. At issue here was the scope of s. 125(1)(z.12) of the *Canada Labour Code*, pursuant to which an employer shall,

> …in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity…ensure that the work place committee or the health and safety representative inspects each month all or part of the work place, so that every part of the work place is inspected at least once each year

A complaint was filed about Canada Post's compliance with this duty, in relation to employees in Burlington, Ontario. Canada Post took the view that the duty under the *Code* extended only to its local depot, not to all of the carrier routes its employees traipse along to reach letter boxes all around Burlington. The Union favoured a more liberal interpretation, which would encompass the routes and the letter boxes. The stakes here were high, as a determination in favour of the Union would, in principle, have nationwide repercussions. A Health and Safety Officer agreed with the Union, but an Appeals Officer took Canada Post's side at the Occupational Health and Safety Tribunal Canada.

By majority, the Supreme Court upheld the Appeals Officer's decision. Here, Rowe J. noted, the Appeals Officer had provided "detailed reasons" which were, indeed, "exemplary"[25] and "contended with the submissions of the parties throughout his analysis".[26] Crucially, these reasons "amply" demonstrated that

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[22] *Ibid.*
[23] *Radzevicius v Workplace Safety and Insurance Appeals Tribunal*, 2020 ONSC 319 at para 57, *per* Swinton J. See also *Hildebrand v Penticton (City)*, 2020 BCSC 353 at para 26; *Teamsters Canada Rail Conference c Canadian Pacific Railway Company*, 2020 QCCA 729 at para 13.
[24] 2019 SCC 67 [*Canada Post*].
[25] *Ibid* at para 30.
[26] *Ibid* at para 60.

the Appeals Officer "considered the text, context, purpose, as well as the practical implications of his interpretation".[27]

The Appeals Officer had not considered, because he had not been referred to it, another provision of the *Code* which deals with the concept of control. This, Rowe J. held, was not fatal, not least because the Appeals Officer had not been referred to it but because, more generally, "[f]ailure to consider a particular piece of the statutory context that does not support a decision maker's statutory interpretation analysis will not necessarily render the interpretation unreasonable".[28] From there, the conclusion that the Appeals Officer's decision was reasonable was unsurprising and, perhaps, inevitable.

In dissent, Abella J. (with whom Martin J. agreed) took the view that s. 125(1)(z.12) was:

> …an unambiguous dual legislative direction to employers that their safety obligations — including the inspection duty — apply both to *workplaces* they control *and*, if they do not control the actual workplace, to every *work activity* that they do control to the extent of that control.[29]

There would be much to be said for this approach, if the court were indeed interpreting the provision *de novo*, without the benefit of the Appeals Officer's reasons. But given that the Appeals Officer had provided detailed reasons which responded amply to the fulsome submissions made by Canada Post and the Union, those reasons were properly the starting point for the Supreme Court's analysis, not the text of the provision. In my view, Rowe J.'s approach is more faithful to the *Vavilov* framework than that of Abella J.

Thus *Vavilov* teaches that judicial review should be **neither a line-by-line treasure hunt for error**[30] **nor an effort in redoing the work of the administrative decision-maker**.[31] Reasons for administrative decisions should be read fairly, with due attention to the decision-making context and the arguments made before the decision-maker.[32] Departures from prior decisions are entirely possible, as long as adequate justification is provided.[33] Some serious error or violation of the legal and factual constraints on the

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[27] *Ibid* at para 43.
[28] *Ibid* at para 52.
[29] *Ibid* at para 78 [emphasis in original].
[30] See *Radzevicius*, *supra* note 24 at para 35-39; *Mudjatik Thyssen Mining Joint Venture v Billette*, 2020 FC 255 at para 59-77; *Bashir v Canada (Attorney General)*, 2020 FC 278 at para 29; *9149-4567 Québec inc. (Villa Berthier) c Tribunal administratif du travail*, 2020 QCCS 2262 at para 38-40; *Stavropoulos c Canada (Procureur général)*, 2020 CAF 109 at para 39; *Paulo c Canada (Citoyenneté et Immigration)*, 2020 CF 990 at para 37; *Tiben v Canada (Citizenship and Immigration)*, 2020 FC 965 at para 24-25; *Attorney General for Ontario v Information and Privacy Commissioner*, 2020 ONSC 5085.
[31] See *Bombardier Aéronautique inc. c Commission des normes de l'équité, de la santé et de la sécurité au travail*, 2020 QCCA 315 at para 30-46; *Yassin v Canada (Attorney General)*, 2020 FC 237 at para 42-43; *Mohammed v Canada (Citizenship and Immigration)*, 2020 FC 234, *passim*; *Huang v Canada (Citizenship and Immigration)*, 2020 FC 241 at para 27; *Singh v Canada (Citizenship and Immigration)*, 2020 FC 328, *passim*; *Theivendram v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 419 at para 40; *Girouard v Canada (Attorney General)*, 2020 FCA 129 at para 42-46; *IN8 (The Capitol) Developments Inc. v Building Kingston's Future*, 2020 ONSC 6151; *Service Employees International Union - West v Saskatchewan Health Authority*, 2020 SKCA 113.
[32] See *e.g. Calgary (City) v Sunridge Mall Holdings Inc*, 2020 ABQB 148; *Saleh v Canada (Citizenship and Immigration)*, 2020 FC 457 at para 15; *Ontario v Association of Ontario Midwives*, 2020 ONSC 2839 at para 90-91.
[33] See *e.g. Canada (Public Safety and Emergency Preparedness) v Shen*, 2020 FC 405; *Canada (Attorney General) v Honey Fashions Ltd.*, 2020 FCA 64; *Centre intégré de santé et de services sociaux de Chaudière-Appalaches c Lévesque*, 2020 QCCS 1854 at para 60; and *Nation Rise Wind Farm Limited Partnership v Minister of the Environment, Conservation and Parks*, 2020 ONSC 2984 at para 83-85.

decision-maker must be demonstrated.[34] And the Quebec Court of Appeal has signalled, in excellent reasons by Moore JA, that it is on the look-out for unfaithful applications of reasonableness review, so-called disguised correctness review.[35]

But it is certainly arguable that *Vavilov* has set a slightly higher bar for decision-makers than the pre-*Vavilov* regime, in respect of justification, demonstrated expertise, responsiveness and contemporaneity.[36] Whilst most respectable administrative tribunals, those engaged in issue-driven analysis, point-first writing and active adjudication, are likely to continue to scale this bar with ease, other bodies might find it more imposing. Those operating in high-volume areas of decision-making (such as immigration) and those used to receiving a high degree of deference on the basis of their expertise (such as labour arbitrators) or electoral legitimacy (such as ministers) are, in my view, going to need to learn to jump higher than they have in the past.

Justification and Demonstrated Expertise

First, the decision must be ***justified*** in light of the legal and factual constraints on the decision-maker. As the Federal Court explained in *Ortiz v Canada (Citizenship and Immigration)*, whereas previously reviewing courts began with the outcome and then looked back at the reasons, *Vavilov* instructs them "to start with the reasons, and assess whether they justify the outcome".[37] There has been, as Elson J remarked in *Pierson v Estevan Board of Police Commissioners*, "a shift in focus from the *justifiability* of the decision maker's conclusion to whether it is actually *justified* by a rational and coherent chain of analysis".[38] A decision-maker must therefore explain how its decisions are justified, by laying out the legal framework and the relevant facts before reaching a conclusion which is intelligible in light of the law and the facts.

Second, the decision must be the product of the ***demonstrated expertise*** of the decision-maker. Prior to *Vavilov*, decision-makers benefited from a thoroughgoing presumption of expertise.[39] A decision-maker must therefore demonstrate that it has applied its expertise, by explaining how its specialized knowledge of the field leads or guides it to the conclusions underpinning its decisions.

The decision of the Ontario Court of Appeal in *Romania v Boros*[40] warrants a special mention as it was issued in the context of extradition proceedings, where the executive has typically been given a wide margin of appreciation. Although the Minister had provided a lengthy, 20-page letter ordering the surrender of the applicant to Romania, he did not provide an adequate justification for an eight-year delay in seeking the extradition. The applicant had been convicted in absentia in 2000; there was a dispute about the state of knowledge of the Romanian authorities and, in particular, whether they knew in 1998 that the applicant was in, or soon to arrive in, Canada, long before making the extradition request in 2008. That the "combined Canadian delay of nearly 8 years is not addressed beyond an implicit general claim

[34] *Syndicat canadien de la fonction publique, section locale 1108 c CHU de Québec — Université Laval*, 2020 QCCA 857 at para 86-97.
[35] See *Syndicat de l'enseignement de Champlain c Commission scolaire Marie-Victorin*, 2020 QCCA 135 at para 41, 65; *Syndicat des métallos, section locale 9449 c Glencore Canada Corporation*, 2020 QCCA 407 at para 33-34.
[36] See Paul Daly, "*Vavilov* and the Culture of Justification in Contemporary Administrative Law" (2020) 100 *Supreme Court Law Review* (2d) (forthcoming).
[37] 2020 FC 188 at para 22.
[38] 2020 SKQB 144 at para 55 [emphasis in original]. See similarly *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968 at para 10, Grammond J: "the decision itself must be justified, not only justifiable".
[39] *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47.
[40] 2020 ONCA 216.

that these matters take a long time" meant the decision was not "adequate".[41] Strikingly, although the Supreme Court held in *Sriskandarajah v United States of America*,[42] that procedural fairness does not require extradition authorities to seek out evidence which may be helpful to an applicant, the Ontario Court of Appeal held in light of *Vavilov* that it was "incumbent upon the Minister to make inquiries" about the point at which the Romanian authorities knew or ought to have known that the applicant was in Canada.[43] As in *Vavilov*, both procedure and substance were considered together, holistically, to justify the conclusion that the decision should be struck down:

> The delay between [1998] and the issuance of the summons on November 15, 2016 – more than 18 years – has not been properly investigated, nor properly explained. In the circumstances, the surrender order cannot stand. On the existing record, we are unable to determine whether the decision to order Ms. Boros' surrender was reasonable. More information is required before we can properly conduct this analysis.[44]

Sriskandarajah was not mentioned but it is entirely possible that it has simply been superceded by the blurring of the line between procedure and substance effected by the emphasis in *Vavilov* on responsiveness.[45] In sum, the Minister did not benefit here from the deference typically afforded elected officials in the sensitive area of deportation, with its implications for Canada's international relations. This is a marker of the significant shift *Vavilov* has required in respect of some types of decision-maker.

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[41] *Ibid* at para 29.
[42] 2012 SCC 70.
[43] 2020 ONCA 216 at para 29.
[44] *Ibid* at para 30. For a similar breach in the process-substance divide, see *A.P. v Canada (Citizenship and Immigration)*, 2020 FC 906 at para 27, quashing an Immigration Appeal Division decision because it disregarded the possibility that a homosexual man and a heterosexual woman could form a conjugal partnership: the decision "was based on a closed mind or bias resulting in an unreasonable assessment of the evidence regarding the possibility of a mixed-orientation couple meeting the criteria for a conjugal partnership". This conclusion is undoubtedly correct; my only observation is that the closed mind standard is applied in the area of bias and fair procedures, not substantive review, and as such *Vavilov* can be seen to have undermined the division between process and substance. As Levesque JA put it in *Procureur général du Québec c P.F.*, 2020 QCCA 1220 at para 53, « Le droit d'être entendu se répercute … dans la révision du mérite d'une décision administrative ».
[45] Compare the more restrained approach in *Beaumann v Canada (Minister of Justice)*, 2020 BCCA 124 but note that this matter had already been up and down the British Columbia court system on a number of previous occasions, so is perhaps to be limited to its special facts. See also *Begum v Canada (Citizenship and Immigration)*, 2020 FC 162 (ministerial refusal to approve a provincially nominated visa application); *Salmonid Association of Eastern Newfoundland v Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 34 at para 64 (unjustifiable departure from previous decisions); *Gomes v Canada (Citizenship and Immigration)*, 2020 FC 506 (Refugee Appeal Division failed to engage with the reasons the Refugee Protection Division provided for refusing the applicant's claim); *Fatime v Canada (Citizenship and Immigration)*, 2020 FC 594 at para 21-22 (semble); *Nation Rise Wind Farm Limited Partnership v Minister of the Environment, Conservation and Parks*, 2020 ONSC 2984 (Minister unreasonably raised new issues on an appeal which was supposed to involve simply a review of the record for error); *Al Bardan v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 733 (Refugee Appeal Division failed to engage with central points of the applicants' case); *Canada (Attorney General) v Poirier*, 2020 FCA 98 at para 17-19 (Appeal Division of the Social Security Tribunal did not engage adequately with the General Division's decision to disallow a claim); *J.D. c Tribunal administratif du Québec*, 2020 QCCS 1658 (failure to answer a central question raised before the tribunal); *Procureur général du Québec c. P.F.*, 2020 QCCA 1220 at para 93-97 (failure to explain a departure from a valid administrative policy); *Poirier c. Canada (Procureur général)*, 2020 CF 850 at para 39 (failure to engage with evidence which undermined the decision-maker's conclusion).

Responsiveness

Third, the decision must be ***responsive*** to the central points raised before the decision-maker who must, indeed, grapple with key arguments and evidence.

For example, in *Langlais c Collège des médecins du Québec*, it was unreasonable for the Collège to fail to address the regulatory provision which a doctor invoked to support his application for recognition as a specialist in internal medicine (necessary because, in 2012, the Collège had introduced more stringent standards in this regard).[46] Similarly, in *Patel v Canada (Citizenship and Immigration)*, Diner J noted that *Vavilov* requires "basic responsiveness" to the evidence presented (and found it lacking here);[47] in *Samra v Canada (Citizenship and Immigration)*, Favel J found a decision unreasonable because it "lacked analysis": "the officer's decision is merely a recitation of the evidence before him followed by a conclusion";[48] in *Li v Canada (Citizenship and Immigration)*, Fuhrer J struck down a sparsely reasoned study permit decision issued by a line officer who failed to "engage" with the applicant's evidence;[49] in *Slemko v Canada (Public Safety and Emergency Preparedness)*, Walker J held that brief reasons for refusing a humanitarian and compassionate application were unreasonable as they failed to consider and weigh all of the applicant's submissions;[50] and in *Albrifcani v Canada (Citizenship and Immigration)*, Strickland J noted that key findings were not justified by reference to the record, with an undefined term "QA" playing an important role.[51]

These Federal Court cases all addressed decisions made by line decision-makers processing hundreds or thousands of applications.[52] In *Rodriguez Martinez v Canada (Citizenship and Immigration)*, McHaffie J explained that while institutional constraints "must inform the assessment of reasonableness",[53] a decision-maker — even a line decision-maker — must nonetheless respond to the evidence.[54] Thus boilerplate statements are now treated with suspicion by the courts. For example, the Federal Court concluded in *Osun v Canada (Citizenship and Immigration)* that a boilerplate comment to the effect that

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[46] 2020 QCCA 134 at para 39-44. See also *Alexander v Canada (Citizenship and Immigration)*, 2020 FC 313 (failure to respond to a mass of evidence was unreasonable), *Alsaloussi v Canada (Attorney General)*, 2020 FC 364 (failure to grapple with contradictory evidence, in a context where the decision (to bar the applicant from passport services for three years) had significant consequences for the individual concerned), *Chaffey v Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 56 at para 50 (failure to grapple with the critical factual issue raised by the applicant), *Commission scolaire francophone, A.B., F.A., T.B., J.J. et E.S. c Ministre de l'Éducation*, 2020 CSTNO 28 at para 113-115 (failure to strike an appropriate balance between the applicants' minority-language rights and the public interest); *The Owners, Strata Plan NW 2575 v Booth*, 2020 BCCA 153 at para 27-28 (failure to respond to arguments made by the parties); *Ville de Sherbrooke c Syndicat des fonctionnaires municipaux et professionnels de la Ville de Sherbrooke*, 2020 QCCA 865 at para 36-38 (lack of responsiveness to and basis in the evidence presented); and *Patel v Canada (Citizenship and Immigration)*, 2020 FC 517 at para 23-26 (where the rejection of a study permit application was not adequately justified in light of the record).

[47] 2020 FC 77 at para 17.

[48] 2020 FC 157 at para 22.

[49] 2020 FC 279 at para 13.

[50] 2020 FC 718 at para 20, 26.

[51] 2020 FC 355 at para 25. Presumably it is obvious enough that this means "Quality Assessment" but quite what the term denoted was obscure: an affidavit would have gone a long way here.

[52] See also *Low v Nova Scotia Police Complaints Commissioner*, 2020 NSSC 113 at para 58; *A.B. v Canada (Citizenship and Immigration)*, 2020 FC 203 at para 53; *Abu Dakka v Canada (Citizenship and Immigration)*, 2020 FC 625 at para 24-25.

[53] 2020 FC 293 at para 13 [*Rodriguez*].

[54] *Ibid at para* 15-17.

the decision-maker had given a piece of evidence "careful consideration" was insufficient, as the decision lacked an "assessment" of the evidence.[55]

Given the emphasis on responsiveness in *Vavilov*, and this line of cases, the analysis in *Tarnow v NWT Legal Aid Commission* came as a surprise.[56] Here, a decision not to allocate work to counsel on a legal aid panel who had worked for the Commission in the previous calendar year was considered to be reasonable in view of the "multiple factors" the Commission had to balance.[57] But the fact that work had so recently been assigned to the applicant called, I think, for specific justification.[58]

Responsive decisions need not be lengthy. Brief explanations can satisfy the responsiveness requirement, as the Federal Court has explained on several occasions.[59] In *Mao v Canada (Citizenship and Immigration)*, Favel J noted that "there is no need for a decision maker to engage with every argument—it is enough that they are alive and aware of them";[60] in *Vavilov*, the requirement to "meaningfully grapple" with an individual's submissions applies only to those which are "key".[61] Moreover, as Slatter JA observed in *Mohr v Strathcona (County)* (albeit in dissent and albeit in respect of a statutory duty to give reasons), "the length of the reasons is not determinative".[62] Thus the Alberta Court of Appeal upheld against a reasonableness challenge a labour relations decision which spent only five paragraphs addressing a key issue.[63] But responsive decisions do need to engage with the arguments and evidence.

It bears mentioning that the responsiveness requirement applies only to matters actually raised before the decision-maker[64] and noting that responsiveness, in the case of appellate tribunals, depends on the role the latter are to play.[65]

Contemporaneity

Four, there is now a strong requirement of **contemporaneity.** Reviewing courts are, consistent with the majority reasons in *Vavilov*, to refrain from bolstering defective administrative decisions with post-hoc

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[55] 2020 FC 295 at para 26. See also *Harrison v Canada (National Revenue)*, 2020 FC 772 at para 67 (conclusionary statement did not meet the *Vavilov* standard).
[56] 2020 NWTSC 13.
[57] *Ibid* at para 50.
[58] See *e.g. Canada (Attorney General) v Honey Fashions Ltd.*, 2020 FCA 64 at para 38, De Montigny JA.
[59] *Mao v Canada (Citizenship and Immigration)*, 2020 FC 542 at para 49; *Qasim v Canada (Citizenship and Immigration)*, 2020 FC 465 at para 42; *Adeleye v Canada (Citizenship and Immigration)*, 2020 FC 640 at para 16; and *Singh v Canada (Citizenship and Immigration)*, 2020 FC 687 at para 59.
[60] 2020 FC 542 at para 49.
[61] *Vavilov*, *supra* note 1 at para 128. See also *Qasim v Canada (Citizenship and Immigration)*, 2020 FC 465 at para 42 (no need to "catalogue" the applicant's case); *Adeleye v Canada (Citizenship and Immigration)*, 2020 FC 640 at para 16, commenting this part of *Vavilov* "does not set a different standard for judicial review"; and *Singh v Canada (Citizenship and Immigration)*, 2020 FC 687 at para 59.
[62] 2020 ABCA 187 at para 40.
[63] *Edmonton (City of) v Edmonton Police Association*, 2020 ABCA 182 at para 27.
[64] See e.g. *Egwuonwu v Canada (Citizenship and Immigration)*, 2020 FC 231 at para 69; *Bell Canada v Hussey*, 2020 FC 795 at para 72-74; *Muniz v Canada (Citizenship and Immigration)*, 2020 FC 872 at para 11; *Khandaker v Canada (Citizenship and Immigration)*, 2020 FC 985 at para 91.
[65] See e.g. *Stavropoulos c Canada (Procureur général)*, 2020 CAF 109 at para 30. See also *Paulo c Canada (Citoyenneté et Immigration)*, 2020 CF 990 at para 60 rejecting the argument that the Refugee Appeal Division had been unduly microscopic in its review of a first-instance decision and noting, on the contrary, that *Vavilov* could be said to require a fastidious approach to internal statutory appeals.

reasoning supplied by the decision-maker in an affidavit,[66] clever counsel at the lectern,[67] or by the reviewing court itself.[68] Reviewing courts are not to conduct a "line-by-line treasure hunt for error",[69] or reweigh evidence considered by the decision-maker,[70] and should read administrative decisions "with sensitivity to the institutional setting and in light of the record".[71] But a reviewing court should not "fashion its own reasons in order to buttress the administrative decision".[72] If justification, responsiveness and demonstrated expertise are not present in the reasons given to the affected individual or parties, a court should ordinarily not permit them to be "coopered up" later on.[73] Courts are no longer able or willing to "infer" that an argument or evidence was considered in the absence of reasons dealing with the argument or evidence.[74]

Judicial re-writing of defective decisions has been definitively ruled out.[75] Consider Gauthier JA's conclusion in the important decision in *Farrier v Canada (Attorney General)*.[76] Quashing as unreasonable a one-page decision from the Parole Board which failed to engage with the applicant's arguments, she commented:

> Before *Vavilov* I would probably have found, as did the Federal Court, that, in light of the presumption that the decision-maker considered all of the arguments and the case law before it and after having read the record, the decision was reasonable. The absence of reasons dealing with the first two issues before the Appeal Division was not at the time sufficient to set aside the decision. It was implicit that the Appeal Division did not accept that the Board's interpretation of the Act was erroneous, particularly considering subsection 143(1) of the Act. Under the circumstances, the administrative decision-maker was presumed to have rejected Mr. Farrier's arguments regarding any prejudice caused by the lack of a recording regardless of whether the Act provides for such a recording or whether there was simply a breach of the Manual. Such a finding was one of the possible outcomes given the Supreme Court's decision in *CUPE*, even if that decision was not cited by the Appeal Division.[77]

In the absence of any internal policies, previous Parole Board jurisprudence or other explanations for not addressing the applicant's arguments,[78] the conclusion that the decision was unreasonable was irresistible.[79] Testing the limits of "coherence and justification" is not a wise strategy, as Rennie JA put it

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[66] *Saskatchewan (Energy and Resources) v Areva Resources Canada Inc*, 2013 SKCA 79 at para 36, 110.
[67] *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 72.
[68] *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 58.
[69] *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para 54; *Vavilov*, *supra* note 1 at para 102.
[70] *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 64; *Vavilov*, *supra* note 1 at para 125.
[71] *Vavilov*, *supra* at para 96.
[72] *Ibid*.
[73] *Canada v Kabul Farms Inc.*, 2016 FCA 143 at para 47, Stratas JA.
[74] *Mattar v The National Dental Examining Board of Canada*, 2020 ONSC 403 at para 51-52.
[75] See *Hasani v Canada (Citizenship and Immigration)*, 2020 FC 125 at para 67-68; and See generally Gleason JA's even-handed analysis in *Canada (Attorney General) v Zalys*, 2020 FCA 81.
[76] 2020 FCA 25 [*Farrier*].
[77] *Farrier, supra* note 77 at para 12. See similarly *Walker v Canada (Attorney General)*, 2020 FCA 44 at para 10.
[78] *Vavilov, supra* note 1 at para 94; *Haddad Pour v The National Dental Examining Board of Canada*, 2020 ONSC 555 at para 37-40.
[79] Cf *Centre intégré de santé et de services sociaux de la Montérégie-Ouest c Syndicat canadien de la fonction publique, section locale 3247*, 2020 QCCS 1603 at para 12, where it had been documented that the point at issue was raised at the oral hearing.

in *Langevin v Air Canada*, where the Canada Industrial Relations Board had reverted to a "conclusory, boiler-plate statement" in respect of a point in dispute:[80] but there, luckily for the Board, a response to the point would have been "of little assistance"[81] and so the decision was upheld.[82]

Summing Up

The analysis in *Scarborough Health Network v Canadian Union of Public Employees, Local 5852*[83] is instructive. This concerned an interest arbitration, which arose in the context of a merger of hospital units and the constitution of a new bargaining unit. Several outstanding issues relating to a new collective agreement could not be resolved and became the subject of an interest arbitration. The most important issue was wage harmonization. After hearing argument from the union and the employer, the arbitration board determined that it would harmonize like classifications to the higher (highest) of the applicable pre-existing wage rates. The entirety of the board's substantive analysis of this issue was contained in a single paragraph:

> There is a well-established pattern in the hospital sector of post-merger harmonization of wages to the higher rate. This pattern is reflected in numerous voluntary settlements, and Arbitrators have adopted this approach on the basis of replication (See, e.g., *The Niagara Health System and Service Employees International Union, Local 204*, July 5, 2002 (Kaplan) at p. 2-4, *Participating Hospitals and Canadian Union of Public Employees,* March 4, 2011 (Petryshen), *Trillium Health Partners and CUPE,* December 9, 2015 (Kaplan)). Having reviewed and carefully considered the parties materials and submissions, and on the basis of the principles identified in the opening section of our main local issues award, including my determination of the pay equity jurisdictional argument, I am satisfied that it is appropriate to replicate the established approach to post-merger wage harmonization.

The Divisional Court quashed the arbitration decision as it lacked the attributes of reasonableness.

First, the decision was not ***justified***:

> There is nothing to show that the Board considered the particular circumstances of this case. There is no analysis of the Hospital's argument that this case is distinguishable from past cases. Past practice may be a relevant consideration, but there is no explanation why past practice, in this case, is so dispositive that other considerations need not be addressed at all.[84]

Second, the decision was not the product of ***demonstrated expertise*** but was rather based on "conclusory" statements about the factors the arbitration board took into account and the decision it reached: "It does not explain why the Board of Arbitration did what it did".[85]

Third, the decision was not ***responsive*** to the arguments made, especially the employer's argument that the factual matrix of this case was unusual: "The employer sought evaluation of the particular context of

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[80] 2020 FCA 48 at para 18.
[81] *Ibid* at para 19.
[82] See also the very relaxed approach — too relaxed, in my view — taken in *ImagineAbility Inc v City of Winnipeg*, 2020 MBCA 39 at para 45.
[83] 2020 ONSC 4577 [*Scarborough*].
[84] *Scarborough, supra* note 84 at para 6.
[85] *Ibid* at para 8.

the hospital and the affected employees".[86] Post *Vavilov*, however, judicial review requires reasons which "demonstrate analysis of the submissions and positions of the parties. It is not enough to summarize the parties' positions. Only through reasons can the parties know that the issues of concern to them have been the subject of reasoned consideration".[87]

And, fourth, in view of the ***contemporaneity*** requirement imposed by *Vavilov*, counsel's attempt to supplement the defective reasons was rejected by the Divisional Court: "It is not a question of whether the decision could be justified on the evidence, but rather whether the decision was justified in the Board's reasons, that is, whether the Board used evidence and analysis to come to a logical, transparent and, thus, reasonable decision".[88] Given the high degree of deference which has typically been accorded to labour relations determinations (by arbitrators or by labour boards), this decision is especially notable.

Specific Legal and Factual Constraints

A number of the specific factual and legal constraints laid out in *Vavilov* deserve closer analysis.

Governing Statutory Scheme

Whereas in respect of the other contextual considerations considered by the majority the permissive term "may" was almost invariably used, it was replaced by the imperative "must" in respect of the governing statutory scheme.[89] A decision-maker *must*, therefore, comply with the "rationale and purview of the statutory scheme";[90] a decision "must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion";[91] and a decision-maker should not fetter a discretionary power.[92] Thus, "[a]lthough a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker *must* nonetheless properly justify that interpretation".[93]

In most other Commonwealth jurisdictions, the exercise of discretionary powers is reviewable on a variety of bases, such as improper purposes, irrelevant considerations, fettering of discretion, sub-delegation and bad faith. These relate, in the argot of *Vavilov*, to the "governing statutory scheme". The difficulty this creates is that the Supreme Court held in the early 2000s that while such grounds of review are "still useful as familiar landmarks", it emphasized that they "no longer dictate the journey" to a conclusion of unreasonableness:[94] it is insufficient "merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration

[86] *Ibid* at para 22.
[87] *Ibid* at para 15.
[88] *Ibid* at para 26.
[89] *Ibid.*
[90] *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at para 15.
[91] *Vavilov*, *supra* note 1 at para 110. See *e.g. Garcia Balarezo v Canada (Citizenship and Immigration)*, 2020 FC 841 at para 47 (failure to have regard to the purposes of the discretion to grant humanitarian and compassionate relief for non-compliance with immigration law).
[92] *Ibid* at para 108. See *e.g. Immigration Consultants of Canada Regulatory Council v Rahman*, 2020 FC 832 at para 22-24.
[93] *Ibid* at para 109 [emphasis added].
[94] *Dr. Q. v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 24.

of an irrelevant factor".[95] Since then, however, many judges have considered that the establishment of at least some of the nominate grounds of review renders an administrative decision *per se* unreasonable.[96]

It is apparent that in respect of some of the nominate grounds of review, a holistic reasonableness analysis will be appropriate and even unavoidable. Take, for example, fettering of discretion, where the question for a reviewing court will not be "was discretion fettered?" but rather "was it reasonable, given the context, to issue a detailed directive to front-line decision-makers?"[97] Sometimes, discretion might indeed be fettered, at least to some extent, but the question for the reviewing court will be whether this was justifiable, given the decision-making context.[98] Therefore, justifying a decision will be easier in circumstances where the decision-maker has been empowered in broad terms, but harder where the statute leaves little room for interpretive manoeuvre:

> If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made.[99]

It is instructive to consider some cases involving judicial review of legislative-type decisions for which contemporaneous reasons were not provided. In *Vavilov* the Supreme Court left the door open to focusing on the outcome of a decision-making process in situations where reasons are not provided. Accordingly, in *1120732 B.C. Ltd. v Whistler (Resort Municipality)*, Tysoe JA held that the enactment of a municipal by-law was reasonable on the basis there were "at least three ways in which the Municipality's council could have reasonably concluded" it had the necessary statutory authority.[100] Contrast, however, the relatively intensive review undertaken in *Minster Enterprises Ltd. v City of Richmond*, where Crerar J rejected the suggestion that the City's policies could expand the meaning of a bylaw relating to building

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[95] *Ibid* at para 22.

[96] See *e.g. Kane v Canada (Attorney General)*, 2011 FCA 19; *Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2019 FC 1126 at para 57. Compare *Alberta (Director of Assured Income for the Severely Handicapped) v Januario*, 2013 ABQB 677 at para 35-37; *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para 73.

[97] As Professor McHarg observes, there is no "general presumption either for or against the legitimacy of administrative rule-making", but the no-fettering principle operates instead "as a means of judicial control over the *degree of structuring* of discretion that is appropriate in particular contexts". Aileen McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 *Current Legal Problems* 267 at 273. See further Daly, "Waiting for Godot", *supra* note 64 at 49-50. See also *Procureur général du Québec c. Lamontagne*, 2020 QCCA 1137 at para 41-52.

[98] See e.g. *Procureur général du Québec c P.F.*, 2020 QCCA 1220 at para 76, holding that, in the context of a statute providing for compensation for victims of criminal acts it was reasonable to have a policy of not taking into account money earned on the black market when calculating an applicant's salary.

[99] *Vavilov*, *supra* note 1 at para 110.

[100] 2020 BCCA 101 at para 88. See also *O'Shea/Oceanmount Community Association v Town of Gibsons*, 2020 BCSC 698 at para 156, commenting that "significant deference" was due to the municipality on the compatibility of a by-law with an official community plan; *Ville de Québec c Galy*, 2020 QCCA 1130.

construction.[101] The best way to understand these contrasting decisions is that, in some instances, the governing statutory scheme[102] will give municipalities (and other makers of regulations) a large margin of appreciation but in others municipalities will be more tightly constrained by prescriptive statutory language.[103]

Statutory Interpretation

Vavilov makes clear that a reviewing court is not to conduct its own statutory interpretation exercise to establish a benchmark or yardstick against which to measure an administrative decision-maker's interpretation of law.[104]

However, the finer details of how to approach the review of a decision based on a statutory interpretation exercise undertaken by the decision-maker are murky. On the one hand, the reader is told: "Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case".[105] On the other hand, a few paragraphs later, the administrative decision-maker's task is said to be to "interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue".[106]

The latter statement looks awfully like a "formalistic statutory interpretation exercise", one which judges suspicious of an administrative decision-maker's ability to issue interpretations of law might well require. Such judges should take particular note of the majority's insistence that sometimes an administrative decision-maker need "touch upon only the most salient aspects of the text, context or purpose".[107] But there is a risk that many anti-deference judges will fasten upon the emphasis on text, context and purpose to constrain administrative interpretations of law.

Consider *Canadian National Railway Company v Richardson International Limited*.[108] The standard of review here was correctness, as the matter came before the Federal Court of Appeal as a statutory appeal from a decision of the Canadian Transportation Agency relating to railways. But Nadon JA also commented, in *obiter*, that he would have struck the decision down for unreasonableness in any event, "because it failed to consider both context and the legislative scheme as a whole".[109] Citing paragraph 118 of *Vavilov* — but not the more equivocal language of paragraphs 119 and 122 — Nadon JA commented that Agency's failure to "observe the fundamental principles of statutory interpretation"[110] was "fatal to its decision".[111] This might be thought to betray a favouritism for an interventionist standard of

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[101] 2020 BCSC 455, especially at para 114-118. See also *Canadian Natural Resources Limited v Elizabeth Métis Settlement*, 2020 ABQB 210.
[102] See *Vavilov, supra* note 1 *at para* 108-110.
[103] See also *Champag inc. c Municipalité de Saint-Roch-de-Richelieu*, 2020 QCCA 613 at para 30, not a case about the authority to promulgate a bylaw but nonetheless an example of a municipality's discretion being constrained by statutory language; and See generally *Innovative Medicines Canada v Canada (Attorney General)*, 2020 FC 725 at para 65-73. it will not invariably be the case that reasons or reasoning are entirely absent in cases involving municipal by-laws; if so, the judicial review will look quite conventional. See *e.g. G.S.R. Capital Group Inc. v The City of White Rock*, 2020 BCSC 489 at para 107-114, 139
[104] *Vavilov*, *supra* note 1 at para 124.
[105] *Ibid* at para 119.
[106] *Ibid* at para 121.
[107] *Ibid* at para 122.
[108] 2020 FCA 20 [*CNRC*].
[109] *CNRC, supra* note 109 at para 46.
[110] *Ibid* at para 48.
[111] *Ibid* at para 49.

reasonableness review on issues of statutory interpretation (although, to be fair, Nadon JA remitted the matter to the Agency and took pains not to "rule out the possibility that the Agency might come to an interpretation that differs from the one it arrived at in the present matter").[112]

A more moderate approach was taken by Boone J in *Salmonid Association of Eastern Newfoundland v Her Majesty the Queen in Right of Newfoundland and Labrador*, where the key flaw was that the Minister "did not explain his reasons for his adoption of an interpretation that he was aware was one of two valid but opposite readings"[113] and by Barnes J in *Glaxosmithkline Biologicals S.A. v Canada (Health)*, noting that the Minister had failed to have regard to the obligation to interpret Canadian law implementing the *Canada Europe Trade Agreement* in conformity with the Agreement.[114] By contrast, in *Natco Pharma (Canada) Inc. v Canada (Health)*, the Minister prevailed but it was a close-run thing:[115] the message for ministerial decision-making from this and other post-*Vavilov* decisions is that ministers must make a sincere effort to justify their decisions in terms of statutory text, context and purpose. And there is also a clear message for all other decision-makers: a statutory interpretation analysis should not be reverse-engineered to achieve a desired outcome on policy grounds.[116]

Nadon JA's *obiter* comments certainly underscore how some portions of *Vavilov* are liable to become battlegrounds between different factions of judges, those who favour more intrusive review on questions of law in one camp, their more deferential colleagues in the other. For a similar approach, almost demanding panoptic qualities on the part of an administrative decision-maker, see *Beals v Nova Scotia (Attorney General)*: "the legislature and applicants…are entitled to presume that the person making a decision about an application under [legislation] knows the occasion and necessity for the enactment, the circumstances existing at the time it was passed, the mischief to be remedied, and the object to be attained, without that information necessarily appearing in the record".[117] Brothers J was quite right in my view to comment, in *Bancroft v Nova Scotia (Lands and Forests)*, that *Vavilov's* approach to statutory interpretation involves a "balancing act".[118]

Consistency

Citizens "are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker".[119] Accordingly, "[w]here a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons".[120] In so stating, the majority in *Vavilov* confirmed, in clear terms, what many of us had supposed to be the case, namely that departures from previous administrative decisions have to be justified.[121]

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[112] *Ibid* at para 54.
[113] 2020 NLSC 34 at para 74.
[114] 2020 FC 397 at para 34-35. See similarly *ViiV Healthcare ULC v Canada (Health)*, 2020 FC 756 at para 28. See also *Oxford v Newfoundland and Labrador (Municipal Affairs and Environment)*, 2020 NLSC 102 at para 40-42.
[115] 2020 FC 788 at para 55-60.
[116] See *David Suzuki Foundation v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2020 NLSC 94 at para 245.
[117] 2020 NSSC 60 at para 32.
[118] 2020 NSSC 175 at para 27. See generally *Weldemariam v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 631 at para 35-38.
[119] *Vavilov*, *supra* note 1 at para 129.
[120] *Ibid* at para 131 [emphasis original].
[121] Paul Daly, "The Principle of Stare Decisis in Canadian Administrative Law" (2015) 49 RJTUM 757.

Consistency within administrative tribunals is obviously important post-*Vavilov*. Here, too, however, nuance is important. The Alberta Court of Appeal observed in *Alberta Union of Provincial Employees v Alberta* that the comments in *Vavilov* "about the general consistency of administrative decisions do not apply with equal vigour to ad hoc arbitrators".[122] Here, the issue was one of disparity of treatment between four correctional officers who had participated in an incident which led to a disciplinary process. But the officers did not appear before the same panel: "[p]arity in penalties is an important consideration, but parity cannot be fully achieved unless all the employees disciplined for involvement in the same incident are brought before the same arbitration board at the same time".[123] Accordingly, "[t]he concept that equally culpable employees should receive equal discipline does not make either decision unreasonable";[124] the decision-maker was aware of the prior decision and this was enough to make it reasonable. It seems that the prior decision was under review at the relevant time; a higher level of engagement with the prior decision would, presumably, have been required if the prior decision had been finalized.

Meanwhile, in *Brockville (City) v Information and Privacy Commissioner, Ontario*, the Divisional Court declined to intervene where the adjudicator had given "ample reasons" for refusing to follow a previous decision on "indistinguishable" facts: "It is the proper role of the court to defer to the tribunal as an institution while it considers how to resolve any inconsistencies of legal interpretation as cases develop".[125]

Grammond J has produced a helpful guide to use in situations of alleged inconsistency with judicial or administrative precedent:

- 1. The Court must assess the degree of legal constraint imposed by the precedent, which involves the following factors:
    - The position of the author of the precedent in the judicial or administrative hierarchy;
    - The degree of consensus about the alleged precedent;
    - If the precedent was a decision on an application for judicial review, whether other outcomes could be deemed reasonable; and
    - The fact that, in order to decide the question that would be governed by the precedent, the decision-maker has to weigh a range of factors;
- 2. The Court must then determine whether the impugned decision is reasonable, which, depending on the circumstances, may raise the following questions
    - If the decision maker explicitly disregarded the precedent, did they give adequate reasons?

[122] 2020 ABCA 284 at para 13.
[123] *Ibid* at para 48.
[124] *Ibid* at para 51. Contrast *Pardo Quitian v Canada (Citizenship and Immigration)*, 2020 FC 846 at para 52, where it was unreasonable not to consider the refugee claims of members of the applicants' family, given the similarity of circumstances between the claims.
[125] 2020 ONSC 4413 at para 41.

- Taken as a whole, is the decision incompatible with the alleged precedent?[126]

To part 1 of the Grammond J *grille d'analyse* can usefully be added the following questions developed by Lacoste J in *Retraite Québec c Tribunal administratif du Québec* (explaining when an administrative decision-maker may depart from a judicial precedent):[127]

> 31.1. Le précédent se distingue de l'affaire dont il est saisi, ou;
>
> 31.2. Le précédent a été rendu « *per incuriam* », ou;
>
> 31.3. Une nouvelle question est soulevée en conséquence d'un changement législatif, ou;
>
> 31.4. Il y a un changement dans les circonstances ou la preuve qui modifient fondamentalement les paramètres du débat.

Note that the decision survived in *Reyes* but Lacoste J was not satisfied in *Retraite Québec* that an adequate justification had been provided.

There have also been a number of Federal Court cases in which decisions were struck down for unreasonableness because the decision-maker failed to grapple with relevant factors as established by prior judicial jurisprudence.[128] Note that the unreasonableness here resulted from failures to seriously consider the factors at all: it might, in principle, be permissible for decision-makers to deviate from judicial decisions but obviously they bear a justificatory burden when they do so.[129] Consistency with prior judicial jurisprudence will, by contrast, indicate that a decision is reasonable.[130]

Quite how much consistency is required, however, may be a difficult question. *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.*, produced three sets of reasons about the scope of an employer's duty to accommodate (here, an employee who vaped cannabis every evening to deal with chronic pain) without really grappling with what should be the key question: the extent to which the arbitrator provided reasons for departing (if, indeed, he did depart) from prior judicial decisions.[131] Rather, as Grammond J justly observed in *Service d'administration P.C.R. Ltée v Reyes*, "when an applicant alleges that the administrative decision-maker applied the 'wrong test' because he or she departed from a judicial precedent, the Court has to examine

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[126] *Service d'administration P.C.R. Ltée v Reyes*, 2020 FC 659 at para 24.
[127] 2020 QCCS 1592 at para 31.
[128] *Mora Alcca v Canada (Citizenship and Immigration)*, 2020 FC 236 at para 18; *Demirtas v Canada (Citizenship and Immigration)*, 2020 FC 302 at para 30; *Chikadze v Canada (Citizenship and Immigration)*, 2020 FC 306 at para 22; *Lopez Bidart v Canada (Citizenship and Immigration)*, 2020 FC 307 at para 30; *Haile v Canada (Citizenship and Immigration)*, 2020 FC 375 at para 25-26; and *Kim v Canada (Citizenship and Immigration)*, 2020 FC 581 at para 55. See also *Crook v British Columbia (Director of Child, Family and Community Service)*, 2020 BCCA 192 at para 60-65 and similarly *Magee (Re)*, 2020 ONCA 418, *passim* (failure to follow mandatory steps set out in statute) but cf *Allushi v Canada (Citizenship and Immigration)*, 2020 FC 722 at para 25-26 where the precedent relied upon by the applicant was not on point.
[129] *Canada (Public Safety and Emergency Preparedness) v Taino*, 2020 FC 427 at para 80; *Qualico Developments (Winnipeg) Ltd. v Winnipeg (City of) et al.*, 2020 MBQB 87 at para 44; *0940460 BC Ltd. v Burnaby (City)*, 2020 BCCA 142 at para 51.
[130] *Cousineau c Commission de protection du territoire agricole du Québec*, 2020 QCCS 900; *Regina Professional Firefighters Association, IAFF Local No. 181 v Regina (City)*, 2020 SKQB 134 at para 24-26.
[131] 2020 NLCA 20.

to what extent that precedent makes a conflicting decision unreasonable and whether the administrative decision-maker gave reasonable grounds to disregard it".[132]

Harsh Consequences

Where a decision "has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention".[133] In particular, "a failure to grapple with such consequences may well be unreasonable".[134] In concrete terms, a decision-maker whose decision will have harsh consequences has "a heightened responsibility" to justify that decision.[135] The revocation of a passport in *Alsaloussi v Canada (Attorney General)*, for example, was unreasonable because the consequences were "severe and harsh" but the decision lacked a "proper analysis" of the effect on the applicant.[136]

In *Downey v Nova Scotia (Attorney General)*, the harsh consequences related to the applicant's property interests: he had occupied land for close to 20 years and sought to have the title clarified.[137] The effect on his property interests bolstered the court's conclusion that it was unreasonable to interpret the provincial land titles clarification legislation as requiring the applicant to demonstrate adverse possession in respect of land to which title was unclear. Here, however, the analysis of harsh consequences simply supported a conclusion of unreasonableness reached on other grounds, which is a feature of the post-*Vavilov* jurisprudence.[138]

Selecting the Standard of Review

Under the *Vavilov* framework, reasonableness review is the starting point in all situations. But statutory appeals will now attract correctness review (at least on extricable questions of law). And in three other non-exhaustive scenarios correctness review is required by the rule of law: the resolution of constitutional questions, questions of central importance to the legal system as a whole and issues of overlapping jurisdiction. Jurisdictional questions, even in their purest form, will no longer attract correctness review.

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[132] 2020 FC 659 at para 20.
[133] *Vavilov*, *supra* note 1 at para 133.
[134] *Ibid* at para 134.
[135] *Ibid* at para 135.
[136] 2020 FC 364 at para 79. Compare *Elangovan v Canada (Attorney General)*, 2020 FC 882 at para 26, where the consequences were taken into account and explained in a transparent manner to the individual and the decision was, thus, upheld.
[137] 2020 NSSC 201 at para 37.
[138] See also *Valiquette c Tribunal administratif du travail*, 2020 QCCS 11 at para 69-70; *Mohammad v Canada (Citizenship and Immigration)*, 2020 FC 473 at para 42; *Ravandi v Canada (Citizenship and Immigration)*, 2020 FC 761 at para 36; *Randhawa v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 905 at para 38. This principle may also apply to the handling of a hearing: See on the introduction of evidence in an internal statutory appeal *e.g. Khan v Canada (Citizenship and Immigration)*, 2020 FC 438 at para 37; *Dugarte de Lopez v Canada (Citizenship and Immigration)*, 2020 FC 707 at para 26. Compare *Sticky Nuggz Inc. v Alcohol and Gaming Commission of Ontario*, 2020 ONSC 5916, where the applicant's application for a Retail Sales Authorization to operate a cannabis store ran afoul of the Commission's policy not to permit stores close to schools. As to harsh consequences, the Divisional Court responded at para 68:

> While the Applicant has perhaps suffered an adverse financial impact from the Decision at issue, this impact is the consequence of having made a financial commitment without appropriate due diligence. RSAs are not guaranteed by the Registrar and the statute provides no right or entitlement to a RSA. A RSA is granted to those that meet the eligibility and application requirements. The burden of ensuring those requirements are met, and the risk of not meeting them, are both borne by the Applicant.

The standard applied "must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law".[139]

The starting point is a presumption of reasonableness review. Significantly, this presumption is based on the brute fact of a legislative choice to delegate decision-making authority to an administrative decision-maker. Other justifications, such as the expertise of the decision-maker in question or the existence of a privative clause, are irrelevant to the selection of the standard of review: "it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review".[140] This is an "institutional design choice"[141] by the legislature. The old contextual approach is out, a simplified, rule-based approach is in.

Institutional Design

Statutory Appeals

Where there is a right of appeal of any sort the appellate review regime laid out in *Housen v Nikolaisen*,[142] applies in all circumstances:

> Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis.[143]

This means that **extricable questions of law** are reviewed on a **correctness standard**. If there is a general issue of principle within a decision, it can be extracted and the court can substitute its judgement for that of the decision-maker.

By contrast, a **mixed question of law and fact** (i.e. an application of a legal standard to the facts as found) or a **question of fact** (i.e. a finding as to whether an event occurred) will be reviewed on the **palpable and overriding error standard**. Judicial intervention for palpable and overriding error will be rare:

> Palpable and overriding error is a highly deferential standard of review . . . . "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.[144]

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[139] *Vavilov*, *supra* note 1 at para 23.
[140] *Ibid* at para 30 [emphasis original].
[141] *Ibid*.
[142] *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*].
[143] *Vavilov*, *supra* note 1 at para 36.
[144] *South Yukon Forest Corp. v R.*, 2012 FCA 165 at para 46, cited with approval by the Supreme Court in *Benhaim v St-Germain*, 2016 SCC 48. See also Morissette J.A.'s formulation in *J.G. v Nadeau*, 2016 QCCA 167 at para 77: « une erreur manifeste et dominante tient, non pas de l'aiguille dans une botte de foin, mais de la poutre dans l'œil. Et il est impossible de confondre ces deux dernières notions ». The question arises here as to whether palpable and overriding error is more or less deferential than reasonableness review. Even on questions of fact, I think palpable and overriding error is more deferential than reasonableness review. Reasonableness review under *Vavilov* is more open-ended, certainly in terms of "factual and legal constraints", because it does not have the imposing twin requirements of palpable-ness and overriding-ness. I can imagine situations where an error of fact which touches on the governing statutory scheme, the harshness of the consequences for the individual concerned or consistency with a previous

Vavilov made a significant change to the law of statutory appeals. As Abella and Karakatsanis JJ. noted in their concurring reasons, "the majority's reasons strip away deference from hundreds of administrative actors subject to statutory rights of appeal".[145] Decisions of economic regulators, such as the federal CRTC[146] and the provincial securities commissions,[147] are typically subject to appeal clauses, as are the decisions of professional disciplinary tribunals.[148] In general such entities have long been used to deference, even on questions of law. This has not been especially controversial, given widespread recognition that matters on which regulators have expertise can bleed into the interpretation of terms in their parent statutes.[149] With expertise shunted to the margins, however, deference will no longer be the starting point in respect of these bodies.

Nonetheless, it is difficult to be categorical about the likely consequences of *Vavilov* for economic regulation and professional discipline, because the expertise of decision-makers is well-established as a matter of social fact even if it is henceforth irrelevant as a matter of legal doctrine. Much will depend on the willingness of first-instance judges to categorize matters coming within the expertise of regulators as questions of law (subject to correctness review) or as mixed questions (subject to review for palpable and overriding error). There is a ***classification game*** and courts around the country have begun to play it.

Classification

One way in which deference might persist on statutory appeals post-*Vavilov* is in **the classification of matters falling within a decision-maker's expertise as factual questions or mixed questions of fact and law**.[150] As Watson JA rightly insisted in *Canadian Natural Resources Limited v Elizabeth Métis Settlement*, a question of law must be extricable to be subject to correctness review: "It must go to the defining elements of the relevant legal test and not merely to how the tribunal assesses the evidence before applying the test".[151] Relatedly, Slatter JA observed in *Yee v Chartered Professional Accountants of Alberta* that "i) the standard of practice the profession expects in any particular case, and ii) whether, on the facts,

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tribunal decision could cause the court to lose confidence in the reasonableness of the decision (*Vavilov* at para 106). I suppose any such factual error would have to be a 'fundamental misapprehension' (*Vavilov* at para 126), but even that seems to be a lower barrier than palpable and overriding error. The other type of fundamental flaw described in Vavilov – a lack of internally coherent reasoning – could also conceivably rest on an error of fact. The Ontario Divisional Court has warned against conflating *Vavilovian* reasonableness review and the palpable and overriding error standard. I appreciate the conceptual distinction between the two, but I fear that these judges are rather like the Dutch youngster holding a finger in the dyke, as comparisons are inevitable given that the statutory appeal and judicial review streams run so close together (*Miller v College of Optometrists of Ontario*, 2020 ONSC 2573 at para 79; *Houghton v Association of Ontario Land Surveyors*, 2020 ONSC 863 at para 15). In particular, if the palpable and overriding error standard on appeal is less generous to appellants than reasonableness review would be, there will inevitably be pressure to expand the scope of the palpable and overriding error standard. I certainly expect comparison to continue, with conflation a distinct possibility.

[145] *Vavilov*, *supra* note 1 at para 199.

[146] *Broadcasting Act*, SC 1991, c 11, s 31; *Telecommunications Act*, SC 1993, c 38, s 64.

[147] See *e.g. Securities Act*, RSBC 1996, c 418, s 167; *Securities Act*, RSA 2000, c S-4, s 38.

[148] See *e.g. Regulated Health Professions Act*, 1991, SO 1991, c 18, s 70; *Law Society Act, 1999*, SNL 1999, c L-9.1, s 55.2(1); *Veterinarians Act*, SBC 2010, c 15, s 64.

[149] See *e.g. Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748.

[150] See *e.g. 1085372 Ontario Limited v City of Toronto*, 2020 ONSC 1136; *Donaldson c Autorité des marchés financiers*, 2020 QCCA 401; and, in relation to costs awards, *Dell v Zeifman Partners Inc.*, 2020 ONSC 3881 at para 42.

[151] 2020 ABCA 148 at para 32.

the professional subject to discipline has met that standard" are questions of mixed fact and law calling for deferential review.[152]

If so, the scope for appellate oversight of professional disciplinary decisions will be quite limited and the change wrought by *Vavilov* not especially dramatic.[153] Perhaps for this reason the New Brunswick Court of Appeal suggested in *Longphee v Workplace Health, Safety and Compensation Commission* that *Vavilov's* new teachings on statutory appeals do "not fundamentally change" the approach to the decisions of (at least some) administrative tribunals.[154] Indeed, in a case relating to discipline in the legal profession, the same court wondered in *obiter* whether the pre-*Vavilov* argument that "[p]ractising lawyers are uniquely positioned to identify professional misconduct and to appreciate its severity"[155] might continue to have force.[156]

It is worth considering the high-profile decision in *Strom v Saskatchewan Registered Nurses' Association*.[157] Here, a nurse had been disciplined by the Association for posting criticisms of the palliative care received by her grandfather on Facebook and Twitter. Under the *Registered Nurses Act*[158], discipline decisions are appealable to the superior court. The nurse had lost at first instance.[159] But by the time the Court of Appeal had heard the nurse's appeal, *Vavilov* had been decided. Accordingly, the appellate review framework was applicable.

However, there was a wrinkle, in the form of s. 26(1) of the *Act*, which provides that "professional misconduct is a question of fact". This provision has many equivalents in Saskatchewan and elsewhere.[160] Faced with an argument by the appellant for correctness review and by the respondent for palpable and overriding error review, Barrington-Foote JA split the difference and applied a different standard altogether. As Barrington-Foote JA noted, discretionary decisions of a first-instance judge are reviewable on a distinct standard which is neither correctness nor palpable and overriding error. In *Penner v Niagara (Regional Police Services Board)*, the standard was described by Cromwell and Karakatsanis JJ in the following terms: "A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice."[161] Barrington-Foote JA justified his selection of the discretionary-decisions standard on the basis that professional discipline determinations are neither fish nor fowl: "a discipline committee deciding whether a registered nurse is

[152] 2020 ABCA 98 at para 30.
[153] Albeit that in *Yee* the appeal was allowed! See also *Dr. Jonathan Mitelman v College of Veterinarians of Ontario*, 2020 ONSC 3039 at para 18; *Olivier c Cayer*, 2020 QCCQ 2060 at para 45; *Commissaire à la déontologie policière c Lavallée*, 2020 QCCQ 1923 at para 24; *Shah v College of Physiotherapists of Ontario*, 2020 ONSC 6240 at para 17.
[154] 2020 NBCA 45 at para 18. The flip side could be glimpsed in *Thibeault v Saskatchewan (Apprenticeship and Trade Certification Commission)*, 2020 SKQB 192 at para 49-52, considering the inadequacy of reasons to be an error of law on a statutory appeal on questions of law or jurisdiction. See also *Dr. Rashidan v The National Dental Examining Board of Canada*, 2020 ONSC 4174 at para 41.
[155] *Law Society of New Brunswick v Ryan*, 2003 SCC 20, Iacobucci J.
[156] *Hughes v Law Society of New Brunswick*, 2020 NBCA 68 at para 41. See also *Mitelman v College of Veterinarians of Ontario*, 2020 ONSC 6171 at para 41: "penalty orders engage the heart of the expertise of self-governing tribunals" But see *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81, where the Court of Appeal carefully parsed a disciplinary decision and successfully extracted several questions of general principle which it reviewed on the correctness standard.
[157] *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 [*Strom*].
[158] *Registered Nurses Act, 1988*, SS 1988-9, c R-12.2.
[159] *Strom v Saskatchewan Registered Nurses' Association*, 2017 SKQB 355.
[160] *Strom*, *supra* note 158 at para 66-67
[161] *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 27.

guilty of professional misconduct is not deciding a question of fact for standard of review purposes. It is either deciding a question of mixed fact and law or making a discretionary decision. As to which, there is no bright line which neatly divides these two categories."[162] Applying this standard, an analysis of the discipline decision revealed "a series of omissions that together constitute an error in principle."[163]

With respect, I think the introduction of a third standard to the *Housen v Nikolaisen* framework adopted by the majority in *Vavilov* is an unhelpful gloss on *Vavilovian* administrative law. For one thing, the definition of professional standards can easily be classified as a mixed question of fact and law or a question of fact subject to review only for palpable and overriding error. For another thing, this common sense conclusion is supported by the legislative direction that the definition of professional standards for nurses in Saskatchewan is a question of fact: even if it is, in reality, a mixed question of fact and law, nothing turns on this fine distinction for the purposes of the *Housen v Nikolaisen* framework, as palpable and overriding error is the applicable standard regardless. Furthermore and perhaps fundamentally, *Vavilov* was designed to simplify Canadian administrative law. Introducing a third standard of review is anathema to the policy of simplification underlying *Vavilov*.[164]

Expertise

Even where a matter has been classified as a question of law subject to the correctness standard on a statutory appeal, respect for the expertise of the decision-maker might still influence the outcome. The following comment from Swinton J is notable:

> While the Court will ultimately review the interpretation of the Act on a standard of correctness, respect for the specialized function of the Board still remains important. One of the important messages in *Vavilov* is the need for the courts to respect the institutional design chosen by the Legislature when it has established an administrative tribunal (at para 36). In the present case, the Court would be greatly assisted with its interpretive task if it had the assistance of the Board's interpretation respecting the words of the Act, the general scheme of the Act and the policy objectives behind the provision.[165]

If judges continue to consider and give weight to administrative interpretations of law on statutory appeals, deference might not be dead just yet.

That said, in *Municipal Property Assessment Corporation v Zarichansky*,[166] Favreau J did not consider in detail the Ontario Assessment Board's rationale for taking a pro-ratepayer view in situations where MPAC (which assesses properties in Ontario for the purposes of calculating municipal property taxes) has failed to discharge its burden of proof. Rather, Favreau J insisted (on correctness review) that the Board was

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[162] *Strom, supra* note 158 at para 73.
[163] *Ibid* at para 117. *Law Society of Ontario v Ejidike*, 2020 ONSC 6228 at para 12-14.
[164] I do agree with Barrington-Foote JA, however, that the compatibility of the discipline decision with the nurse's *Charter* right to free expression was properly subject to correctness review: although it was clearly the sort of decision which ordinarily would attract deference under *Doré v Barreau du Québec,* 2012 SCC 12 where a statutory appeal has been provided for, *Charter* compliance is, in my view, an extricable question of law subject to correctness review.
[165] *Planet Energy (Ontario) Corp. v Ontario Energy Board, 2020 ONSC 598 at para 31. See also Edmonton (City of) v Ten 201 Jasper Avenue Ltd, 2020 ABCA 60 and Borgel v Paintearth (Subdivision and Development Appeal Board), 2020 ABCA 192 at para 21-22 (taking tribunal (and lower court) jurisprudence into account in applying the correctness standard to an extricable question of law).*
[166] 2020 ONSC 1124.

bound by the terms of its governing statute: my cursory review of the Board's jurisprudence suggests, however, that it had provided a reasoned basis for its approach; there is little consideration by Favreau J of whether his approach will create difficulties for the Board, MPAC and ratepayers in future cases.[167] Of course, it is clear from *Vavilov* that even where an administrative decision-maker's jurisprudence is considered the appellate court retains the final word on questions of law and is not bound to follow administrative jurisprudence.[168]

Appeals on Questions of Law or Jurisdiction

There are some situations where it is patently obvious that *Vavilov* has effected a significant change. These are where the statute provides for an appeal on a question of law or jurisdiction. One of these situations arose in the companion case to *Vavilov*, *Bell Canada v Canada (Attorney General)*.[169] Section 31 of the *Broadcasting Act* provides for an appeal, with leave, on questions of law or jurisdiction, from orders of the CRTC, to the Federal Court of Appeal. As the question at issue - whether the CRTC had the authority to target the Super Bowl for special treatment - "plainly" fell "within the scope of the statutory appeal mechanism", correctness was the appropriate standard.[170]

What is a question of law or jurisdiction for the purposes of such an appeal clause? It is likely that appellate courts will take the view that "law or jurisdiction" is to be read conjunctively, to apply to any extricable question of law which materially affected the outcome of the matter under appeal.[171] Skillful advocacy is required to get within a limited appeal clause.[172] But once an appellant has succeeded in demonstrating that their appeal falls within the clause, arguments for deference are likely to fall on deaf ears.

Consider the decision of the Manitoba Court of Appeal in *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board) et al*.[173] Here, the Public Utilities Board sought to create a special zero electricity rate for First Nations residential customers on reserves, looking to alleviate poverty in one of the province's most disadvantaged groups. But the Court of Appeal held that the Board erred in concluding that it had the power to create a differential rate for First Nations customers.

The Court of Appeal's analysis was based on two building blocks, one about the Board's ability to create a class of customers who would benefit from a reduced rate, one about the extent to which the Board could wander into the realm of social policy-making. Both building blocks would have proved much more brittle on a deferential standard of review.

First, s. 39(2.1) of the *Manitoba Hydro Act*[174] provides that "The rates charged for power supplied to a class of grid customers within the province shall be the same throughout the province". For further clarity,

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[167] See similarly *Associated Developers Ltd v Edmonton (City)*, 2020 ABCA 253 at para 34-39.
[168] See *e.g. East Hants (Municipality) v Nova Scotia (Utility and Review Board)*, 2020 NSCA 41.
[169] 2019 SCC 66 [*Bell Canada*].
[170] *Bell Canada, supra* note 170 at para 35. The same majority from *Vavilov* concluded that the authority under the statutory provision the CRTC invoked "is limited to issuing orders that require television service providers to carry specific channels as part of their service offerings, and attaching [general] terms and conditions…" (at para 44). In dissent, Abella and Karakatsanis JJ. refused to follow the *Vavilov* framework. Applying reasonableness review to what they described as "an archetype of an expert administrative body" (at para 83), they found nothing to exclude the possibility that CRTC orders "could relate to a single program in this context" (at para 93).
[171] See e.g. *Canadian National Railway Company v Emerson Milling Inc.*, 2017 FCA 79, especially at para 20-28.
[172] See e.g. *Bell Canada v British Columbia Broadband Association*, 2020 FCA 140.
[173] 2020 MBCA 60 [*Manitoba*].
[174] CCSM c H190.

s. 39(2.2)(b) adds that "customers shall not be classified based *solely* on the region of the province in which they are located or on the population density of the area in which they are located" (my emphasis). Creating a special rate for First Nations, based on their location on reserves, fell outside the scope of s. 39, as even though the Board "created the on-reserve class to address poverty concerns, treaty members who do not reside on reserve are not eligible, even if they are living in similar circumstances", such that "the defining circumstance for class membership is geographic location, not poverty or treaty status", a criterion "based solely on a geographic region of the province in which certain customers are located".[175]

In defence of the Board, I would observe that the best need not be made the enemy of the good. Striking a rate for members of First Nations, regardless of their location within the province, would be administratively difficult if not impossible.[176] That the Board was not able to proceed with surgical precision should not necessarily mean that no procedure could be undertaken at all. This defence of the Board can be grounded in the language of the statute: s. 39(2.2) prohibits making a class where geographical location is the *sole* criterion. But the Board was evidently not motivated *solely* by geography in setting a special rate for First Nations. Rather, the geographical locations — reserve lands — were convenient proxies for the alleviation of disadvantage the Board wished to achieve. Had the Board's decision been reviewed on a standard of reasonableness, the result might well have been different. It is at least arguable that s. 39(2.2) can reasonably bear the Board's interpretation.

Second, s. 43(3) of the *Act* provides for a limitation on the use and allocation of Manitoba Hydro's funds: they "shall not be employed for the purposes of the government…" The Court of Appeal accepted that the Board had broad jurisdiction under the *Act* to consider "social policy and any other factors it considers relevant in fulfilling its mandate",[177] as befits a body required to set rates which are just and reasonable all things considered. But in pursuing the goal of poverty alleviation, the Board failed to respect the limitation contained in s. 43(3), because "[T]he ability to consider factors such as social policy and bill affordability in approving and fixing rates for service does not equate to the authority to direct the creation of customer classifications implementing broader social policy aimed at poverty reduction and which have the effect of redistributing Manitoba Hydro's funds and revenues to alleviate such conditions".[178] Whereas the Board preferred to follow the majority of the Divisional Court in *Advocacy Centre For Tenants-Ontario v Ontario Energy Board*,[179] the Court of Appeal found Swinton J's dissent more persuasive on this point.

Again, it is at least arguable that s. 43(3) does not stand in the way of making a special rate for customers residing on First Nations lands. Section 43(3) can be read more narrowly but no less purposively, as an anti-commandeering principle which prevents the government from directing Manitoba Hydro's resources to its political ends. Nothing of the sort was happening here. Rather, the Board was attempting to achieve the broad goal of poverty alleviation, in the context of a nationwide effort to promote reconciliation between Canada and its First Nations.[180]

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[175] *Manitoba, supra* note 174 *at para* 53-54.
[176] *Manitoba, supra* note 174 at para 55, 91.
[177] *Ibid* at para 81.
[178] *Ibid at para* 85-86.
[179] (2008) 293 DLR (4th) 684.
[180] *Cf Manitoba, supra* note 173 at para 87.

The point is not that the Board was right and the Court of Appeal wrong, or *vice versa*. The point is that in a deferential regime, the outcome in this case would quite probably have been different. It is true that Canadian courts have policed the boundaries of rate-setting authority with some vigour.[181] But the pre-*Vavilov* law was very favourable to expert economic regulators. This case demonstrates that *Vavilov* is much less friendly, at least where there is a statutory right of appeal.

What is An "Appeal"?

Post-*Vavilov* the existence of an appeal is potentially very important. What, then, is an "appeal?" In *Vavilov*, the majority noted that some legislation provisions "simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context".[182] These are not "appeal" clauses. But what is the difference between a clause which creates a right of appeal and a clause which simply provides for procedural matters?

There has been some discussion of what counts as an "appeal" clause, with cases falling on two sides of the line. In British Columbia, it has unsuccessfully been argued that s. 623 of the *Local Government Act*, which makes provision as to how an application to set aside a bylaw can be made, constitutes an appeal clause: properly interpreted, s. 623 is simply a "particular procedure that applies to the judicial review of decisions of local governments";[183] it "serves to clarify for whom a right to judicial review exists, the powers the court can exercise on such a review, and what procedural requirements must be met to assert that right", but does not constitute a legislative institutional choice to have courts review matters on a correctness standard.[184]

On the other side of the line fell *McCarthy v Guest*.[185] At issue here was s. 27(1) of the *Residential Tenancies Act*:

> Any landlord or tenant affected by any decision…may, within 7 days…apply by Notice of Application to a judge of The Court of Queen's Bench of New Brunswick to review and set aside the decision…on the ground that it was made
>
> (a) without jurisdiction, or
>
> (b) on the basis of an error of law.[186]

Petrie J held that although the legislature had not used the magic word "appeal", the "review" provided for was the functional equivalent of an appeal, as the legislature had "enacted a fairly detailed statutory mechanism…of involving the courts…"[187] Certainly the limitation of the issues to be considered by the court to those of jurisdiction or law is "akin" to the language of a statutory appeal.[188] The argument that this was simply a mechanism to get matters before the courts (the argument which prevailed in British

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[181] See e.g. *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4.
[182] *Vavilov*, *supra* note 1 at para 51.
[183] *G.S.R. Capital Group Inc. v The City of White Rock*, 2020 BCSC 489 at para 69.
[184] *O'Shea/Oceanmount Community Association v Town of Gibsons*, 2020 BCSC 698 at para 51. See also *Pendergast v Sidney (Town)*, 2020 BCSC 1049.
[185] 2020 NBQB 150 [*McCarthy*].
[186] SNB 1975, c R-10.2.
[187] *McCarthy*, *supra* note 185 at para 35.
[188] *Ibid* at para 35.

Columbia) was unavailing in view of these indicia of legislative intent. The appellate standard was applied[189] and Petrie J found there had been an error of law.[190]

At the federal level, it is clear (if further clarity were needed) that judicial reviews of trademark decisions in the Federal Court are, where new evidence is admitted, *de novo*, with a correctness standard thus applying.[191] Meanwhile, in *Anderson v Saskatchewan Apprenticeship and Trade Certification Commission*, Barrington-Foote JA clarified (if any clarification were needed) that a legislature may preclude "an appeal to the Court of Appeal from a decision of the Court of Queen's Bench", a proposition which was not qualified in any way by *Vavilov*.[192]

It is also worth pondering, when considering "appeals", the position of the certified question regime in federal immigration law — on its face the ability of the Federal Court to certify a general question of law for resolution by the Federal Court of Appeal does not attract the *Housen v Nikolaisen* framework[193] but it is nonetheless difficult in some cases to conduct a reasonableness review of the decision-maker's reasons because the real issue is whether the Federal Court has accurately followed appellate authority.[194] It is certain, however, that what matters here is statutory language, not the character of the decision-maker: superior court review of provincial court decisions is to be conducted under the *Vavilov* framework unless the magic word "appeal" has been used.[195]

Lastly, it is now clear that the Court of Quebec, sitting on "appeal", is to apply henceforth the appellate standards of review and not perform a judicial review.[196] This last observation should help to resolve any lingering controversy about the role of the Court of Quebec, due to be considered later this year by the Supreme Court on an appeal from a reference decision of the Quebec Court of Appeal. One of the issues raised in the reference related to the Court of Quebec's appellate jurisdiction over a variety of administrative tribunals. Since 2008, the Court of Quebec has been performing judicial reviews of these tribunals. But the Court of Quebec's judicial reviews are subject to judicial review in the Superior Court (or, depending on the statutory scheme, to appeal to the Court of Appeal). This was problematic.[197]

Vavilov has, however, helped to resolve these problems. The Court of Quebec, being a court, now applies the *Housen v Nikolaisen* framework in statutory appeals and its conclusions can be judicially reviewed in

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[189] *Ibid* at para 38.
[190] *Ibid* at para 63.
[191] See e.g. *Pentastar Transport Ltd. v FCA US LLC*, 2020 FC 367 at para 42-45; *The Clorox Company of Canada, Ltd. v Chloretec S.E.C.*, 2020 FCA 76 at para 21-23; *FFAUF S.A. v Industria di Diseno Textil, S.A.*, 2020 FC 520 at para 26-28, 39. See also, on customs appeals, *Robidoux v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 766 at para 23. Cf *Lynch v St. John's (City)*, 2020 NLCA 31 at para 75 and the unusual scheme described in *Saskatchewan Government Insurance v Schira*, 2020 SKCA 88 at para 19-52.
[192] *Anderson v Saskatchewan Apprenticeship and Trade Certification Commission,* 2020 SKCA 54 at para 11.
[193] See e.g. *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130 at para 9, *per* Rennie JA: "Once a question is certified, all issues that bear upon the disposition of the appeal are at large".
[194] See e.g. *Canada (Citoyenneté et Immigration) c Solmaz*, 2020 CAF 126 at para 73-116.
[195] *S.G. v G.M.*, 2020 BCSC 975 at para 65-84.
[196] See e.g. *Fabrique of the Parish of Saint-Patrick c Ville de Montréal*, 2020 QCCS 855 at para 10 and See also *Khan c Office municipal d'habitation de Montréal*, 2020 QCCQ 1675 at para 15-16.
[197] Paul Daly, "Is Deference Constitutional in Canada?" *Administrative Law Matters*, 12 October 2017; "Les appels administratifs au Canada" (2015) 93 Can Bar Rev 71, at Part III-C; "Section 96: Striking a Balance between Legal Centralism and Legal Pluralism" in Richard Albert, Paul Daly and Vanessa MacDonnell eds., *The Canadian Constitution in Transition* (University of Toronto Press, Toronto, 2019), p 84, at pp 99-100 (discussing reconsideration but the same principles apply).

the Superior Court. It is true that the Superior Court's role will be limited in situations where the Court of Quebec applies the palpable and overriding error standard. But the Court of Quebec is a generalist appellate body and, as such, should defer to expert administrative tribunals.

Does the fact that the Superior Court will review applications of the palpable and overriding error standard for reasonableness create constitutional difficulties? I am inclined to think not. The Superior Court should be capable on judicial review of correcting any misapplication of the palpable and overriding error standard. It is difficult to see how a misapplication would not contain the sorts of fundamental flaw or disregard of factual and legal constraints identified in *Vavilov*. For instance, a misapplication of the palpable and overriding error standard would mean "the conclusion reached cannot follow from the analysis undertaken";[198] and the Court of Quebec applying the palpable and overriding error standard is as likely to unreasonably fundamentally misapprehend the evidence as the first-instance decision-maker.[199] There is, therefore, little or no fear that defective administrative decisions will be sheltered from judicial oversight by virtue of Quebec's unique administrative appeals structure.

Arbitration Appeals

There has been disagreement on the issue of whether arbitration decisions are subject to the appellate review framework post *Vavilov* or, as was the case previously, subject to the judicial review framework as held by the Supreme Court in *Sattva Capital Corp. v Creston Moly Corp.*[200] In *Buffalo Point First Nation et al. v Cottage Owners Association*,[201] and *Allstate Insurance Company v Her Majesty the Queen*,[202] the courts took the view that *Sattva* has been superseded by *Vavilov*. But in *Cove Contracting Ltd v Condominium Corporation No 012 5598 (Ravine Park)*,[203] it was held that *Sattva* continues to bind.[204]

Subject, obviously, to the details of the statutory provision in a given jurisdiction, I think the better view must be that the use of the word “appeal” in relation to arbitration decisions now carries with it the appellate review framework (correctness on extricable questions of law, palpable and overriding error for the rest).

Hainey J doubted this view in *Ontario First Nations (2008) Limited Partnership v Ontario Lottery And Gaming Corporation*, reasoning that the legislative intent branch of the *Vavilov* framework did not apply because the right of appeal was found in an agreement between the parties, not the provincial arbitration statute.[205]

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[198] *Vavilov*, *supra* note 1 at para 103.
[199] *Vavilov*, *supra* note 1 at para 126.
[200] 2014 SCC 53.
[201] 2020 MBQB 20 at para 56.
[202] 2020 ONSC 830 at para 19.
[203] 2020 ABQB 106 at para 10.
[204] See also *Freedman v Freedman Holdings Inc.*, 2020 ONSC 2692 at para 102-103 on the commonalities between review of administrative decisions and arbitration decisions. Bennett JA recognized the importance of the issue in *Nolin v Ramirez*, 2020 BCCA 274 at para 36: “there is an issue percolating in courts across the country as to whether *Vavilov* applies to commercial arbitration, or arbitration generally. To date, and to my knowledge, no appellate court has considered the issue”. Alas, she determined at para 39 that it was not necessary to address it in the instant case: “In my opinion, it makes no difference in this case whether the standard of review is reasonableness or palpable and overriding error, as the result would be the same. Since it is unnecessary to decide the obviously complex question, I will leave it to another day”.
[205] 2020 ONSC 1516 at para 61-75.

To my eye, this distinction is far too fine. It is true that s. 45 of the *Arbitration Act* does not explicitly provide for appeals, but it does draw distinctions between the treatment of questions of law (s. 45(1) and (2)) and questions of fact and questions of mixed fact and law (s. 45(3)). The natural reading, in light of *Vavilov*, is that the legislature has proceeded on the basis that the courts will apply the appellate review framework. Whilst no standard of review is specified in the legislation, I do not think this is necessary to engage the legislative intent branch of *Vavilov* where the statute provides for an appeal (it is necessary where the statute purports to set out grounds of review: see the discussion of patent unreasonableness below).

The Effect of a Limited Appeal Clause

In *Vavilov* the Supreme Court made clear that a limited right of appeal does not preclude an application for judicial review:

> [T]he existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal.[206]

Let us return to the facts of *Bell Canada*. As it happens, the conclusion that the decision at issue fell within the appeal clause and that the CRTC had acted outside its jurisdiction was mightily convenient. For the CRTC has a general power under s. 18(3) of the *Broadcasting Act* to "issue any decision…if it is satisfied that it would be in the public interest to do so". This power only extends to matters within the CRTC's jurisdiction. The Supreme Court's conclusion that the CRTC did not have jurisdiction meant that it was not necessary to consider whether the CRTC could have invoked its s. 18(3) power. This was a convenient conclusion because the s. 18(3) power is neither a question of law nor a question of jurisdiction. It is outside the scope of the appeal clause. Even in a case where the CRTC relied on its s. 18(3) power, judicial review would be an option. Therefore, it would seem possible for a party unhappy with a CRTC decision to (1) appeal the legal/jurisdictional elements of the CRTC decision *and* (2) judicially review the factual/discretionary elements of the CRTC decision.[207] Indeed, it would be prudent to do so, for otherwise a party might be told its appeal is outside the scope of s. 31.

Consider, in this regard, the decision of the Ontario Divisional Court in *Zhou v Cherishome Living*.[208] This was an appeal from the Landlord and Tenant Board under s. 210 of the provincial *Residential Tenancies Act*. Appeals are available on questions of law only. The panel concluded that it was "not appropriate" to request additional submissions on the consequences of *Vavilov*.[209] Yet the effect of the panel's application of *Vavilov* was that one of the issues raised by the tenants — who were self-represented — was one of mixed fact and law and thus "not appealable".[210] But it was made clear in *Vavilov* that appeal clauses which do not cover all of the issues in dispute do not preclude unhappy appellants from bringing judicial review proceedings in respect of the other issues.[211] Post-*Vavilov*, the appellants could have commenced

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[206] *Vavilov*, *supra* note 1 at para 52. For discussion, see Nigel Bankes, "Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response", *ABlawg*, 3 January 2020, available online: <https://ablawg.ca/2020/01/03/statutory-appeal-rights-in-relation-to-administrative-decision-maker-now-attract-an-appellate-standard-of-review-a-possible-legislative-response/>.
[207] Cf *Bell Canada v British Columbia Broadband Association*, 2020 FCA 140.
[208] 2020 ONSC 500.
[209] *Ibid* at para 32.
[210] *Ibid* at para 68.
[211] *Vavilov, supra* note 1 at para 52.

judicial review proceedings in parallel to their appeal (indeed, unless and until there is further clarification of this point, I think wise counsel will generally advise clients to do so). That is not to say that a court would ultimately have allowed a judicial review application to proceed (not least because the litigation between the parties has been ongoing for many years), just that it would have been more prudent at least to ask the appellants if they had something to say.

This point has been causing some confusion: compare the correct statement of the law in *Ewanek v Winnipeg (City of) et al.*, to the effect that matters not falling within an appeal clause can be dealt with according to judicial review principles[212] with *Van de Sype v Saskatchewan Government Insurance*,[213] where this problem does not seem to have been identified; and both *Thibeault v Saskatchewan (Apprenticeship and Trade Certification Commission)*,[214] and *Lansdowne Equity Ventures Ltd. v Cove Communities Inc.*,[215] where it is said bluntly that factual matters may not be considered on an appeal on questions of law or jurisdiction (though note the comments in the latter case on the situations in which an error of fact will constitute an appealable error of law). Of course, as Elson J explained in *Lansdowne Equity Ventures Ltd. v Cove Communities Inc.*,[216] account must be taken now of the spirit of *Housen v Nikolaisen* which is, in part, to minimize the number of appeals. But if reasonableness review is so important – indeed, "reasoned decision-making is the lynchpin of institutional legitimacy"[217] - any exclusion of the consideration of factual matters by a reviewing court should be treated with suspicion.

Legislated Standards of Review

In *Vavilov*, the majority stated that courts must "respect clear statutory language that prescribes the applicable standard of review".[218]

It is not enough for the legislature to prescribe *grounds* of review. Again, it must use magic words like "correctness" and "reasonableness".

In *Khosa v Canada (Citizenship and Immigration)*,[219] the Supreme Court considered the interaction of the common law of judicial review and the *Federal Courts Act*.[220] Section 18.1(4) of the Act sets out a codified scheme of grounds of review, for instance that a decision-maker "acted without jurisdiction", "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner" or "erred in law in making a decision or an order". But s. 18.1(4) does not set out any *standard* of review. The language of s. 18.1(4) is "open textured" and has to be "supplemented by the common law".[221] For example, the reference to error of law in s.18.1(4) "provides a *ground* of intervention" but not a standard such that where deference is appropriate, "the common law will stay the hand of the judge(s)…".[222] By contrast, where, as in the *Criminal Code* provisions relating to Review Board decisions, a right of appeal is

[212] 2020 MBQB 98 at para 32.
[213] 2020 SKCA 18.
[214] 2020 SKQB 192 at para 8.
[215] 2020 SKQB 113 at para 30.
[216] *Ibid* at para 26, 35. See also *Sinclair v North Prairie Developments Ltd.*, 2020 SKQB 216.
[217] *Vavilov*, *supra* note 1 at para 74, quoting from the amici curiae's factum.
[218] *Vavilov*, *supra* note 1 at para 34.
[219] 2009 SCC 12 at para 19 [*Khosa*].
[220] RSC 1985, c F-7.
[221] *Khosa, supra* note 219 at para 44.
[222] *Ibid* [emphasis in original]. See also *Bergman v Innisfree (Village)*, 2020 ABQB 661 at para 114.

restricted by legislation to a consideration of the reasonableness of a decision, the standard will straightforwardly be reasonableness.[223]

Patent Unreasonableness

The most well-known legislated standard of review is British Columbia's *Administrative Tribunals Act*.[224] Sections 58(2)(a) and 59(3) apply a standard of review of "patent unreasonableness" to certain administrative decisions: determinations of law protected by a privative clause and discretionary decisions, respectively. At the time of the enactment of the *Act*, there were three standards of review: correctness, reasonableness simpliciter and patent unreasonableness. In enacting a standard of patent unreasonableness, the legislature can be taken to have intended a high degree of deference to be shown to administrative tribunals covered by this standard (essentially, those protected by a privative clause).

The standard is defined identically in ss. 58(3) and 59(4) as follows:

> a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

An alert reader of *Khosa* will note that these provisions simply specify *grounds* of review; indeed, they parrot the classic grounds of judicial review for abuse of discretion. They do not – regardless of what the legislature wished to accomplish and of how deferentially these grounds had been applied in practice – specify a *standard* of review. And as Binnie J. explained in *Khosa*, there is a significant difference between identifying the sorts of error which *may* lead an administrative decision-maker to take an unlawful decision and identifying *when* judicial intervention is justified. *Khosa* holds that judicial intervention is justified only when, say, a failure to take statutory requirements into account renders a decision unreasonable as a whole. *Vavilov's* discussion of the governing statutory scheme compels a similar conclusion.

In *British Columbia (Workers' Compensation Board) v Figliola*,[225] the Supreme Court failed to appreciate this difficulty, simply noting uncritically that, "based on the directions found in s. 59(3) of the *ATA*, the Tribunal's decision is to be reviewed on a standard of patent unreasonableness".[226] On the facts, a majority of the Court held that the decision in the instant case was unreasonable because "the Tribunal based its decision to proceed…on predominantly irrelevant factors and ignored its true [statutory] mandate…"[227] The Supreme Court subsequently stated that patent unreasonableness requires the "utmost deference" to a decision-maker's interpretation of its parent statute and its decisions.[228]And, in

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[223] See e.g. *Ahmadzai (Re)*, 2020 ONCA 169 at para 12; *Nguyen (Re)*, 2020 ONCA 247 at para 28; *R v Ferzli*, 2020 ABCA 272 at para 20 (appeals from a Criminal Code Review Board to the Court of Appeal).
[224] SBC 2004, c 45. I am indebted to Frank A Falzon QC for detailed discussion.
[225] 2011 SCC 52 [*Figliola*]. See also *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43.
[226] *Figliola, supra* note 225 at para 20.
[227] *Ibid* at para 54. The concurring judges, led by Cromwell J, were slightly more deferential, but also accepted that the patent unreasonableness standard applied. See *Ibid* at para 97.
[228] *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para 29.

Vavilov, the majority stated "legislated standards of review should be given effect",[229] referring to several of its decisions from British Columbia.

Despite these difficulties, the British Columbia courts have unquestioningly (and, by all accounts, happily) applied patent unreasonableness in a highly deferential manner, without reference to the definition of patent unreasonableness provided in the *Act*.[230] In *Speckling v British Columbia (Workers' Compensation Board)*, the Court of Appeal endorsed six principles as defining the content of patent unreasonableness. In particular, to be patently unreasonable, a decision must be "openly, clearly, evidently unreasonable";[231] the standard must be applied "to the result not to the reasons leading to the result" and "a decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not".[232]

However, subsequent to the enactment of the *Administrative Tribunals Act*, the Supreme Court of Canada eliminated the patent unreasonableness standard of review.[233] This required the British Columbia courts to respond to arguments that the law in British Columbia should evolve to take account of evolution in the common law. The British Columbia Court of Appeal heard argument on the point on several occasions and held that there had been "no change" in the meaning of patent unreasonableness on account of the Supreme Court of Canada's elimination of patent unreasonableness.[234]

Vavilov has reopened a debate which seemed to have been closed. In *College of New Caledonia v Faculty Association of the College of New Caledonia*,[235] the petitioner argued that the articulation of "robust" reasonableness review in *Vavilov* should inform the application of patent unreasonableness in British Columbia. Francis J was unimpressed and, stating that "*Vavilov* has not changed the law with respect to the meaning of patent unreasonableness", went on to uphold the decision.[236] But in *Guevara v Louie*, Sewell J took the opposite view, drawing inspiration from *Vavilov* in defining the content of patent unreasonableness: "In [*Vavilov*], the Court emphasized that it is the duty of a reviewing court to determine whether the decision maker's reasons meaningfully account for the central issue and concerns raised by

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[229] *Vavilov*, *supra* note 1 at para 34.

[230] Indeed, it is arguable that the statutory definition and common-law definition of patent unreasonableness have been merged: see *C.S. v British Columbia (Workers' Compensation Appeal Tribunal)*, 2019 BCCA 406 at para 45, 76-81. Note that the statutory definition of patent unreasonableness does not apply to the British Columbia Labour Relations Board: *Labour Relations Code*, RSBC 1996, c 244, s 115.1. This may be because the Board feared that the definition would be applied non-deferentially. For an example of non-deferential application of the patent unreasonableness standard, see *Moore v College of Physicians and Surgeons of British Columbia*, 2013 BCSC 2081 at para 112-113, aff'g 2014 BCCA 466. As it is, the "common-law definition" of patent unreasonableness applies to the Board, not the statutory definition: see *Casavant v British Columbia (Labour Relations Board)*, 2020 BCCA 159 at para 24. See further *BCNU v HSABC*, 2017 BCSC 343 at para 29; *Langston v Teamsters, Local 155*, 2010 BCSC 534 at para. 26; and *COPE, Local 378 v BC Hydro*, 2006 BCSC 1145 at para. 29. Many thanks to Elena Miller for discussion.

[231] Or, if it makes any difference, "clearly irrational" (*Shamji v Workers' Compensation Appeal Tribunal*, 2018 BCCA 73 at para 37) or bordering on the absurd (*West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para 28). See also *Unifor Local 2301 v Rio Tinto Alcan (Kitimat Works)*, 2016 BCSC 455 at para 6.

[232] *Speckling v British Columbia (Workers' Compensation Board),* 2005 BCCA 80 at para 33. The other three "principles" do not, in my view, have any analytical force.

[233] *Dunsmuir v New Brunswick,* 2008 SCC 9 [*Dunsmuir*].

[234] *Pacific Newspaper Group Inc. v Communications, Energy and Paperworkers Union of Canada, Local 2000,* 2014 BCCA 496 at para 48. See also *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v Auyeung,* 2011 BCCA 527.

[235] 2020 BCSC 384.

[236] *Ibid* at para 33.

the parties. While these comments were made in the context of a review on a reasonableness standard, it is my view that they also apply to a review of reasons on the standard of patent unreasonableness".[237] And in *Team Transport Services Ltd. v Unifor*, Gomery J took *Vavilov* to require a reasons-first approach to judicial review.[238]

What future, then, for patent unreasonableness in British Columbia (assuming that it is, as the British Columbia courts and the Supreme Court have construed it, a highly deferential standard)?

To begin with, it is necessary to ask whether "patent unreasonableness" was set in aspic in 2004. Was the standard set by reference to Supreme Court jurisprudence to evolve or stay still? Is patent unreasonableness a living tree, or an ice sculpture? I think it must be a living tree, for two reasons. For one thing, the patent unreasonableness standard was notoriously difficult to define, as LeBel J pointed out in devastating concurring reasons in *Toronto (City) v C.U.P.E., Local 79*. To take just one of the many points eloquently made there by LeBel J, to say that a decision is patently unreasonable if it is "openly, clearly, evidently unreasonable" is tautological.[239] To suggest that a standard which no one understood in 2004 should forever have the meaning that it had in 2004 is, at least, unrealistic and probably, well, tautologous. For another thing, when common law terms of art are set out in a statute, it is natural for courts "to look to the common law for clarification".[240] As Binnie J put it in *Khosa*, patent unreasonableness was "intended to be understood in the context of the common law jurisprudence" and to evolve accordingly: "the *content* of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law".[241]

Accordingly, evolutions in the general principles of administrative law are relevant to determining the meaning of the patent unreasonableness standard. However, this prompts a further question: *how* are subsequent developments in the common law of judicial review *relevant*? There are two possibilities.

- One is that patent unreasonableness changes in lockstep with changes to the reasonableness standard. This seems inappropriate. Even if the legislature did not set patent unreasonableness in aspic in 2004 (inasmuch as one can set the inchoate in aspic), when a common law standard is codified in this way, "it is stated in a fixed statutory form while its substance remains the same"[242] and the substance of patent unreasonableness could not be equated with the substance of reasonableness – it is its antithesis. As the British Columbia Court of Appeal observed of Binnie J's comments, in *Khosa*, they "did not signify that the standard of patent unreasonableness would evolve along with changes in the standard of reasonableness at common law post-*Dunsmuir*".[243]
- Another possibility is that patent unreasonableness should be *informed* by subsequent developments in the common law of judicial review. Other standards of review can be used as a foil to determine the content of patent unreasonableness. Patent unreasonableness is *not* reasonableness: that much is clear about its "substance" at the time of enactment.

[237] 2020 BCSC 380 at para 48.
[238] 2020 BCSC 91 at para 19.
[239] 2003 SCC 63 at para 104-105.
[240] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 436 [*Sullivan*].
[241] *Khosa*, *supra* note 219 at para 19.
[242] *Sullivan, supra* note 240 at 436.
[243] *Pacific Newspaper Group supra* note 234 at para 46.

> Therefore, patent unreasonableness can be defined by reference to the components of the reasonableness standard that *it does not share*. In this regard, I am reminded of the old joke about what on earth it means to be Irish: it means not being English.

In terms of the common law *informing* patent unreasonableness, the following options are available. One possibility is to use the key differences between pre-*Vavilov* and post-*Vavilov* reasonableness review – justification, demonstrated expertise, responsiveness and contemporaneity – to define the content of patent unreasonableness. In essence, a reviewing court should look only to whether a decision lies in the range of possible, acceptable outcomes (not whether the reasons justify the outcome), a reviewing court should presume that the decision-maker brought its expertise to bear on the matter before it, a reviewing court should not require responsiveness to key arguments or pieces of evidence, and a reviewing court can freely look to the record to find reasons which *could* have been given in support of a decision in determining whether it falls within the range of possible, acceptable outcomes.[244] This would make for a meaningful difference between patent unreasonableness in British Columbia and *Vavilov's* reasonableness standard, respecting legislative intent but also ensuring that the patent unreasonableness standard evolves. It also respects one of the key features of the existing British Columbia definition of patent unreasonableness, that judicial review should be outcome-focused, not reasons-focused.

An alternative would be simply to say that where the patent unreasonableness standard applies, it forms part of the "governing statutory scheme" and operates so as to give the decision-maker "greater flexibility"[245] in discharging its statutory mandate. The alternative has the merit of simplicity, but it does not track the important differences between pre- and post-*Vavilov* reasonableness review.

In Ontario, meanwhile, the reference to patent unreasonableness in the *Human Rights Code*,[246] continues to be taken to require the application of the reasonableness standard.[247] The British Columbia options laid out in the preceding paragraphs could certainly be actioned in Ontario. But there may be an important nuance. The Ontario statute makes reference to a common law concept (patent unreasonableness) which has been assimilated by the courts to another common law concept (reasonableness). Unlike in British Columbia, the legislature and the courts have not attempted to specify the content of patent unreasonableness but rather signalled a willingness to rely on judicial development of patent unreasonableness: Ontario judges have considered since *Dunsmuir* that the goals of patent unreasonableness can be achieved through the application of the reasonableness standard. In this instance, it might be said that the assimilation of patent unreasonableness to reasonableness does no violence to legislative intent. Equally, however, patent unreasonableness might be given content by using reasonableness review as a reference point, as I have suggested for British Columbia. Over to you, Courts of Appeal!

Eliminating Grounds of Review

There are limits on the legislature's ability to pick and choose grounds of review.

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[244] But see *Air Canada v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at para 74, where Groberman J doubted this proposition, based on a comprehensive review of the case law.
[245] *Vavilov*, *supra* note 1 at para 110.
[246] RSO 1990, c H-19, s 45.8.
[247] *Intercounty Tennis Association v Human Rights Tribunal of Ontario*, 2020 ONSC 1632 at para 30-38; *Ontario v Association of Ontario Midwives*, 2020 ONSC 2839 at para 88.

For example, s. 34(1) of the *Federal Public Sector Labour Relations and Employment Board Act*[248] excludes several of the grounds of review set out in the *Federal Courts Act*, most notably error of law. But in *Canada (Attorney General) v Public Service Alliance of Canada*,[249] the Federal Court of Appeal refused to accept that the exclusion was effective. Giving effect to the exclusion "runs afoul of the rule of law concerns that provide the constitutional underpinning for judicial review of administrative action by the independent judicial branch".[250] The result would be that decisions of the Board would be "largely unreviewable": "This cannot be".[251] Rather, the exclusion of several grounds of review indicated that decisions of the Board should be reviewed deferentially.[252]

In *Ponoka Right to Farm Society v Ponoka (County)*,[253] Neilson J considered s. 539 of the *Municipal Government Act*,[254] which provides: "No bylaw or resolution may be challenged on the ground that it is unreasonable". Following the analysis in *Koebisch v Rocky View County*,[255] Neilson J held that this amounted to a legislative direction to apply the patent unreasonableness standard.[256]

Section 539 raises quite the conundrum. The idea that it requires the application of the common law patent unreasonableness standard runs into the objection that patent unreasonableness has now been assimilated to reasonableness as a matter of common law. Inasmuch as there is any legislative intent, it points as much to the reasonableness standard as it does to the patent unreasonableness standard. Of course, this suggests that s. 539's bar to reasonableness review is meaningless. But I would not be too quick to jump to this conclusion. Again, the key lies in *Vavilov's* reference to circumstances where a decision-maker will have "greater flexibility".[257] Section 539 can, very simply, be understood to provide "greater flexibility" to municipalities. It would not, then, be necessary to breathe new life into the patent unreasonableness standard.

My approach to s. 539 also avoids a potential constitutional objection:[258] robust reasonableness review might be part of the constitutional core minimum of judicial review; if so, s. 539 might be unconstitutional.

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[248] SC 2013, c 40, s 365.
[249] 2019 FCA 41.
[250] *Ibid* at para 30.
[251] *Ibid* at para 31.
[252] *Ibid* at para 34.
[253] 2020 ABQB 273.
[254] RSA 2000, c M-26.
[255] 2019 ABQB 508.
[256] 2020 ABQB 273 at para 13. Historically, the provision can be explained on the basis that it attempted to oust reasonableness review as articulated in cases such as *Kruse v Johnson*, [1898] 2 QB 1: see John Mark Keyes, "Judicial Review of Delegated Legislation: the Long and Winding Road to *Vavilov*", *Ottawa Faculty of Law Working Paper No. 2020-14*, 18 June 2020, available online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630636>, at 6 n 40, describing the provision "as a measure to counteract the strict review of municipal bylaws before the more recent reforms to municipal legislation at the beginning of the 21st century". The solution I propose in the text is consistent with this underlying intention.
[257] *Vavilov*, *supra* note 1 at para 110. The legislature *has* specified patent unreasonableness as a standard of review in respect of under decisions taken under the same legislation: see *Bergman*, *supra* note 222. This might lead to an inference that patent unreasonableness could not be a standard of review under s. 539: the legislature appreciated the possibility of setting patent unreasonableness as a standard of review and must be taken to have consciously chosen not to set it as a standard of review for s. 539. Even if this is so, however, it does not undermine the argument that a decision subject to s. 539 is one in respect of which the decision-maker has "greater flexibility", because the resultant increased margin of appreciation does not have to be described as or even equated with patent unreasonableness.
[258] See David Mullan, *supra* note 1.

Of course, the majority in *Vavilov* is not at all clear on what's entrenched and what's not entrenched, and s. 539 is not a complete ouster (as it leaves correctness review in place), but allowing legislatures to oust reasonableness review would surely be constitutionally dubious at best in view of the importance accorded to "robust" reasonableness review in *Vavilov*.

The Rule of Law

Any other departures from the starting point of the presumption of reasonableness review are only justifiable by reference to the rule of law. These are the categories set out in *Dunsmuir v New Brunswick*,[259] minus true questions of jurisdiction: "respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies".[260] The majority's conception of the oft-controversial concept of the rule of law is as wafer thin as its conception of institutional design: the rule of law is engaged only in situations where "consistency" and thus "a final, determinate answer" to a legal question is necessary.[261]

Constitutional Questions

In *Doré v Barreau du Québec,*[262] the Supreme Court of Canada held that alleged infringements of *Charter* rights by administrative decision-makers should be reviewed on the deferential reasonableness standard. What matters is not whether the decision survives the rigours of the proportionality test set out in *R v Oakes* but whether it represents an appropriate balance between *Charter* values and the decision-maker's statutory objectives. *Vavilov* does not discuss *Doré* in terms, but the emerging judicial consensus is that the two decisions are consistent.

The conceptual framework of *Vavilov* supports the continued application of *Doré*. Exceptions to the presumption of reasonableness review can only be based on legislative intent or the rule of law. In the absence of federal or provincial legislation requiring correctness review for *Charter* questions, it is only where the rule of law is engaged that *Charter* issues will be subject to correctness review under the *Vavilov* framework. But the rule of law, as defined in *Vavilov*, is engaged only where a "final and determinate" judicial interpretation is necessary to ensure "consistency".[263]

The first post-*Vavilov* decision, *Peter v Public Health Appeal Board of Alberta*,[264] did embrace correctness review on constitutional issues. By contrast, in *Syndicat des employé(e)s de l'école Vanguard ltée (CSN) c Mercier*, St-Pierre J applied the reasonableness standard even in the face of an argument based on the

[259] *Dunsmuir, supra* note 233.
[260] *Vavilov*, *supra* note 1 at para 53.
[261] *Ibid.* Compare the rich discussion of the rule of law and constitutionalism in *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 70-78.
[262] 2012 SCC 12 [*Doré*].
[263] *Vavilov*, *supra* note 1 at para 53.
[264] 2019 ABQB 989.

quasi-constitutional Quebec *Charter*.[265] St-Pierre J's position is more persuasive given the narrow conceptual basis provided for the correctness categories in *Vavilov*.[266]

Of course, direct challenges to the constitutionality of statutes or similarly general norms will continue to attract correctness review,[267] as will decisions touching on the borderline between provincial and federal regulation,[268] and those setting the boundaries of constitutional rights or obligations,[269] but like it or not, the *Doré* framework survived *Vavilov* and has perhaps emerged even stronger. In *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*,[270] Masuhara J relied on the expertise of the decision-maker to justify the application of the *Doré* framework. Post-*Vavilov*, expertise is not relevant to the selection of the standard of review, but, this means the argument for deference is *a fortiori*: *Vavilov* teaches that deference applies in all *scenarios* unless the rule of law (or legislative intent) requires otherwise which, given the narrow conceptual basis provided for it, will be exceedingly rare.[271]

Facial challenges to statutes, the borderline between provincial and federal regulation and the determination of the scope of constitutional rights or obligations demand a uniform answer, inasmuch as the answer should not depend on the identity of the administrative decision-maker providing it. Here, the integrity of the legal system is at stake and correctness review rests comfortably on the narrow rule-of-law basis provided in *Vavilov*. But individualized decisions about the appropriate application of the *Charter* in a particular regulatory setting do not compromise the integrity of the legal system: different balances may perfectly legitimately be struck in different areas of regulation between individual rights and the public interest.

Indeed, I would observe in this regard that the application of a proportionality test to individualized decisions would be no guarantor of uniformity. A superior court determination of whether there were alternative means of achieving the same regulatory objective and whether an appropriate balance was struck in a given case might be very different in, say, the legal-professional context than in the context of a healthcare professional. Put another way, the degree of deference built into the proportionality test undermines any argument that proportionality must be applied to all alleged *Charter* violations by administrative decision-makers in order to achieve uniformity.

Overlapping Jurisdiction

In the interests of uniformity and the integrity of the legal system, courts must "resolve questions regarding the jurisdictional boundaries between two or more administrative bodies."[272] These questions have most commonly arisen in the context of labour relations disputes, where a collective agreement

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[265] 2020 QCCS 95 at para 17-19.
[266] See also *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at para 27; *Borradaile v British Columbia (Superintendent of Motor Vehicles)*, 2020 BCSC 363 at para 34; *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561 at para 28-31; *Sagkeeng v Government of Manitoba et al.*, 2020 MBQB 83 at para 101; *R. B. v British Columbia (Superintendent of Motor Vehicles)*, 2020 BCSC 1496 at para 50.
[267] See *Canada Union of Correctionnel Officers) v Canada (Attorney General)*, 2019 FCA 212 at para 21.
[268] *Canada (Attorney General) v Northern Inter-Tribal Health Authority Inc.*, 2020 FCA 63 at para 12-13.
[269] *Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025 at para 37; *Coldwater*, *supra* note 266 at para 27.
[270] 2020 BCSC 561 at para 30.
[271] See *Doré, supra* note 260 *at para* 51-52.
[272] *Vavilov, supra* note 1 at para 63.

arguably gives an arbitrator the authority to adjudicate the dispute. In *Regina Police Assn. Inc. v Regina (City) Board of Police Commissioners,*[273] an arbitrator declined to hear a matter, reasoning that it could be dealt with under a police discipline procedure established by statute. By contrast, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)*,[274] the Quebec Human Rights Tribunal could hear a human rights complaint in respect of alleged discrimination even though such matters related to the complainants' employment. In these cases, there was no conflict as such between competing jurisdictions: in the former, the arbitrator had declined jurisdiction; and in the latter, the Tribunal had asserted jurisdiction. But there was no competing decision from the body said to have the authority to hear the matter. Nonetheless, the Supreme Court resolved the question of jurisdictional boundaries on a correctness standard in these cases. As explained in *Vavilov*, "Members of the public must know where to turn in order to resolve a dispute."[275]

However, it is arguable that *Vavilov* has narrowed the scope of this correctness category. Recall the narrow rule-of-law basis set out in *Vavilov*: "the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions."[276] Arguably, then, it is only where there is a live conflict over the identity of the decision-maker to hear a dispute that the courts should intervene on a correctness standard. There would have to be two tribunals saying "we have jurisdiction". In both *Regina Police Association* and *Commission des droits de la personne*, everyone knew where to turn: to the police discipline procedure and to the Tribunal respectively. Reviewing these decisions on a reasonableness standard would not have undermined the integrity of the legal system. Of course, the particular area of arbitration jurisdiction is complicated by the Supreme Court's decision in *Weber v Ontario Hydro*,[277] which talks in terms of "exclusive" jurisdiction and thereby invites correctness review to establish the boundaries of the "exclusive" jurisdiction. But it remains the case that the peril to the legal system in many cases involving jurisdictional boundaries will be some way off in the future.

Accordingly, of the Ontario Court of Appeal's application of correctness to the issue of overlapping jurisdiction in *Ball v McAulay*,[278] I would observe that there was no conflict (yet) between competing jurisdictions; a university tribunal had concluded it had jurisdiction and no labour arbitrator had asserted otherwise, so arguably this was outside the rule-of-law basis provided in *Vavilov*. Reviewing the university tribunal's assertion of jurisdiction for reasonableness would have done no immediate violence to the rule of law.[279]

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[273] 2000 SCC 14.
[274] 2004 SCC 39.
[275] *Vavilov, supra* note 1 at para 64.
[276] *Vavilov, supra* note 1 at para 65.
[277] [1995] 2 SCR 929.
[278] 2020 ONCA 481.
[279] See also, rejecting overlapping jurisdiction claims, *Heffernan v Saskatchewan Police Commission*, 2020 SKQB 65 at para 25-27; *1582235 Ontario Limited v Ontario*, 2020 ONSC 1279 at para 22; *The Real Canadian Superstores v United Food and Commercial Workers Union Local 1400*, 2020 SKCA 102 at para 31-34. *Cf Régie de l'assurance maladie du Québec c Morin*, 2020 QCCS 294 at para 9-11

Questions of Central Importance to the Legal System

The category most apt to be expanded after *Vavilov* is surely the 'questions of central importance to the legal system' category. But the narrow rule of law basis for the correctness categories does not provide a solid foundation for such arguments.

In *Bank of Montreal v Li*,[280] for example, the issue was whether an employee who had signed a release on conclusion of her employment could nonetheless make an unjust dismissal claim. An adjudicator held she could and, on judicial review, the company sought to persuade the courts to apply correctness review on the basis that the issue of whether an individual can waive a statutory entitlement is a general one requiring definitive judicial resolution. De Montigny JA was not persuaded, concluding that the waiver issue would not have systemic or constitutional implications and noting that "framing an issue in a general or abstract sense is not sufficient to make it a question of central importance to the legal system as a whole".[281]

The question of privilege in *College of Physicians and Surgeons v SJO* was summarily held to be subject to correctness review[282] but as there is ample precedent in support of this conclusion and it does not suggest that this category has widened post-*Vavilov*.[283]

A more curious decision is *Low v Nova Scotia Police Complaints Commissioner*,[284] , where the common law doctrine of discoverability was held to apply in the context of police complaints, on what looked quite like a correctness basis[285] but without consideration of paras 111-114 of *Vavilov*, where the issue of statutory or common law constraints on administrative decision-makers is authoritatively addressed as forming part of the reasonableness analysis.

Further Correctness Categories?

In *Vavilov*, the "rule-of-law" door is left slightly ajar. The majority "would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case".[286] In language reminiscent of *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*[287] and *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*,[288] the reader is warned that any new category would be "exceptional".[289] If history is any guide, however, such equivocation will be treated by lawyers as a wedge with which to open another door to correctness review. Again, whether the coalition can hold and whether lower courts resist the temptation to take a peek behind the rule-of-law door is impossible to tell at this point.

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[280] 2020 FCA 22.
[281] *Ibid* at para 28. See also *Beach Place Ventures Ltd. v British Columbia (Employment Standards Tribunal)*, 2020 BCSC 327 at para 32-34; *Brockville (City) v Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 at para 24-25; *Syndicat canadien de la fonction publique, section locale 1108 c CHU de Québec — Université Laval*, 2020 QCCA 857 at para 26-35; *Procureur général du Québec c Lamontagne*, 2020 QCCA 1137 at para 23-28.
[282] 2020 ONSC 1047 at para 10.
[283] See also *Alberta Health Services v Farkas*, 2020 ABQB 281 at para 37.
[284] 2020 NSSC 113.
[285] *Ibid at para* 46-51.
[286] *Vavilov*, *supra* note 1 at para 70.
[287] 2011 SCC 61.
[288] 2018 SCC 31.
[289] *Vavilov*, *supra* note 1 at para 70.

In *obiter* comments in *Entertainment Software Assoc. v Society Composers*,[290] Stratas JA considered whether the Supreme Court's 2012 decision in *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*[291] is still good law. *Rogers* stands for the proposition that decisions of the Copyright Board are reviewable on a standard of correctness: copyright matters may come before the Federal Court in first instance or before the Federal Court of Appeal on a judicial review application; and to avoid incoherence (e.g. the Federal Court saying one thing and the Federal Court of Appeal refusing to find the Copyright Board was unreasonable to say another) a standard of correctness should apply across the board.

Stratas JA suggested that *Rogers* survives *Vavilov*, for three reasons: first, *Rogers* is of recent provenance and had the Supreme Court wanted to overrule it, the *Vavilov* majority could have said so in terms; second, *Rogers* can be understood — to borrow a key concept from *Vavilov* — to respect Parliament's institutional design choices; and third, *Rogers* safeguards the values of consistency, coherence and certainty.

I am not persuaded. First, it would ordinarily be strange to overrule a precedent *sub silentio* but *Vavilov* was clearly intended as a 'big bang': if something is inconsistent with *Vavilov*, I think *Vavilov* must trump.

Second, "institutional design" as employed in *Vavilov* is a very thin concept, relating only to the provision of a right of "appeal" and not to broader notions about the allocation of authority in the legal system. Indeed, if "institutional design" is expanded, the correctness categories are liable also to expand, undermining the *Vavilovian* simplification project. Moreover, "institutional design" can only be expanded by the introduction of contextual considerations which the majority in *Vavilov* clearly wished to exclude in pursuit of a simpler approach to standard of review. In short, I think any expansion of "institutional design" is contrary to the letter and spirit of *Vavilov*.

Third, the majority in *Vavilov did* address consistency, coherence and certainty, particularly in its articulation of reasonableness review. In terms of coherence, administrative decision-makers are permitted to mold common law concepts to their ends[292] and even, if they have justifiable reasons for doing so, depart from judicial decisions. In terms of consistency and certainty, the mere possibility of divergent approaches within an administrative decision-making structure to a particular question does not, on its own, require correctness review. Rather, where there is a departure from a previous decision or prior practice, the administrative decision-maker must justify such a departure. Translated into the Copyright Board-Federal Court-Federal Court of Appeal conundrum, the *Vavilovian* answer is that the Copyright Board may indeed depart from Federal Court jurisprudence, but would bear a heavy justificatory burden in doing so (with the Federal Court of Appeal charged with determining if the burden has been discharged); and, meanwhile, the Federal Court (and Federal Court of Appeal) would have to be mindful in its jurisprudence of the Copyright Board's preferred approach. When dealing with tricky questions about standard of review, we must now start with *Vavilov* and, in this instance, I think *Vavilov* provides an answer: *Rogers* is no longer good law.

[290] 2020 FCA 100.
[291] 2012 SCC 35.
[292] See e.g. *1582235 Ontario Limited v Ontario*, 2020 ONSC 1279 at para 39.

Remedies

Despite occasional suggestions to the contrary, remedial discretion is a key feature of contemporary administrative law.[293] In *Vavilov*, the majority discussed the issue at surprising length — surprising because although remedial discretion is by now a well-developed phenomenon, it is rarely the subject of detailed discussion.

The majority set out a variety of factors which are influential in the exercise of remedial discretion:

> Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources… [294]

The particular aspect discussed in *Vavilov* is the discretion of reviewing court which has quashed an administrative decision to "remit the matter to the decision maker for reconsideration with the benefit of the court's reasons".[295]

Remitting the matter will "most often"[296] be the appropriate course of action, as "the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide".[297] Considerations of efficient and effective administration will also be relevant[298] and although these will typically also militate in favour of remitting a matter for fresh consideration by a specialized, expert decision-maker, there are "limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters".[299] It may, for instance, not be appropriate to remit 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".[300]

Initially, judges did not seem overly anxious to jump on the suggestion that they might refuse to remit a matter consequent on a finding of unlawfulness where it is "evident" that a "particular outcome is inevitable".[301] In *Canadian Broadcasting Corporation v Ferrier*, for example, Sharpe JA remitted to the decision-maker the question of the applicability of the open court principle to police board hearings (here, a preliminary hearing on whether the time period for reporting alleged police misconduct should be extended).[302] Sharpe JA remitted the question even though much of his analysis was conducted on a

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[293] See e.g. Christopher Forsyth, "The Rock and the Sand: Jurisdiction and Remedial Discretion" (2013) 23:1 JR 360; But See *Harelkin v University of Regina,* [1979] 2 SCR 561 at 576; *State (Cussen) v Brennan,* [1981] IR 181 at 195; *Seal v Chief Constable of the South Wales Police,* [2007] 1 WLR 1910 at para 33; *Walton v Scottish Ministers,* [2013] Env LR 16 at para 81 (Lord Reed), 103, 112 (Lord Carnwath), 155-156 (Lord Hope); and *R (New London College) v Secretary of State for the Home Department,* [2013] 1 WLR 2358 at para 45-46.
[294] *Vavilov*, *supra* note 1 at para 142.
[295] *Ibid* at para 139.
[296] *Vavilov*, *supra* note 1 at para 140.
[297] *Ibid.*
[298] *Ibid.*
[299] *Ibid* at para 142.
[300] *Ibid.*
[301] *Ibid*.
[302] *Supra* note 269.

standard of correctness,[303] he had little doubt that a recent Ontario Court of Appeal decision on the application of the open court principle to police board hearings was dispositive,[304] and the judicial review proceedings had already slowed down a process which was moving quite slowly.[305] On balance, Sharpe JA concluded, the decision-maker "should be permitted to take another look at the matter with the benefit" of the recent decision in *Langenfeld*.[306] I think Sharpe JA was quite right to remit the matter, especially because the issues in *Ferrier* and *Langenfeld* arose in different contexts. Where a file is factually and legally complex, the better course is to remit it for further consideration by the decision-maker, in light of the reviewing court's analysis.[307] Indeed, it will be very rare to find a case "where the evidence can lead only to one result" and refusal to remit would thus be appropriate.[308]

I would single out *Downey v Nova Scotia (Attorney General)*, for special attention as an example of how to resist the attraction of exercising the remedial discretion identified in *Vavilov*: here a relatively simple land titles matter was remitted to the Minister even though the factual record before the reviewing court would have allowed the judge to issue a definitive order as to the applicant's entitlements under the provincial land titles clarification legislation.[309] The vast majority of Canadian judges have, rightly in my view, taken this course post *Vavilov*.

More recently, however, the examples of judges taking a muscular approach to refusal to remit unreasonable decisions have multiplied. In *Alexis v Alberta (Environment and Parks)*, the majority of the Alberta Court of Appeal was convinced (in spite of a spirited dissent from one of their colleagues) on a thin factual record from which reasons were absent that the outcome of any remittal was preordained.[310] Pentelechuk JA's partially concurring and partially dissenting observations about the thinness of the record and inadequacy of the decision-making process should have given the majority pause.[311] Consider also *JE and KE v Children's Aid Society of the Niagara Region*, where the import of the Divisional Court's

[303] *Ibid* at para 37.
[304] *Ibid* at para 58. See *Langenfeld v Toronto Police Services Board*, 2019 ONCA 716.
[305] *Ibid* at para 79.
[306] *Ibid* at para 80.
[307] See also *Commission scolaire francophone, A.B., F.A., T.B., J.J. et E.S. c Ministre de l'Éducation*, 2020 CSTNO 28 at para 122, 128-134; *J.D. c Tribunal administratif du Québec*, 2020 QCCS 1658 at para 85. For similarly restrained approaches, See also *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 at para 661; *Alberta Union of Provincial Employees v Alberta Health Services*, 2020 ABCA 4 at para 59; *Langlais c Collège des médecins du Québec*, 2020 QCCA 134 at para 64-65; *Mbula-Kolela v Canada (Citizenship and Immigration)*, 2020 FC 260 at para 18-20; *Rodriguez Martinez v Canada (Citizenship and Immigration)*, 2020 FC 293 at para 18-20; *McKenzie c Ambroise*, 2020 CF 340 at para 31-37; *Salmonid Association of Eastern Newfoundland v Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 34 at para 112-114; *Romania v Boros*, 2020 ONCA 216 at para 31-32; *United Steel v Georgia-Pacific LP*, 2020 ONSC 1560 at para 70-74; *Dhanoa v British Columbia (Agricultural Land Commission)*, 2020 BCSC 854 at para 64-65; *Paulo c Canada (Citoyenneté et Immigration)*, 2020 CF 990 at para 50.
[308] *Canada (Attorney General) v Impex Solutions Inc.*, 2020 FCA 171 at para 90.
[309] *Downey v Nova Scotia (Attorney General)*, 2020 NSSC 201 at para 40-41. But See *Guevara v Louie*, 2020 BCSC 380 at para 85-87; *Yu v City of Richmond*, 2020 BCSC 454 at para 38; and See also *Coquitlam (City) v British Columbia (Assessor of Area #10 – North Fraser Region)*, 2020 BCSC 440 (though this was a statutory appeal so arguably the *Vavilov* principles on discretion do not apply).
[310] 2020 ABCA 188.
[311] *Ibid* at para 188-192.

order was to place a child for adoption with a family in circumstances where another family had sought to adopt the child.[312]

The issue in *Nation Rise Wind Farm Limited Partnership v Minister of the Environment, Conservation and Parks* was the Minister's decision to cancel a major wind farm project on appeal from the Environmental Review Tribunal.[313] The sole reason for the cancellation decision was the effect the project would have on the maternity colonies of bats. But the effect on bats had not been raised by any of the parties to the Tribunal decision or the appeal. It was unreasonable for the Minister to raise the effects *sua sponte*.[314] The implication was that there would be "no utility" in sending the matter back to the Minister[315] because the Minister had made clear that the effect on bats was the "only basis" for revoking the permission for the project;[316] and the Minister's findings on this point were, moreover, unreasonable.[317] There was also "evidence of urgency", in the form of a "real risk" that the project would be cancelled if the matter were sent back for further redetermination by the Minister.[318] For my part, I wish I could share the Divisional Court's confidence in the inevitability of the outcome of a complex regulatory process. If the Minister were to do it all again, with the effect on bats out of the picture, would the appeal process have unfolded as it did? Even on the understanding of remedial discretion laid out in *Vavilov*, inevitability is a high bar and I am not sure it was reached here.

Finally, in *Oberg v Saskatchewan (Board of Education of the South East Cornerstone School Division No. 209)*,[319] McCreary J quashed a decision removing the applicant as the principal of a high school and ordered that the applicant be reinstated: it was unreasonable for the Board to have demoted the applicant and the only other option open to the Board was the status quo. This is, I suppose, logical enough so far as it goes but when one considers how reluctant common law courts traditionally have been to make mandatory orders (especially in employment-related matters[320]) it is a striking example of the potentially radical results *Vavilov's* discussion of remedies might lead to.

Conclusion

This conclusion arrives 1,500 decisions and 22,000 words too late for a summary of the vast terrain covered in this paper.

Although I have been critical of the *Vavilov* framework in some respects,[321] I would say that 2020 has been, by the historical standards of Canadian administrative law, fairly plain sailing. The *Vavilov* framework has rough edges, which have to be smoothed out, but for the most part *Vavilov* itself contains the necessary implements. As long as judges continue to abide by the spirit of simplification and clarification which animates the *Vavilov* framework, it should prove workable and durable.

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[312] 2020 ONSC 4239 at para 111-118.
[313] 2020 ONSC 2984.
[314] *Ibid* at para 91.
[315] *Ibid* at para 159.
[316] *Ibid* at para 161.
[317] *Ibid* at para 160.
[318] *Ibid* at para 163.
[319] 2020 SKQB 96.
[320] *Chief Constable of the North Wales Police v Evans,* [1982] 1 WLR 1155.
[321] Daly, *supra* note 1.