Legal Education Society of Alberta

ADMINISTRATIVE LAW UPDATE

Calgary April 5, 2022
Edmonton, April 6, 2022

VAVILOV
WHAT IT DOES, AND WHAT IT DOES NOT DO

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Vavilov[1] is the sixth attempt in 50 years by the Supreme Court of Canada to grapple with standards of review.[2] The reasons in *Vavilov* are quite extensive, and provide a great deal of food for thought. The majority changes some of the previous approach to standards of review in a large part of Administrative Law. The minority sharply disagrees with some of the majority's analysis and approach. This paper will concentrate on the important highlights and take-aways from *Vavilov*, leaving detailed dissection to other places[3] and other authors.[4] It will also identify areas which *Vavilov* does not deal with, or which bear watching for further developments.

I. WHAT DID *VAVILOV* DO?

The most significant principles established by the majority[5] in *Vavilov* are:

1. The overriding principle is determining legislative intent. Accordingly, legislative provisions prescribing the standard of review will govern for both appeals and judicial review.

This paper builds on presentations to the Canadian Bar Association's National Administrative Law and Employment Law Section in 2020, the Manitoba Bar Association's Midwinter Meeting in 2021, and the CBA's Northern Alberta Administrative Law Section in 2021.

1. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. See also the companion case of *Bell Canada v. Canada (Attorney General)*, 2019 SCC 67 which included the decision in *National Football League v. Canada (Attorney General)*. The Court's very next decision dealt with how to apply the newly articulated reasonableness standard of review: *Canada Post Corporation v. Canadian Union of Public Employees*, 2019 SCC 67.

2. *Anisminic* (1968) and *Metropolitan Life* (1970); *CUPE v. NB Liquor* (1979); *Bibeault* (1988); *Pushpanathan* (1998); *Dunsmuir* (2008); now *Vavilov* (2019). Looking back over the 50 years, is this really just a case of *plus ça change, plus c'est la même chose*?

3. For a detailed analysis, see Chapter 12 in the Seventh Edition of Jones & de Villars, *Principles of Administrative Law* (2020; Carswell/Thomson Reuters).

4. An excellent source of sustained commentary on *Vavilov* (and many other topics in Administrative Law) can be found at Professor Paul Daly's blog at https://www.administrativelawmatters.com/.

5. The majority consisted of Chief Justice Wagner and Justices Moldaver, Gascon, Côté, Brown, Rowe and Martin. Justices Abella and Karakatsanis gave joint reasons concurring in the outcome but dissenting from some of the majority's analysis.

2. Where there is no statutorily prescribed standard of review:[6]

   (a) **For statutory appeals**, the standards set out in *Housen v. Nikolaisen*[7] are to be used.[8] Therefore, correctness is to be used for questions of law and "palpable and overriding error" is to be applied for questions of fact or mixed law and fact. This is a major shift.

   (b) **For applications for judicial review**,[9] there is a rebuttable strong presumption that the standard of review is reasonableness for all issues, except that presumption is rebutted in the following circumstances:

      (i) Where the legislature has indicated that it intends a different standard of review to apply by either stipulating the standard of review to be used in a statutory provision[10] or by providing a statutory right of appeal from the decisions of the statutory delegate; and

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6. Note that the British Columbia *Administrative Tribunals Act*, SBC 2004, c. 45 contains a fairly comprehensive (but not entirely exhaustive) specification of the standards of review to be applied in various circumstances. Accordingly, *Vavilov* should have limited application in B.C.

7. 2002 SCC 33.

8. As in civil litigation.

9. For the previous twenty years or so, there had been a tendency to assimilate statutory appeals and applications for judicial review for the purposes of determining the applicable standard of review: *Dr. Q v. College of Physicians and Surgeons of BC*, 2003 SCC 19 at paras 20*ff*. While both procedures involve review by courts ("*curial* review"), the two have different historical origins and conceptual underpinnings, which *Vavilov* recognizes and reinstates. See the distinction by Justice Slatter between curial review where an appeal is "internal" to the statutory scheme, and judicial review which is "external" to the statutory scheme: *Edmonton East (Capilano) Shopping Centres Limited v. Edmonton (City)*, 2015 ABCA 85, reversed (pre-*Vavilov*) by SCC at 2016 SCC 47.

10. Apart from the B.C. *Administrative Tribunals Act*, there aren't very many statutory statements about the applicable standard of review. One recent one is found in Part 4 of the recent Alberta *Land and Property Rights Tribunal Act* ("Appeal and Judicial Review") which amalgamates four previously separate land regulatory tribunals. Section 19 provides:

    > On an application for judicial review of or leave to appeal a decision or order of the Tribunal or on an appeal of a decision or order of the Tribunal, the standard of review to be applied is reasonableness.

    Question: does the reasonableness standard really apply to all types of questions, including procedural fairness and constitutional questions or issues of central importance to the legal system as a whole (such a solicitor-client privilege)?

(ii) Where the Rule of Law requires the standard of correctness to apply. Examples include constitutional questions (such as the division of powers, the relationship between the legislature and other branches of the state, the scope of Aboriginal and treaty rights); general questions of law that are of central importance to the legal system as a whole; and issues of conflicting jurisdiction between different statutory delegates. This list is not exhaustive. However, "true questions of jurisdiction" are no longer a separate category of issues which automatically engage the correctness standard.[11]

3. Because of the strong presumption that reasonableness is the applicable standard of review in applications for judicial review, the first step in judicial review (determining the applicable standard of review) no longer includes the"pragmatic and functional" analysis of the context that was set out in the court's previous decision in *Pushpanathan*[12] and left at least as a remnant in *Dunsmuir*.[13] Nor is it necessary at this stage to consider the expertise of the statutory delegate. These factors, among others, are now only to be taken into account at the subsequent step of applying the reasonableness standard of review. This is also a significant shift in the analysis, particularly about where expertise fits in.

4. In applying the reasonableness standard, a wide range of (contextual) factors must be considered, including but not limited to:

    - the governing statutory scheme;
    - the purpose of the legislation;
    - the statutory and common law context in which the decision was made;
    - the principles of statutory interpretation;
    - the expertise of the statutory delegate;

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11. Though the concept of "jurisdiction" has not been abolished—indeed, it remains the foundation which underlies all of Administrative Law.

12. *Pushpanathan v. Canada (Minister of Employment and Immigration)*, [1998] 1 S.C.R. 982.

13. *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

- the factual context, including the record and submissions; past practices and decisions of the statutory delegate; and

- the potential impact of the decision on those to whom it applies.[14]

In many ways, these look like the *Pushpanathan* analysis, but at the second stage of determining whether the impugned decision is unreasonable in all of the context, rather than at the first stage of determining the applicable standard of review.

5. "Reasonableness" relates to both the outcome and the justification, intelligibility, and transparency of the reasons for the particular decision. The reviewing court's focus should be on the actual decision at issue; it should not start its reasonableness review from its own view of the right answer or the possible range of reasonable answers; and reasonableness review does not entail nitpicking or intense scrutiny.

6. If a decision is set aside on judicial review as being unreasonable, the usual remedy would be for the court to remit the matter back to the statutory delegate. However, there are some circumstances in which it would be appropriate for the court to make the decision itself. This may be the case, for example, where to send the matter back to the statutory delegate would stymie the timely and efficient resolution of matters or where a particular outcome is inevitable.[15]

The majority is clear that the courts should respect and give credence to the intention of the legislature in setting up the particular legislative scheme.[16]

II. THE MINORITY'S CRITICISM

Justices Abella and Karakatsanis concurred in the outcome, and agreed with the majority that there should be a presumption of reasonableness in judicial review, the contextual factor

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14. Para. 106.

15. See *Farrier v. Canada (Attorney General)*, 2020 FCA 25 for an example of a case in which the court held it would be pointless to remit a matter back to the decision-maker.

16. See paras. 23 to 32.

analysis should be eliminated from the first step of selecting the applicable standard of review, and that "true questions of jurisdiction" should not be a separate category of issues which automatically engage the correctness standard of review.

However, the minority was concerned that the majority's new framework for judicial review is formalistic; would undermine a meaningful presumption of deference to statutory delegates; obliterates expertise especially as a rationale for deference; ignores the legislature's intention to leave certain legal and policy questions to statutory delegates; and could result in expanded correctness review and more intensive reasonableness review.

With respect to statutory appeals, the minority objected that the new framework overrules precedent without justification. It noted that the mere fact that a statute confers an appeal says nothing about the degree of deference required in the review process. For at least 25 years (long before *Dunsmuir*), the courts had not treated the presence of a statutory appeal as a determinative indication of the legislature's intention about the applicable standard of review—it was just one factor. The minority argued that adopting the correctness standard [on a question of law] where there is a statutory right of appeal, but reasonableness where there is judicial review, creates a two-tier system, and will affect many statutory delegates.[17] If the legislatures had disagreed with the court's previous decisions about the purposes and effect of statutory appeal provisions, they were free to clarify their intent through legislative amendment, but had not generally done so.[18]

While acknowledging that the court should offer additional direction on conducting reasonableness review,[19] the minority was concerned that the multi-factored, open-ended list of factors to be considered in determining the reasonableness of administrative decisions would encourage reviewing courts to dissect administrative decisions in a line-by-line hunt for error—not all of which are necessarily material in determining reasonableness. The minority cautioned that courts must be alert not to use correctness in the guise of reasonableness, including in cases involving statutory interpretation.

In summary, the minority criticized the new framework for not giving sufficient weight to curial deference,[20] which is the hallmark of reasonableness review, and which has three dimensions:

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17. At para. 251.

18. Of course, the legislatures could always legislate now if they are not content with the majority's new framework.

19. At para. 284.

20. At paras. 286-295.

(a) Deference is the attitude a reviewing court must adopt towards a statutory delegate, respecting its specialized expertise and institutional setting.

(b) Deference affects how a court frames the question it must answer and the nature of its analysis—a reviewing court should not ask how it would have resolved an issue, but rather whether the answer provided by the statutory delegate was unreasonable, given the context, the reasons it gave, the record, the statutory scheme, and the particular issues raised, etc.

(c) Deference impacts how a reviewing court evaluates challenges to a decision—the party seeking judicial review bears the onus of showing that the decision was unreasonable; the statutory delegate does not have to persuade the court that its decision is reasonable.

III. THE MAJORITY'S RESPONSE TO THIS CRITICISM

The majority responded to the minority's criticism as follows:

> 75 We pause to note that our colleagues' approach to reasonableness review is not fundamentally dissimilar to ours. Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. Moreover, as explained below, reasonableness review considers all relevant circumstances in order to determine whether the applicant has met their onus.
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> 145 Before turning to Mr. Vavilov's case, we pause to note that our colleagues mischaracterize the framework developed in these reasons as being an "encomium" for correctness, and a turn away from the Court's deferential approach to the point of being a "eulogy" for deference (at paras. 199 and 201). With respect, this is a gross exaggeration. Assertions that these reasons adopt a formalistic, court-centric view of administrative law (at paras. 229 and 240), enable an unconstrained expansion of correctness review (at para. 253) or function as a sort of checklist for "line-by-line" reasonableness review (at para. 284), are counter to the clear wording we use and do not take into consideration the delicate balance that we have accounted for in setting out this framework.

In my respectful view, the majority's lengthy explanation and conceptual justification for the presumption in judicial review that reasonableness is the default standard of review[21] does appreciate the "delicate balance" between judicial review and curial deference. The fact that certain core issues engage the correctness standard of review, or that sometimes decisions by statutory delegates may actually be unreasonable, does not make the majority blind to that delicate balance. The majority's reference to the panoply of possible reasons why a statutory delegate's decision might be unreasonable does not contain anything new; the issue is what to do about those possible defects. Judicial review is not a mathematical equation or scientific formula that can be applied by artificial intelligence—it is an attitude and an approach that requires judgment.

And I also agree with majority's change to make *Housen v Nikolaisen* applicable to administrative appeals, assimilating this part of Administrative Law to the rest of *civil* litigation.

IV. WHAT DID *VAVILOV* NOT DO?

There are at least seven areas of Administrative Law that *Vavilov* either did not change or which bear watching.

1. *The concept of "jurisdiction" is not dead*

In my view, it would be wrong to conclude that the concept of "jurisdiction" is dead. While there have been numerous statements over the years that "jurisdiction" is a difficult and not always helpful concept, it nevertheless underlies the whole foundation of Administrative Law. It provides the *grounds* for review, even if a jurisdictional defect does not automatically engage the correctness standard of review.

This is what the majority said about "true questions of jurisdiction" not automatically engaging the correctness standard of review:

> 65 We would cease to recognize jurisdictional questions as a distinct category attracting correctness review. The majority in *Dunsmuir* held that it was "without question" (para. 50) that the correctness standard must be applied in reviewing jurisdictional questions (also referred to as true questions of jurisdiction or *vires*). True questions of jurisdiction were said to arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter": see *Dunsmuir*, at para. 59; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at para. 32. Since

21. See paras. 16 to 32.

Dunsmuir, however, majorities of this Court have questioned the necessity of this category, struggled to articulate its scope and "expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law": *McLean*, at para. 25, referring to *Alberta Teachers*, at para. 34; *Edmonton East*, at para. 26; *Guérin*, at paras. 32-36; *CHRC*, at paras. 31-41.

66 As Gascon J. noted in *CHRC*, the concept of "jurisdiction" in the administrative law context is inherently "slippery": para. 38. This is because, in theory, any challenge to an administrative decision can be characterized as "jurisdictional" in the sense that it calls into question whether the decision maker had the authority to act as it did: see *CHRC*, at para. 38; *Alberta Teachers*, at para. 34; see similarly *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013), at p. 299. Although this Court's jurisprudence contemplates that only a much narrower class of "truly" jurisdictional questions requires correctness review, it has observed that there are no "clear markers" to distinguish such questions from other questions related to the interpretation of an administrative decision maker's enabling statute: see *CHRC*, at para. 38. Despite differing views on whether it is possible to demarcate a class of "truly" jurisdictional questions, there is general agreement that "it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute": *CHRC*, at para. 111, per Brown J., concurring. This tension is perhaps clearest in cases where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute: see, e.g., *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635.

67 In *CHRC*, the majority, while noting this inherent difficulty – and the negative impact on litigants of the resulting uncertainty in the law – nonetheless left the question of whether the category of true questions of jurisdiction remains necessary to be determined in a later case. After hearing submissions on this issue and having an adequate opportunity for reflection on this point, we are now in a position to conclude that it is not necessary to maintain this category of correctness review. The arguments that support maintaining this category – in particular the concern that a delegated decision maker should not be free to determine the scope of its own authority – can be addressed adequately by applying the framework for conducting reasonableness review that we describe below. Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.

However, none of this deals with jurisdictional defects as *grounds* for judicial review. The concept of jurisdiction (or lack thereof) is the very foundation of Administrative Law. It provides the justification for courts to intervene and grant judicial review remedies; otherwise, the courts themselves would have no jurisdiction. The concept of the standard of review does not displace the fundamental concept of jurisdiction.

2. *The concept of "expertise" is also not dead—just relevant at a later step in judicial review*

The analytical framework established by the majority makes consideration of expertise unnecessary in the selection of the applicable standard of review (the first step in judicial review). This makes sense because of their strong overarching presumption that reasonableness is the applicable standard of review (which is what a reference to expertise was previously intended to achieve).[22] In the majority's new analytical framework, expertise is only relevant at the second step of the analysis—namely, determining whether the statutory delegate's decision is reasonable.[23]

On the other hand, the minority in *Vavilov* take the position that expertise is the foundation of the modern understanding of legislative intent in delegating authority to a statutory delegate, because expertise (and specialization) permits an appreciation of the (a) on-the-ground consequences of particular legal interpretations, (b) statutory context, (c) purposes of a provision or legislative scheme, and (d) specialized terminology—all of which are the core reason for deference. Removing this as the conceptual basis for deference removes the possibility that reasonableness might be the appropriate standard of review even where there is a statutory appeal,[24] and opens the gates for more intensive (successful) judicial review (which the minority argue amounts to correctness review).[25]

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22. Subject to certain Rule of Law categories where correctness is the applicable standard (where the majority would say expertise is irrelevant). See para. 32.

23. See paras. 27-31, 93.

24. See paras. 217, 221, 225-229, and 245-252.

25. See paras. 221-224, 229.

It will be interesting to see what role expertise plays in the courts' application of *Vavilov* reasonableness,[26] and in particular in contexts involving statutory interpretations.[27]

3. *Privative clauses are not irrelevant*

Prior to *Vavilov*, the presence or absence of a privative clause in the statutory delegate's enabling legislation was one of the four *Pushpanathan* factors the court considered in determining the standard of review which it would apply on an application for judicial review.[28] However, the presumption of reasonableness under the *Vavilov* framework significantly diminishes the impact of a privative clause in determining the standard of review. The majority stated:

> 49 . . . in such a framework that is based on a presumption of reasonableness review, contextual factors that courts once looked to as signalling deferential review, such as privative clauses, serve no independent or additional function in identifying the standard of review.

One may wonder, however, whether the presence of a strong privative clause would provide some of the context in which the impugned decision was made, at least potentially colouring the court's appreciation of the reasonableness of that decision. Also, what about a privative clause that explicitly provides that none of the remedies available on judicial review would be available (so that even the reasonableness standard might not apply), or squarely covers how a statutory delegate exercises its discretion?[29]

How does ignoring a privative clause square with honouring the intention of the legislature?

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26. What role would expertise play in a statutory appeal where *Housen v. Nikolaisen*] determines the applicable standards of review?

27. The issue from *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 involving the interplay between deference (generally and to expert bodies specifically) and the principles of statutory interpretation: what makes a statutory delegate's statutory interpretation unreasonable?

28. It would generally be unusual for a statute to contain both a statutory appeal and a privative clause with respect to the same matter, unless to make it doubly clear that judicial review is not available instead of or in addition to the statutory appeal.

29. And one might ask: in the face of such a privative clause, what would give the court power to set aside a decision as being unreasonable? That the intention of the legislature could never have been that the statutory delegate could make an unreasonable decision? That is, that the statutory delegate did not have jurisdiction to make such a decision?

4. *Reasons*

The majority's emphasis on the role of reasons as an important element in determining the reasonableness of an impugned decision raises the question about whether it has tangentially expanded the previous law about the obligation to provide reasons.

This is what the majority in *Vavilov* said in commenting on the role of written reasons in determining the reasonableness of a decision:

> *A. Procedural Fairness and Substantive Review*
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> 76 Before turning to a discussion of the proposed approach to reasonableness review, we pause to acknowledge that the requirements of the duty of procedural fairness in a given case – and in particular whether that duty requires a decision maker to give reasons for its decision – will impact how a court conducts reasonableness review.
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> 77 It is well established that, as a matter of procedural fairness, reasons are not required for all administrative decisions. The duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 22-23; *Moreau-Bérubé*, at paras. 74-75; *Dunsmuir*, at para. 79. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker*, at paras. 23-27; see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 5. Cases in which written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal: *Baker*, at para. 43; D. J. M. Brown and the Hon. J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 3, at p. 12-54.
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> 78 In the case at bar and in its companion cases, reasons for the administrative decisions at issue were both required and provided. Our discussion of the proper approach to reasonableness review will therefore focus on the circumstances in

> which reasons for an administrative decision are required and available to the reviewing court.
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> 79 Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15 and 22-23. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at paras. 12-13. As L'Heureux-Dubé J. noted in *Baker*, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S.A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at p. 220.
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> 80 The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process: *Baker*, at para. 39. This is what Justice Sharpe describes – albeit in the judicial context – as the "discipline of reasons": *Good Judgment: Making Judicial Decisions* (2018), at p. 134; see also *Sheppard*, at para. 23.
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> 81 Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision: *Baker*, at para. 39. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the Court reaffirmed that "the purpose of reasons, when they are required, is to demonstrate 'justification, transparency and intelligibility'": para. 1, quoting *Dunsmuir*, at para. 47; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 126. The starting point for our analysis is therefore that 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. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

Our Court of Appeal's subsequent decision in *Mohr v. Strathcona (County)*[30] also addressed the requirement to give reasons. A group of landowners appealed a decision of the

30. 2020 ABCA 187. See also *Farrier v. Canada (A.G.)*, 2020 FCA 25.

Development Appeal Board which dismissed their appeal from a decision granting a development permit for a cannabis production facility. In a 2-1 split decision,[31] the Court of Appeal allowed the appeal on the grounds that the Board's reasons were inadequate. The majority of the court held that the Board's reasons failed to address the inconsistency between the Development Plan and the Land Use Bylaw contrary to the *Municipal Government Act (Alberta)* which now required consistency between the two. The majority emphasized how reasons assist a court in reviewing decisions of a development appeal board:

> 19 Post-*Vavilov*, the interpretation of a municipal development plan may well be reviewed for correctness (see *CFPM Management Services Ltd v Edmonton (City)*, 2020 ABCA 62 and *Edmonton (City of) v Edmonton (City of) Subdivision and Development Appeal Board*, 2020 ABCA 7 at paras 11-12). And therein lies the need for fulsome reasons from the development appeal board as to why it found compliance in this case. To simply state that the Land Use Bylaw overrides the MDP will no longer suffice, whether or not there appears to be a glaring inconsistency. Nor could such reason suffice when the Land Use Bylaw itself requires compliance with the Municipal Development Plan.

Notwithstanding *Vavilov*'s caveats about not overly-finely parsing reasons and that not all errors are material, there is the possibility that in practice there will be a greater requirement for statutory delegates to provide reasons—and more extensive reasons—than they previously were required to do. Statutory delegates will need to be alert to this possibility.

5. *Are there areas of Administrative Law not covered by the* **Vavilov** *paradigm?*

There has long been a question about whether the two standards of review—correctness and reasonableness—apply to all areas of Administrative Law, or just to adjudicative functions?

Two particular areas which were not clearly dealt with in *Vavilov* bear watching:

- The principles of natural justice and procedural fairness; and
- Determining the *vires* of subordinate legislation.[32]

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31. The majority consisted of Justices O'Ferrall and Pentelechuk. Justice Slatter dissented on the issue of adequacy of reasons.

32. Compare *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 485; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2; *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*, 2013 SCC 64; *Green v. Law Society of Manitoba*, 2017 SCC 20; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22.

(a) The standard of review applicable to issues of natural justice and procedural fairness

One issue that *Vavilov* did not definitively answer, and that courts will have to continue to grapple with, is whether the correctness/reasonableness standards of review paradigm is required—or even appropriate—when a decision is challenged on the basis of procedural unfairness.

While *Vavilov* addresses the requirement for reasons, it does not clearly address the broader notion of the duty to be fair (apart, perhaps, from treating the duty to give proper reasons as a subset of procedural fairness). Most of the court's discussion about procedural fairness focusses solely on the issue of reasons; other aspects of the duty to be fair are not addressed.

In one respect, it could be argued that the court in *Vavilov* recognized that the correctness/reasonableness standards of review analysis is not required where the issue is one of procedural fairness. The majority stated:

> 23 Where a court reviews the merits of an administrative decision (*i.e.*, judicial review of an administrative decision other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies 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. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
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> [Emphasis added.]

However, the majority later suggested that the reasonableness standard of review would apply to questions of procedural fairness:

> 76 Before turning to a discussion of the proposed approach to reasonableness review, we pause to acknowledge that the requirements of the duty of procedural fairness in a given case – and in particular whether that duty requires a decision maker to give reasons for its decision – will impact how a court conducts reasonableness review.

In my view, even after *Vavilov*, the procedural fairness of a proceeding should not be measured by the standards of "correctness" or "reasonableness". It should be measured by whether the proceedings have met the level of fairness required by law. The standard is "fairness". That is the question the court must answer. Determining whether a process was

fair does not engage deference. The process was either fair or it was not—and the court gets to determine that.[33]

In the appellate context, our Court of Appeal has recognized that the standard of review for these types of issues is "fairness":[34]

> [9] 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:
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> (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.
>
> (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

33. Which may be the source of the heresy that the standard of review for procedural fairness is correctness: the consequence of applying the correctness standard of review is that the court has the last word about whether the impugned decision is correct. The court also has the last word about whether the procedure used was fair. But the court having the last word does not equate to the standard of review being correctness rather than fairness.

34. *Al-Ghamdi v. College of Physicians and Surgeons of Alberta*, 2020 ABCA 71. See also: *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA; *Zuk v. Alberta Dental Association and College*, 2020 ABCA 162; and *Moffat*, 2021 ABCA 183.

> information and thinking things through, would have a reasonable apprehension of bias.
>
> [Emphasis added.]

On a different plane, our Court of Appeal has made the distinction between issues of procedural fairness (a ground for review) and the reasonableness of the decision (a different ground for review). *UAlberta Pro-Life v. Governors of the University of Alberta*[35] raised the issue of whether the complainants had standing to challenge the merits of a decision by the University not to prosecute counter-demonstrators who were the subjects of a complaint filed by the appellants. The chambers judge held that the complainants did not have standing in the absence of allegations of procedural unfairness in the decision-making process. The Court of Appeal upheld that decision, and in doing so, distinguished between advancing a procedural fairness argument and advancing an argument that a decision was unreasonable:

> 43 Although Pro-Life complains that the process was unfair, the unfairness alleged seems to be derived from what Pro-Life submits is an unacceptable and unreasonable decision. I am not persuaded by that reasoning. There was no basis for the chambers judge to find fundamental unfairness in the appeal process. Unfairness in the appeal process would presumably involve some apparent clear disregard of essential elements to be followed in the appeal process. That sort of disregard is not proven merely because the conclusion at the end of the process differs from what the complainant sought.[36]

(b) The standard of review applicable to determining the *vires* of subordinate legislation.

The correctness/reasonableness standards of review analysis may—or may not—be applicable in determining the *vires* of subordinate legislation.

Prior to *Vavilov*, there were two conflicting lines of cases. One line in effect just automatically applied the correctness standard: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*;[37] *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*.[38] The second line took a more contextual approach to determine whether the subordinate legislation was reasonably related to the parent legislation: *Catalyst Paper Corp.*

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35. 2020 ABCA 1 (*per* Watson JA).

36. The court went on to discuss how discretionary decisions not to prosecute the targets of complaints might be determined unreasonable: see paras. 44 to 62.

37. 2004 SCC 485.

38. 2013 SCC 64.

v. North Cowichan (District);[39] *Green v. Law Society of Manitoba*;[40] *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeals Tribunal)*.[41]

Vavilov does not directly address this issue at any length.

However, in a unanimous recent decision by the Federal Court of Appeal, Justice Stratas has issued a thoughtful decision which attempts to justify applying the *Vavilov* paradigm to determining the *vires* of subordinate legislation: *Portnov v. Attorney General of Canada*.[42]

> **B. Reviewing regulations**
>
> [18] The Attorney General agrees that Mr. Portnov wants to end the continuing effect of the 2019 Regulations. He says that to accomplish that, Mr. Portnov must satisfy a special rule for attacking regulations. The rule is found in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810.
>
> [19] There are three parts to the *Katz* rule: (1) when a party challenges the validity of regulations, the party bears the burden of proof; (2) to the extent possible, regulations must be interpreted so that they accord with the statutory provision that authorizes them; and (3) the party must overcome a presumption that the regulations are valid. On the third part, *Katz* suggests (at paras. 24 and 28) that the presumption is overcome only where the regulations are "irrelevant", "extraneous" or "completely unrelated" to the objectives of the governing statute. A leading commentator on Canadian administrative law calls this "hyperdeferential": Paul Daly, "Regulations and Reasonableness Review" in Administrative Law Matters, (29 January 2021), <www.administrativelawmatters.com/blog/2021/01/29/regulations-and-reasonableness-review/>. I agree.
>
> [20] The first two parts of the *Katz* rule are well-accepted, judge-made principles. The third part—the presumption and the very narrow ways it can be rebutted—is more controversial. In my view, later jurisprudence from the Supreme Court, particularly *Vavilov*, has overtaken it.
>
> [21] The presumption of validity and the very narrow ways it can be rebutted were first introduced into Canadian law at a time when "legislative" decisions (e.g., *Alaska Trainship Corp. v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261,

39. 2012 SCC 2.

40. 2017 SCC 20.

41. 2018 SCC 22.

42. 2021 FCA 171.

120 D.L.R. (3d) 577 at p. 274 S.C.R.) or decisions of "public convenience and general policy" (*e.g.*, *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577 at p. 111 S.C.R.) could not be set aside unless "jurisdiction" was lost through some rare and significant error. These included "egregious" exceedance of authority (see *e.g. Thorne's Hardware* and *Alaska Trainship*), pursuit of an improper purpose (*Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Div. Ct.)) and the taking into account of wholly irrelevant considerations. Tellingly, in developing the third part of the rule, *Katz* relies upon all of the cases in this paragraph—cases based on concepts of "jurisdiction"—and later cases that rely on them.

[22] Over the last half-century, the role of "jurisdiction" as a controlling idea in Canadian administrative law has been on the decline, along with the concomitant need for challengers to show exceedance of authority, improper purpose or the taking into account of wholly irrelevant considerations. Concepts of "patent unreasonableness" and "reasonableness" and, later, just "reasonableness" have been in the ascendancy. By 2008, only a last small vestige of "jurisdiction" remained—correctness review on "true questions of jurisdiction" such as the *vires* of regulations: *Dunsmuir* at para. 59, citing *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485. In 2019, *Vavilov* eradicated that last vestige. Thus, the third part of the *Katz* rule is an artefact from a time long since passed.

[23] So how should we go about reviewing regulations today? We must begin by reminding ourselves that in answering questions like that we should concentrate on real substance, not superficial form: *Canadian Council for Refugees*; *JP Morgan*. In substance, regulations, like administrative decisions and orders, are nothing more than binding legal instruments that administrative officials decide to make—in other words, they are the product of administrative decision-making. This suggests that the proper framework for reviewing regulations must be the one we use to review the substance of administrative decision-making: see *e.g. Terrigno v. Calgary (City)*, 2021 ABQB 41, 21 Alta. L.R. (7th) 376.

[24] Indeed, many Supreme Court cases considering regulations and subordinate legislation during the *Dunsmuir* era used that very framework, not the framework in *Katz*: see *e.g. Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635; see also the analysis in John Mark Keyes, "Judicial Review of Delegated Legislation: The Long and Winding Road to *Vavilov*", (18 June 2020), <dx.doi.org/10.2139/ssrn.3630636>.

[25] Today, the framework for reviewing the substance of administrative decision-making is *Vavilov*. It is intended to be sweeping and comprehensive—a "holistic revision of the framework for determining the applicable standard of review" (at para. 143). We are to draw upon *Vavilov*, not cases like *Katz*: we

> must "look to [the] reasons [in *Vavilov*] first in order to determine how [*Vavilov*'s] general framework applies to [a] case" (*ibid*.).
>
> [26] *Vavilov* offers us even more justification for not following *Katz*. *Vavilov* instructs us (at para. 143) that cases under the now-discarded category of "true questions of jurisdiction"—of which *Katz* is one—"will necessarily have less precedential force". As well, in the course of its discussion abolishing the category of "true questions of jurisdiction", *Vavilov* mentions that there are "cases where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute" (at para. 66) yet makes no attempt to carve out a special rule for regulations: see also the analysis in *Morris v. Law Society of Alberta (Trust Safety Committee)*, 2020 ABQB 137, 12 Alta. L.R. (7th) 189 at para. 40; *TransAlta Generation Partnership v. Regina*, 2021 ABQB 37 at para. 46.
>
> [27] More fundamentally, *Vavilov* instructs us to conduct reasonableness review of all administrative decision-making unless one of three exceptions leading to correctness review applies. This applies to regulations as a species of administrative decision-making: Federal Court's reasons at para. 23; *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101, 445 D.L.R. (4th) 448 at para. 39. For good measure, *Vavilov* cites *Green* and *West Fraser* with approval—cases that conducted reasonableness review without applying the *Katz* rule: see paragraph 24, above. Finally, the *Katz* rule applies across-the-board to all regulations regardless of their content or context. This sits uneasily with *Vavilov* which adopts a contextual approach to reasonableness review.
>
> [28] Thus, in conducting reasonableness review, I shall not apply *Katz*. I shall follow *Vavilov*.

It is understood that our Court of Appeal has recently asked for supplemental submissions about the decision in the *Potnov* case.[43]

Finally, given the current pandemic and the use of public health legislation to authorize Cabinet or individual Ministers to amend or hold statutory provisions in abeyance, it may become necessary to consider the standard of review to be applied to the exercise of these "Henry VIII" clauses. An example of such a clause (which is very unusual) is contained in section 52.1 of the Alberta *Public Health Act*:[44]

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43. The case is *Transalta v Alberta Minister of Municipal Affairs*, on appeal from 2021 ABQB 37. Thanks to Jeneane Grundberg for drawing this case to my attention.

44. See comments by Justice Côté in the *Greenhouse Gas Pollution Pricing Act Reference*, 2021 SCC 11; and Paul Daly's comment at: https://www.administrativelawmatters.com/blog/2021/04/22/the-constitutionality-of-henry-viii-clauses-in-canada-administrative-law-matter-no-1-in-the-references-re-greenhouse-gas-pollution-pricing-act-2021-scc-11/

State of Public Health Emergency

State of public health emergency

52.1(1) Where, on the advice of the Chief Medical Officer, the Lieutenant Governor in Council is satisfied that

(a) a public health emergency exists or may exist, and

(b) prompt co-ordination of action or special regulation of persons or property is required in order to protect the public health,

the Lieutenant Governor in Council may make an order declaring a state of public health emergency relating to all or any part of Alberta.

(2) On the making of an order under subsection (1) and for up to 60 days following the lapsing of that order, a person referred to in subsection (3) may by order, without consultation,

(a) suspend or modify the application or operation of all or part of an enactment, subject to the terms and conditions that person may prescribe, or

(b) specify or set out provisions that apply in addition to, or instead of, any provision of an enactment, if the person is satisfied that doing so is in the public interest.

(2.1) An order made under subsection (2) may be made retroactive to a date not earlier than the date on which a state of public health emergency was declared under subsection (1).

(2.2) An order made under subsection (2) may not

(a) impose or increase any tax or impost,

(b) appropriate any part of the public revenue or any tax or impost, or

(c) create a new offence with retroactive effect.

(2.3) Every order made under subsection (2) on or after March 17, 2020 and before the coming into force of this subsection that is purported to apply retroactively to a date not earlier than March 17, 2020 is deemed to have been validly made.

> **(2.4)** Where there is a conflict or inconsistency between an order made under subsection (2) and a provision of the enactment to which the order relates, the order prevails to the extent of the conflict or inconsistency.
>
> **(3)** The following persons may make an order under subsection (2):
>
> (a) the Minister responsible for the enactment;
>
> (b) if the Minister responsible for the enactment is not available, the Minister of Health.
>
> [Emphasis added.]

6. *What is a "Rule of Law" issue that will engage the correctness standard of review?*

The majority in *Vavilov* contemplates that cases involving the Rule of Law could (but would not necessarily) engage the correctness standard of review.

Dunsmuir contemplated the possibility that correctness might apply to general questions of law that were of central importance to the legal system which were not in the expertise of the decision-maker. The majority in *Vavilov* tweaked the *Dunsmuir* formulation to apply to constitutional questions, general questions of law of central importance to the legal systems as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies.[45] However, the majority in *Vavilov* reiterate that just because a question of law is important is not sufficient to engage correctness. Nor is the existence of inconsistent decisions by a statutory delegate sufficient to automatically create a Rule of Law issue or engage the correctness standard of review.

In my respectful view, more work needs to be done in this area. The courts need to be a beacon for bringing unity and consistency to questions of law.

For example, as Justice Slatter noted in the Court of Appeal of Alberta in *Edmonton East (Capilano)*,[46] the court has a unifying role in establishing the law, particularly where there are multiple statutory bodies operating under the same statute (such as many local assessment

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45. Paragraph 53. For a recent case involving questions of jurisdictional boundaries between two or more administrative bodies, see *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 (labour arbitration under collective agreement *vs.* human rights adjudicator).

46. *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)*, 2015 ABCA 85; reversed by SCC in (*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47. Query: effectively reversed again by *Vavilov*?

review boards acting throughout the province). Another example of this type of situation would be the numerous *ad hoc* labour adjudicators needing a uniform interpretation of their governing legislation: *Wilson v. Atomic Energy Ltd.*[47] It is a sleight of hand to try to deal with these situations using the reasonableness standard of review.

The unanimous British Columbia Court of Appeal has recently issued a decision that perhaps creates a new category of cases that engage the correctness standard of review: *OK Industries Ltd. v. District of Highlands*:[48]

> [53] In my view, the question in this case does not fit comfortably into the categories described by the Court in *Vavilov* as exceptions to the reasonableness standard. It does not fit well as a question regarding the jurisdictional boundaries between two or more administrative tribunals, as it involves one administrative decision maker (the mines inspector exercising delegated authority under the *Mines Act*) and a legislative body (the District exercising delegated authority under the *Community Charter*). While the mines inspector, in issuing the quarry permit, did not purport to limit the general application of District bylaws, it is not his role to make any such determination. Moreover, it is not simply a jurisdictional question or a question of the interpretation of an enabling statute. The *vires* of the District's bylaws is not in issue, as was the case in *New Westminster*. Rather, the issue is whether the bylaws apply to a quarry, in light of the interplay among the numerous provincial statutes governing the regulation of mines and mining activities and the regulatory authority of local governments. In this circumstance, I agree with the Attorney General's submission that the question plausibly relates to the overarching concept of a question for which the rule of law requires consistency and a final and determinate answer. It is a question with significant legal consequences to the institutions of the provincial and municipal governments that purport to regulate mining resources in British Columbia.
>
> [54] The Court in *Vavilov* did not contemplate "every possible set of circumstances in which legislative intent or the rule of law will require a derogation from the presumption of reasonableness review" and therefore did not "definitively foreclose the possibility" that another category could be recognized: at para. 70. I consider this case to be one of the exceptional circumstances where the rule of law justifies a correctness review.

47. 2016 SCC 29.

48. 2022 BCCA 12 *per* Madam Justice Fisher writing for herself, Madam Justice Newberry, and Mr. Justice Butler.

> [55] All that said, in my opinion, an application of the reasonableness review in respect of this question yields the same result in light of the legislative restraints on the District's authority to regulate mines and mining activity.
>
> [Emphasis added.]

7. *Applying* Housen v. Nicholaisen

Applying the standards of review in *Housen v. Nicholaisen* to statutory appeals will require characterizing the issue as one of law (which will engage the correctness standard of review), fact (which will engage the "palpable and overriding error" standard of review), or mixed fact and law (which may require a somewhat higher but still deferential standard).[49]

It will be interesting to see how the courts go about doing this characterization.

Even where a question of law is undoubtedly involved, it will be interesting to see how the courts deal with appeals about decisions by expert statutory bodies.[50]

And does *Housen v. Nicholaisen* apply to internal administrative appeals from one level of administration to another? At least in the context of professional discipline, the reasonableness standard of review from *Dunsmuir* was transplanted from judicial review to internal administrative appellate bodies even with respect to questions of law. After *Vavilov*, one might have contemplated a revised transplant to make *Housen* the applicable standard

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49. Justice Côté described a "palpable and overriding error" in *Hydro-Québec v. Matta*, 2020 SCC 37 as follows:

> Absent a palpable and overriding error, an appellate court must refrain from interfering with findings of fact and findings of mixed fact and law made by the trial judge: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10-37; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352. An error is *palpable* if it is plainly seen and if all the evidence need not be reconsidered in order to identify it, and is *overriding* if it has affected the result: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 55-56 and 69-70; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33. As Morissette J.A. so eloquently put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77, [translation] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions": quoted in *Benhaim*, at para. 39. The beam in the eye metaphor not only illustrates the obviousness of a reviewable error, but also connotes a misreading of the case whose impact on the decision is plain to see.

50. Recall the SCC's decisions in *Southam* and *Pezim* where the court did not apply the correctness standard of review to legal questions in appeals from expert bodies.

of review for these types of appeals. However, our Court of Appeal has restricted *Vavilov* to appeals to the *courts*, so not applying to internal administrative appeals.[51]

CONCLUSION

Vavilov makes some significant changes to the standards of review landscape in Canadian Administrative Law, but it leaves some areas untouched or unclear. It will be interesting to see how all of this develops over the next ten years or so. Will the Supreme Court of Canada then embark on yet another (seventh) attempt to grapple with standards of review?

DPJ

51. *Moffat v. Edmonton Police Service*, 2021 ABCA 183.