Canadian Bar Association
Administrative Law Section–Northern Alberta

SOME INITIAL TALKING NOTES ABOUT *VAVILOV*

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1. *Vavilov* is one of a trilogy of cases which the SCC granted leave on to provide clarification on "the scope of judicial review and standards of review".

2. Decisions issued on December 19, followed by a further decision the next day about how to apply the reasonableness standard of review (*Canada Post*).

3. *Vavilov* is 236 pages (343 paragraphs) long.

The Sixth Attempt to Simplify in 50 Years

4. This is the sixth attempt in 50 years to try to address how intensely the courts should review decisions by statutory delegates:

   - *Metropolitan Insurance* (1970) and *Bell* (1971), referring to HL in *Anisminic* (1968)—lengthy category of "jurisdictional errors", including the concept of preliminary and collateral matters;

   - *CUPE v New Brunswick Liquor* (1979)—matters should quickly not be characterized as "jurisdictional" if not obviously so---leading deference even with respect to questions of law, particularly if not"patently unreasonable"

   - *Bibeault* (1988)—the functional and pragmatic approach to determining whether the legislator intended the question to be within the jurisdiction conferred on the tribunal.

   - *Pushpanathan* (1998)—the four factors to be considered in the functional and pragmatic approach: (1) a privative clause, which speaks to deference; (2) expertise, which speaks to deference; (3) the purpose of the Act as a whole and

the provision at issue in particular; (4) the "nature of the problem"–whether a queston of law or fact.

- *Dunsmuir* (2008)—merged the "patently unreasonable" and the "reasonableness *simpliciter*" deferential standards of review into one "reasonableness" standard, which presumptively applies except with respect to a small but not closed category of situations where the "correctness standard" applied (constitutional matters, questions of law of general importance to the legal system that are not within the expertise of the statutory delegate, etc.)

- Now *Vavilov* (2019)—result *in judicial review* is not a mathematical equation or a scientific formula that can be applied by artificial intelligence, but rather an approach or attitude to be used in considering the circumstances in which the courts should appropriately set aside administrative actions.

5. The assimilation of appeals and judicial review in *Pezim/Southam/Khosa* (1994, 1994, 1998)–and the view that the courts should defer to statutory delegates with respect to questions of law (as opposed to correctness under *Hausen v. Nikolaisen*).

Key Points from *Vavilov*

6. *Vavilov* emphasizes that statutory intention is key to what the court is to do, how intensively it is to review and evaluate the decision, both with respect to (a) when the legislature provides a statutory appeal, and (b) in judicial review, in determining whether the impugned decision is reasonable. Must interpret the statute as a whole.

Legislatures can prescribe the applicable standard of review

7. Legislatures are able to prescribe the applicable standard of review (as in British Columbia's *Administrative Tribunals Act*), presumably in both appeals and applications for judicial review.

The distinction between appeals and judicial review

8. Previously, *Dr* Q (2003) assimilated both statutory appeals and applications for judicial review, and applied deference to both. *Vavilov* now treats these quite differently, particularly changing the approach to standard of review in appeals.

The standard of review for appeals

9. Most significant aspect of *Vavilov*: it changes the standard of review where there is a statutory appeal to *Hausen v. Nikolaisen* which is the usual standard in civil matters—namely, correctness on questions of law, palpable and overriding error on other issues. No more deference on questions of law where there is a statutory appeal from a statutory delegate.

10. The presence of a statutory appeal is an indication of the legislature's intention about what the court is to do, with respect to the matters covered by the appeal.

11. Previously, deference (not correctness) was the standard of review for many/most questions of law in appeals arising in the administrative law context: *Southam*, *Pezim*, *Dr. Q*. *Vavilov* essentially reverses the SCC's recent decision in *Edmonton (East Capilano*) and adopts Slatter J.'s analysis in that case that a statutory right of appeal connotes a legislative intention for the appellate court to decide questions of law for itself (i.e., correctness), no basis for deference.

12. Prediction: there may be arguments about whether a particular matter is or is not covered by the statutory appeal; as well as whether an issue is a question of law *vs.* fact *vs.* mixed fact and law, or whether there is an extricable issue of law.

Internal administrative appeals

13. *Hausen* should now apply where the Legislature has created an internal administrative appeal.

14. Previously, the law seemed to have coalesced around a view that deference was to apply in these circumstances, with the internal appellate body only interfering if the initial decision was unreasonable: *Newton*.

15. Now *Hausen* will determine the applicable standard of review: *Yee v. Chartered Professional Accountants of Alberta,* 2020 ABCA 98 at paragraphs 29-35 (reproduced in Appendix A below).

16. At the very least, an internal appellate body should use the correctness standard with respect to questions of law (including the interpretation of the home statute).

Judicial review

17. If there is no statutory appeal (which Slatter J characterized as "internal judicial review"), then common law judicial review applies ("external judicial review").

Reasonableness is the presumed standard in applications for judicial review

18. With respect to judicial review (as opposed to statutory appeals), *Vavilov* reinforces the presumption that "reasonableness" is generally the applicable standard of review.

Given this presumption, there is no need any more to determine the standard of review by performing a contextual analysis, or to consider the expertise of the statutory delegate, or the presence of a privative clause—but however, these (and other) factors are now to be considered at the later step in applying the reasonableness standard to determine whether the decision being questioned is reasonable.

... even with respect to errors of law

19. Note that *Vavalov* does not change the standard of review in judicial review (as opposed to statutory appeals) with respect to alleged errors of law. Reasonableness is still the applicable standard.

Reasonableness and the principles of statutory construction

20. *Vavalov* does recognize that there will be circumstances where only one interpretation is available (given the statutory context), so any other interpretation will be unreasonable: the same result as previously in *Wilson v. Atomic Energy of Canada*. Question: does this continue to be "correctness in the guise of reasonableness"?

Very limited exceptions to the reasonableness standard of review

21. Limited exceptions to the reasonableness standard: constitutional issues such as division of powers; questions of general importance to the legal system; rule-of-law issues–in which case correctness applies. The category is not closed, but it remains to be seen whether further examples will ever be identified.

No separate correctness category for "jurisdictional errors" (though every time the court does grant judicial review, it must be because the statutory delegate does not have jurisdiction/authority to do whatever it did in the way it did it). Things that might have been characterized as "jurisdictional errors" under *Anisminic*, etc., will now be set aside as being "unreasonable".

22. Re-stated and re-calibrated what "reasonableness" means. To be determined by reference to the statutory scheme (what did the Legislature intend the statutory delegate to do?), the record, the reasons given for the decision, and the outcome, etc. See the decision the next day in *Canada Post* about how SCC applied the reasonableness standard.

No more *Sopinka Heresy*

23. No more of the "*Sopinka Heresy"* which was "I first determine whether I agree with the decision. If so, it is correct and nothing more needs be done. If not, I determine whether the decision is nevertheless within a range of reasonableness; if so, not for the court to set it aside."

To the extent the reasonableness standard applies, it is irrelevant what the court thinks the correct answer is—the focus is on the statutory delegate's reasoning, and the reasonableness of the outcome, in light of the statutory scheme and the record.

And we probably won't continue to see courts saying "regardless of the applicble standard of review, the impugned decision is both correct and reasonable, so application for judicial review is dismissed."

Reasons

24. The discussion about reasons may have increased the threshold of what constitutes sufficient or adequate reasons. Important change: the court is not to speculate or substitute reasons *which **could** have been given by the statutory delegate*. The *ATA* decision confined to its specific facts, where the issue (whether a deadline could be extended after it had expired) was not raised in front of the statutory delegate but there was no doubt what the statutory delegate's reason would have been, given previous decisions.

Precedent

25. Precedent is to be followed. If precedent is to be departed from, then there must be a reasoned justification for doing so.

Diverging reasons not in and of itself "unreasonable"

26. The mere fact that there are differing decisions by an administrative tribunal does not in and of itself make one or more of the decisions unreasonable, though it may do so, particularly where there is a rule of law issue.

Query: in *Capilano* many assessment review boards in many different municipalities—is it a rule of law issue that they should have a uniform interpretation of the law? Is this different from a single administrative tribunal where different panels have different interpretations, given the tools available to the tribunal to discuss/consult/determine what the appropriate interpretation is to be?

The relationship between the reasonableness standard and procedural fairness

27. Still not clear if correctness/reasonableness standards apply to procedural fairness. issues. The question being asked in this circumstance is: was the process fair, not was it correct or reasonable. But many courts have said "correctness" is the applicable standard of review, presumably because that allows them to determine whether the process was fair. *Vavilov* doesn't clearly address this, and seems to imply that an unfair procedure would make the decision unreasonable. *Vavilov* rather mixes up procedural fairness issues with reasons, but they are two separate issues.

How will *Vavilov* reasonableness affect the degree of scrutiny by the courts?

28. One of the questions that will have to be worked out is whether the restated reasonableness standard of review from *Vavilov* will result in increased scrutiny by the courts in a "new culture of justification" (to use Justice Pentelechuk's phrase from *Alexis v. Alberta (Environment & Parks)*, 2020 ABCA 188 (see the extract in Appendix B below).

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APPENDIX A

Yee v. Chartered Professional Accountants of Alberta

2020 ABCA 98

per **Slatter JA (concurring in the result):**

Standard of Review

[29] The standards of review on a statutory appeal from an administrative tribunal are the same as those on other appeals: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para. 49. Those standards of review can be summarized as follows:

> (a) conclusions on issues of law are reviewed for correctness: ***Housen v Nikolaisen***, 2002 SCC 33 at para. 8, [2002] 2 SCR 235. That includes questions of statutory interpretation, including interpretation of the tribunal's "home statute".
>
> (b) findings of fact, including inferences drawn from the facts, are reviewed for palpable and overriding error: ***Housen*** at paras. 10, 23; ***H.L. v Canada (Attorney General)***, 2005 SCC 25 at para. 74, [2005] 1 SCR 401.
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> (c) findings on questions of mixed fact and law call for a "higher standard" of review, because "matters of mixed law and fact fall along a spectrum of particularity": ***Housen*** at paras. 28, 36. A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole, but a correctness standard can be applied when the error arises from the statement of the legal test: ***Housen*** at paras. 33, 36.
>
> (d) issues of fairness and natural justice are reviewed, having regard to the context, to see whether the appropriate level of "due process" or "fairness" required by the statute or the common law has been granted: ***Vavilov*** at para. 77.
>
> (e) the test on review for bias is whether a reasonable person, viewing the matter realistically and practically, and after having obtained the necessary information and thinking things through, would have a reasonable apprehension of bias.

[30] In professional disciplinary appeals, interpretation of the governing statute is reviewed for correctness. Important questions of mixed fact and law calling for deference by a reviewing court will often include i) the standard of practice the profession expects in any particular case, and ii) whether, on the facts, the professional subject to discipline has met that standard.

[31] As noted, the *Regulated Accounting Profession Act* sets up a tiered system of discipline, under which findings of a discipline tribunal can be appealed to the appeal tribunal. In this case, the Appeal Tribunal concluded that the standard of review to be applied by it was "reasonableness". One of the appellant's central arguments is that the correct standard of review on an internal appeal is "correctness".

[32] The Appeal Tribunal was unfortunately distracted by a lengthy discussion of the standard of review. It unhelpfully characterized certain issues as being "jurisdictional", although there was nothing in these proceedings that called into question the jurisdiction of the Discipline Tribunal. It relied on the decision in ***Dunsmuir v New Brunswick***, 2008 SCC 9, [2008] 1 SCR 190, which has since been overruled by ***Vavilov***. In any event, ***Dunsmuir*** was not the applicable authority. ***Dunsmuir*** dealt with the standard of review in external review of administrative action, that is, it dealt with the standard of review by a superior court of the decisions of an administrative tribunal. Different, although overlapping considerations apply to review at various internal levels within the administrative structure: ***Newton v Criminal Trial Lawyers' Association***, 2010 ABCA 399 at paras. 42-3, 57, 493 AR 89, 38 Alta LR (5th) 63. For example, on external review deference is extended by superior courts because the professional disciplinary tribunal is presumed to have heightened expertise and insight. There is no reason to presume that a professional internal appeal tribunal has less expertise than a discipline tribunal.

[33] The mandate and powers of an appeal tribunal are set out in the *Act*:

> 111(1) Unless the parties to the appeal otherwise agree, an appeal must be based on
>
> (a) the decision of the body from which the appeal is made,
> (b) the record of proceedings before that body, and
> (c) any further evidence that the appeal tribunal agrees to receive.
>
> (2) In proceedings under this Part,
>
> (a) an appeal tribunal, in addition to the authority it has under this Part, has the authority of a discipline tribunal under Part 5, and . . .
>
> 112(1) An appeal tribunal may quash, confirm, vary or reverse all or any part of a decision of the body from which the appeal was made, make any finding or order that in its opinion ought to have been made or refer the matter back to the same or another body with or without directions.

It is well established that the breadth of the wording in s. 111(2) and s. 112(1) does not mean that an appeal tribunal should afford no deference whatsoever to the decision of the discipline tribunal: ***Newton*** at para. 54; ***Zuk v Alberta Dental Association and College***, 2018 ABCA 270 at para. 72, 78 Alta LR (6th) 12. That would undermine the integrity of the first level of the

disciplinary structure, and make the proceedings before the discipline tribunal an ineffectual waystation along the path to a final decision.

[34] Of central importance in setting the internal standard of review is the role assigned to the appeal tribunal by the governing statute: ***Zuk*** at para. 71; ***City Centre Equities Inc v Regina (City)***, 2018 SKCA 43 at paras. 58-9, 75 MPLR (5th) 179. The wording of the *Act* makes it clear that the appeal tribunal is to conduct "appeals". Its decision is to be "based on the decision of the body from which the appeal is made", signalling that the primary role of the appeal tribunal is to review that decision. It follows that the appeal tribunal is not to re-conduct the entire proceeding *de novo*, a conclusion that is affirmed by the provision in s. 111(1)(b) that the appeal proceeds on the "record": ***Newton*** at para. 64. The provision allowing the introduction of fresh evidence on appeal is not intended to displace the presumption that the appeal is on the record, and fresh evidence must be allowed with caution in order to avoid undermining the proceedings before the disciplinary tribunal: ***Newton*** at para. 81.

[35] When reviewing the decision of a discipline tribunal, the appeal tribunal should remain focused on whether the decision of the discipline tribunal is based on errors of law, errors of principle, or is not reasonably sustainable. The appeal tribunal should, however, remain flexible and review the decision under appeal holistically, without a rigid focus on any abstract standard of review: ***Halifax (Regional Municipality) v Anglican Diocesan Centre Corporation***, 2010 NSCA 38 at para. 23, 290 NSR (2d) 361. The following guidelines may be helpful:

(a) findings of fact made by the discipline tribunal, particularly findings based on credibility of witnesses, should be afforded significant deference;

(b) likewise, inferences drawn from the facts by the discipline tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for disagreeing;

(c) with respect to decisions on questions of law by the discipline tribunal arising from the profession's home statute, the appeal tribunal is equally well positioned to make the necessary findings. Regard should obviously be had to the view of the discipline tribunal, but the appeal tribunal is entitled to independently examine the issue, to promote uniformity in interpretation, and to ensure that proper professional standards are maintained;

(d) with respect to matters engaging the expertise of the profession, such as those relating to setting standards of conduct, the appeal tribunal is again well-positioned to review the decision under appeal. The appeal tribunal is entitled to apply its own expertise and make findings about what constitutes professional misconduct: ***Newton*** at para. 79. It obviously should not disregard the views of the discipline tribunal, or proceed as if its findings were never made. However, where the appeal tribunal perceives unreasonableness, error of principle, potential injustice, or another sound basis for intervening, it is entitled to do so;

(e) the appeal tribunal is also well-positioned to review the entire decision and conclusions of the discipline tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession;

(f) the appeal tribunal may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias.

In this case, the Appeal Tribunal erred in applying a universal standard of review of reasonableness, resulting from its overreliance on ***Dunsmuir***. With respect to matters such as the appropriate standard of professional conduct, and the integrity of the discipline process, it should have engaged in a more intensive review.

APPENDIX B

Alexis v. Alberta (Environment and Parks)
2020 ABCA 188

***per* Pentelechuk JA**

VII. Analysis and Decision

i. Guidance from *Vavilov*

[137] ***Vavilov*** aims to clarify the law and provides a "revised framework [that] will continue to be guided by the principles underlying judicial review... articulated in ***Dunsmuir v New Brunswick***, **2008 SCC 9**": para 2. The Supreme Court of Canada in ***Vavilov*** endorses the need for a robust culture of justification in administrative decisions by highlighting the starting point of a reasonableness review as judicial restraint that respects the distinct role of the administrative decision maker: para 13.

[138] This starting point reflects and respects the law as it was developed and articulated prior to ***Vavilov*** and the companion cases. It remains that a reasonableness review properly considers both the outcome of the decision and the reasoning process. Neatly summarized, a reasonable decision evidences "an internally coherent and rational chain of analysis" and "is justified in relation to the facts and law that constrain the decision maker": ***Vavilov*** at para **85**.

ii. Absence of reasons

[139] The Director did not provide reasons for her decision. Mr. Alexis does not argue that the Director's failure to provide reasons amounts to a breach of procedural fairness in this case, so I will not consider this question.

[140] Relying on ***Vavilov,*** the Director argues that because she was not required to provide reasons, courts must conduct a reasonableness review in a manner that respects the legislature's choice relating to the decision-making process and more broadly, other aspects of administrative decisions. Accordingly, it is not necessary for this Court to intervene.

[141] However, even when there is no requirement for reasons, a reasonableness review is still robust. As noted, the Supreme Court of Canada in ***Vavilov*** is clear that when exercising administrative decision-making power, decision makers must ensure that their decision can withstand scrutiny in the new culture of justification.

[142] When reviewing a decision in the absence of reasons, the reviewing court may look to the record as a whole, where "the court will often uncover a clear rationale for the decision": ***Vavilov*** at para **137**. Where the basis for the decision is still opaque, the reasonableness review will still be robust, but the analysis will be forced to "focus on the outcome rather than on the decision maker's reasoning process": ***Vavilov*** at para **138**.

[143] As the Supreme Court of Canada cautions in ***Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association***, **2011 SCC 61** at para **54**, citing ***Petro-Canada v British Columbia (Workers' Compensation Board)***, **2009 BCCA 396** at para **56**, the reviewing court's ability to supplement reasons "is not a 'carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result'." Additional reasons must *supplement*, not *supplant* the analysis of the administrative body: ***Delta Air Lines Inc v Lukács***, **2018 SCC 2** at para **24**. As recently articulated in ***Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)***, **2018 SCC 4** at para **154** [***Williams Lake Indian Band***], the point at which after-the-fact supplementation of reasons traverses 'projecting lines from the dots on the page' to 're-drawing the dots' is not always easy to discern.

[144] In ***Vavilov***, the Supreme Court of Canada provided guidance at para 96 as to when "re-drawing the dots occurs":

> even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. ... [I]t is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome [emphasis added].

iii. Does the record reveal reasons for the Director's decision that the Project is not a quarry?

[145] The record is comprised mainly of the Project application and a series of emails between staff members at the Director's office which state and reiterate the following:

This project does not fall under the definition of a quarry. We would consider this activity a sand and gravel pit to be covered under the code of practice for pits and/or possibly an approval to cover the washing plant component which [employee name] does not believe would be addressed by a standard registration. That being said a more detailed project scope is required to make a final determination on **EPEA**/**Water Act**/Public Land approval requirements.

[146] The record does not reveal why the Director and her staff concluded the Project was not a quarry. However, the staff's emails do reveal a gap in the analysis, resulting in an inconsistent categorization of the Project, which is demonstrated in the context of statutory interpretation.

iv. Was the statutory interpretation reasonable?

[147] The guiding rule of statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87, cited in ***Rizzo & Rizzo Shoes Ltd (Re)***, **1998 CanLII 837 (SCC)**, [1998] 1 SCR 27 at 41, 154 DLR (4th) 193.

[148] While the law does not require administrative decision makers to engage in a formalistic exercise when completing statutory interpretation, the decision maker's interpretation—here the Director's interpretation of "quarry"—must be consistent with the text, context, and purpose of the provision: ***Vavilov*** at para **120**. As already noted, s 2 of the ***EPEA*** establishes that the primary purpose of the **EPEA** is to protect the environment and to ensure that wise consideration of preserving the environment is at the forefront of

economic, research-based, and government decisions. Further, the Supreme Court of Canada held that "[w]here the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements": ***Vavilov*** at para **120**.

. . . . .

vii. Was the Director's decision based on a rational chain of analysis?

[185] As already noted, while the Director did not provide reasons, the record does show that the Director's staff contemplated the Project as involving more than the simple removal of sand. They considered whether the "washing plant component" would need an approval under the ***Activities Designation Regulation***, rather than simply a registration. As a pit only requires registration under that Regulation, they were necessarily considering whether the scope of activities at the plant might constitute more than a pit. This leads to a contradictory conclusion; the Project cannot both be something more than a pit and also be only a pit.

[186] In their discussions regarding the Project, the staff seemed to treat the extraction of sand and the treatment of the sand as two separate projects with different requirements. However, in the result, the Director lumped the Project activities together, deciding that because the sand removal did not require an EIA, the treatment of the sand at the plant did not either.

[187] As established in ***Vavilov***, "a decision will be unreasonable if the reasons for it, read holistically... reveal that the decision was based on an irrational chain of analysis": para 103. While the reasons for the Director's decision are not complete or transparent, the parts that are discernable from the record reveal precisely such an irrational chain of analysis.

VIII. Conclusion

[188] The dearth of reasons, lack of information on the record, and contradictory conclusions made by staff members render the Director's decision unreasonable. It fails to meet the standards of transparency, intelligibility and justification necessary for a reasonable decision. Further, the lack of information on the record as to the scope of the Project's activities makes it difficult to determine afresh whether these activities traverse from a pit to quarry. Wayfinder's application to the Director was a mere four pages, including a cover letter and map. The Director's staff decided that more information was needed to determine the scope of the operation, but if that information was ever received by the Director, it is not before this Court. Finally, the record reveals an inconsistency in the staff's logic which is never reconciled on the record.

[189] For these reasons, I cannot conclude, as my colleagues have, that the Project is clearly a quarry under the ***EPEA*** and that Wayfinder's Brief Project Description, reproduced at para 27 above, "unquestionably demonstrates this." In my view, principles of statutory interpretation compel that both the ***EPEA*** and the Code of Conduct for Pits and its regulations, be read holistically. The exercise is not completed by simply focussing on the definition of "quarry" under the ***EPEA***.

[190] When reasons for a decision "contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision": ***Vavilov*** at para **96**. In her chapter on standard of review in the text *Administrative Law in Context*, Audrey Macklin outlines some of the principled reasons why buttressing reasons should be avoided:

When courts step in and supply reasons that a decision-maker could have but did not provide, they are not demonstrating respect for the decision-maker: they are doing the job that the decision-maker was supposed to do. More worrying is the perv[e]rse incentive that this practice creates for administrative decision-makers: instead of crafting thorough reasons that risk being set aside as "unreasonable," why not write the bare minimum to satisfy *Newfoundland Nurses'* low standard, and let a reviewing court fill in any gaps?

Audrey Macklin, "Standard of Review: Back to the Future?" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery Publications Limited, 2018).

[191] Further, as noted in ***Williams Lake Indian Band*** at para **156**, "[w]hen faced with reasons that are deficient for their failure to explain or justify an essential element of their analysis, reviewing courts should typically remit the matter for further consideration."

[192] Accordingly, in my view it is not appropriate for this Court to provide its own reasons to support the decision that the Project is a quarry. This amounts to "re-drawing the dots." The Director should be required to interpret her home statute in a manner consistent with the culture of justification identified by the Supreme Court in ***Vavilov***. Remitting the matter back acknowledges the starting point of a reasonableness review as judicial restraint that respects the distinct role of the administrative decision maker: ***Vavilov*** at para **13**.

[193] Having concluded that the only reasonable interpretation is that sand is a mineral under the ***EPEA***, I would remit this decision to the Director for reconsideration as to whether Wayfinder's Project goes beyond the mere removal of sand and therefore cannot be classified as a pit, but must be a quarry.

[Underlined emphasis added.]