

# Administrative Law – Cases, Text and Materials

Supplement – 2015-2021

**Part II – Trilogy**

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**Administrative Law – Cases, Text and Materials  
Supplement 2015-2021 (Part II – Trilogy)\*  
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## Selecting the standard of review

“These reasons set out a holistic revision of the framework for determining the applicable standard of review. A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case.”

*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 143

With its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, the Supreme Court “charted a new course forward” for determining the standard of review that applies when a court reviews the merits of an administrative decision. Its pre-*Vavilov* approach to selecting the standard of review was comprehensively set out in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31. Under this framework, questions of fact, discretion or policy, as well as questions involving legal issues that cannot easily be separated from factual issues, attracted a standard of reasonableness. Where an administrative body interpreted its home statute, the presumptive standard was reasonableness. This presumption was grounded in the legislature’s choice to give a specialized tribunal responsibility for administering the statutory provisions and the tribunal’s expertise in doing so. The presumption could be rebutted if the administrative decision involved: (1) constitutional questions; (2) true questions of jurisdiction or *vires*; (3) issues of competing jurisdiction between tribunals; and (4) questions that were of central importance to the legal system and outside the decision maker’s expertise. In “the exceptional other case”, the presumption could be rebutted where a contextual inquiry showed a clear legislative intent that the correctness standard be applied. Exceptional cases included statutory regimes with “unusually worded” rights of appeal (an appeal limited to questions of law or jurisdiction certified by a judge to be sufficiently important to merit leave to appeal was not considered “unusual”) or where the administrative decision maker and the courts shared first instance jurisdiction to interpret a statutory regime.

As noted by the majority in *Vavilov*, this previous approach attracted a chorus of criticism from judges and academics alike. In particular, the presumption of reasonableness review seemed impervious to indicators that legislatures sometimes intended to create administrative decision makers of limited expertise on certain matters of law (relative to reviewing courts) and whose decisions on those matters could be appealed and reviewed on a correctness standard. Uncertainty remained around several questions. For example, what was the scope of the limited and exceptional role of contextual factors in determining the standard of review? Similarly, what was the scope of the category of general questions of law of central importance to the legal system as a whole? And could the category of questions of jurisdiction arise at all?

The wide variations in the stories that have led to the Supreme Court’s recent review of the framework governing substantive review point to the sheer breadth of administrative law and of the challenging task of judicial review of administrative action. First, in *Vavilov* itself, Alexander Vavilov was born in Canada to parents who were later revealed to be Russian spies

sent to Canada towards the end of the Cold War to assume false Canadian identities and establish fictitious personal histories. After moving to the United States, Vavilov's parents were arrested and deported to Russia when they admitted their status as Russian citizens acting on behalf of the Russian state. Besides inspiring a popular television series called "The Americans", this dramatic set of events sparked litigation in Canada when the Registrar of Citizenship cancelled Vavilov's Canadian citizenship certificate on the grounds that, as the child of an "employee in Canada of a foreign government", he was not entitled to the automatic citizenship normally conferred by the *Citizenship Act* to Canadian-born children. Judicial review proceedings undertaken by Vavilov, the child of the Russian spies, against the Registrar's decision eventually led to the Supreme Court.

Second, the facts underlying the two *Vavilov* companion cases – *Bell Canada* and *National Football League* – are more prosaic. They involved statutory appeals of an order of the Canadian Radio-television and Telecommunications Commission (CRTC) under the *Broadcasting Act* which exempted the broadcast of the Super Bowl from the CRTC's simultaneous substitution regime. This regime had prevented Bell Canada, which acquired the Canadian broadcast rights to the Super Bowl from the National Football League, from replacing the US signal of the Super Bowl with Canadian commercials rather than the high-profile commercials aired on the US broadcast. In both companion cases, the administrative decision maker was interpreting its enabling statute and the decisions were reviewed by the lower courts on a reasonableness standard.

When it allowed leave to appeal in *Canada (Minister of Citizenship and Immigration) v Vavilov*, *Bell Canada v Canada (Attorney General)*, and *National Football League v Canada (Attorney General)*, the Supreme Court took the unusual step of issuing this invitation:

"The Court is of the view that these appeals provide an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick* and subsequent cases. To that end, the appellant and respondent are invited to devote a substantial part of their written and oral submissions on the appeal to the question of standard of review..."

*Canada (Citizenship and Immigration) v Vavilov*, [2017] S.C.C.A. No. 352

This signal that the Court was prepared to revisit its standard of review framework and address criticisms directed against it was confirmed when the Court allowed for submissions by close to thirty intervenors, including provincial Attorneys General, NGOs, and administrative decision makers. The Court also appointed *amicus curiae* who assisted the Court with written and oral submissions. It was as if the Court sought to conduct a wider inquiry into the law in advance of its own plans to revise it. The resulting *Vavilov* decision sets out the Supreme Court's reformed framework and is the central focus of this chapter. An excerpt from the companion case in *Bell Canada* is presented in the following chapter as an illustration of correctness review.

***Canada (Minister of Citizenship and Immigration) v Vavilov*****2019 SCC 65**

The following is the judgment delivered by

**Wagner C.J.C., Moldaver, Gascon, Côté, Brown, Rowe, Martin JJ.:**

1 This appeal and its companion cases (see *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66 (S.C.C.)), provide this Court with an opportunity to re-examine its approach to judicial review of administrative decisions.

2 In these reasons, we will address two key aspects of the current administrative law jurisprudence which require reconsideration and clarification. First, we will chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision. Second, we will provide additional guidance for reviewing courts to follow when conducting reasonableness review. The revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) : that judicial review functions to maintain the rule of law while giving effect to legislative intent. We will also affirm the need to develop and strengthen a culture of justification in administrative decision making.

3 We will then address the merits of the case at bar, which relates to an application for judicial review of a decision by the Canadian Registrar of Citizenship concerning Alexander Vavilov, who was born in Canada and whose parents were later revealed to be Russian spies. The Registrar found on the basis of an interpretation of s. 3(2)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29, that Mr. Vavilov was not a Canadian citizen and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*, SOR/93-246. In our view, the standard of review to be applied to the Registrar's decision is reasonableness, and the Registrar's decision was unreasonable. We would therefore uphold the Federal Court of Appeal's decision to quash it, and would dismiss the Minister of Citizenship and Immigration's appeal.

**I. Need for Clarification and Simplification of the Law of Judicial Review**

4 Over the past decades, the law relating to judicial review of administrative decisions in Canada has been characterized by continuously evolving jurisprudence and vigorous academic debate. This area of the law concerns matters which are fundamental to our legal and constitutional order, and seeks to navigate the proper relationship between administrative decision makers, the courts and individuals in our society. In parallel with the law, the role of administrative decision making in Canada has also evolved. Today, the administration of countless public bodies and regulatory regimes has been entrusted to statutory delegates with decision-making power. The number, diversity and importance of the matters that come before such delegates has made administrative decision making one of the principal manifestations of state power in the lives of Canadians.

5 Given the ubiquity and practical importance of administrative decision making, it is essential that administrative decision makers, those subject to their decisions and courts tasked with reviewing those decisions have clear guidance on how judicial review is to be performed.

6 In granting leave to appeal in the case at bar and in its companion cases, this Court's leave to appeal judgment made clear that it viewed these appeals as an opportunity to consider the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir* and subsequent cases. In light of the importance of this issue, the Court appointed two *amici curiae*, invited the parties to devote a substantial portion of their submissions to the standard of review issue, and granted leave to 27 interveners, comprising 4 attorneys general and numerous organizations representing the breadth of the Canadian administrative law landscape. We have, as a result, received a wealth of helpful submissions on this issue. Despite this Court's review of the subject in *Dunsmuir*, some aspects of the law remain challenging. In particular, the submissions presented to the Court have highlighted two aspects of the current framework which need clarification.

7 The first aspect is the analysis for determining the standard of review. It has become clear that *Dunsmuir*'s promise of simplicity and predictability in this respect has not been fully realized. In *Dunsmuir*, a majority of the Court merged the standards of "patent unreasonableness" and "reasonableness *simpliciter*" into a single "reasonableness" standard, thus reducing the number of standards of review from three to two: paras. 34-50. It also sought to simplify the analysis for determining the applicable standard of review: paras. 51-64. Since *Dunsmuir*, the jurisprudence has evolved to recognize that reasonableness will be the applicable standard for most categories of questions on judicial review, including, presumptively, when a decision maker interprets its enabling statute: see, e.g., *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.) ; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 (S.C.C.), at para. 46; *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 (S.C.C.), at para. 55; *Canadian Artists' Representation / Le Front des artistes canadiens v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 (S.C.C.), at para. 13; *Alliance Pipeline Ltd. v. Smith*, 2011 SCC 7, [2011] 1 S.C.R. 160 (S.C.C.), at paras. 26 and 28; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.), at para. 25; *Dunsmuir*, at para. 54. The Court has indicated that this presumption may be rebutted by showing the issue on review falls within a category of questions attracting correctness review: see *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.), at para. 22. It may also be rebutted by showing that the context indicates that the legislature intended the standard of review to be correctness: *McLean*, at para. 22; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 (S.C.C.), at para. 32; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 (S.C.C.) ("CHRC"), at paras. 45-46. However, uncertainty about when the contextual analysis remains appropriate and debate surrounding the scope of the correctness categories have sometimes caused confusion and made the analysis unwieldy: see, e.g., P. Daly, "Struggling

Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 *McGill L.J.* 527.

8 In addition, this analysis has in some respects departed from the theoretical foundations underpinning judicial review. While the application of the reasonableness standard is grounded, in part, in the necessity of avoiding "undue interference" in the face of the legislature's intention to leave certain questions with administrative bodies rather than with the courts (see *Dunsmuir*, at para. 27), that standard has come to be routinely applied even where the legislature has provided for a different institutional structure through a statutory appeal mechanism.

9 The uncertainty that has followed *Dunsmuir* has been highlighted by judicial and academic criticism, litigants who have come before this Court, and organizations that represent Canadians who interact with administrative decision makers. These are not light critiques or theoretical challenges. They go to the core of the coherence of our administrative law jurisprudence and to the practical implications of this lack of coherence. This Court, too, has taken note. In *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 (S.C.C.), at para. 19, Abella J. expressed the need to "simplify the standard of review labyrinth we currently find ourselves in" and offered suggestions with a view to beginning a necessary conversation on the way forward. It is in this context that the Court decided to grant leave to hear this case and the companion cases jointly.

10 This process has led us to conclude that a reconsideration of this Court's approach is necessary in order to bring greater coherence and predictability to this area of law. We have therefore adopted a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. The analysis begins with a presumption that reasonableness is the applicable standard in all cases. Reviewing courts should derogate from this presumption only where required by a clear indication of legislative intent or by the rule of law.

11 The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard. The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome somewhere between "good enough" and "not quite wrong". These concerns have been echoed by some members of the legal profession, civil society organizations and legal clinics. The Court has an obligation to take these perspectives seriously and to ensure that the framework it adopts accommodates all types of administrative decision making, in areas that range from immigration, prison administration and social security entitlements to labour relations, securities regulation and energy policy.

12 These concerns regarding the application of the reasonableness standard speak to the need for this Court to more clearly articulate what that standard entails and how it should be applied in practice. Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir*'s promise to protect "the legality, the reasonableness and the

fairness of the administrative process and its outcomes”, reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.

13 Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a “rubber-stamping” process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

14 On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be “justified to citizens in terms of rationality and fairness”: the Rt. Hon. B. McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, “Proportionality and Justification” (2014), 64 *U.T.L.J.* 458, at pp. 467-70.

15 In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker’s place.

## **II. Determining the Applicable Standard of Review**

16 In the following sections, we set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged. It starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions.

17 The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature’s intent that appellate standards apply when a court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. The general rule of

reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. As a result, it is no longer necessary for courts to engage in a “contextual inquiry” (*CHRC*, at paras. 45-47, see also *Dunsmuir*, at paras. 62-64; *McLean*, at para. 22) in order to identify the appropriate standard.

18 Before setting out the framework for determining the standard of review in greater detail, we wish to acknowledge that these reasons depart from the Court’s existing jurisprudence on standard of review in certain respects. Any reconsideration such as this can be justified only by compelling circumstances, and we do not take this decision lightly. A decision to adjust course will always require the Court to carefully weigh the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach: see *Bedford v. Canada (Attorney General)*, 2013 SCC 72, [2013] 3 S.C.R. 1101 (S.C.C.), at para. 47; *Craig v. R.*, 2012 SCC 43, [2012] 2 S.C.R. 489 (S.C.C.), at paras. 24-27; *Fraser v. Ontario (Attorney General)*, 2011 SCC 20, [2011] 2 S.C.R. 3 (S.C.C.), at paras. 56-57 and 129-31, 139; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 (S.C.C.), at paras. 43-44; *R. v. Bernard*, [1988] 2 S.C.R. 833 (S.C.C.), at pp. 849-50.

19 On this point, we recall the observation of Gibbs J. in *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (Australia H.C.), which this Court endorsed in *Craig*, at para. 26:

No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.

20 Nonetheless, this Court has in the past revisited precedents that were determined to be unsound in principle, that had proven to be unworkable and unnecessarily complex to apply, or that had attracted significant and valid judicial, academic and other criticism: *Craig*, at paras. 28-30; *Henry*, at paras. 45-47; *Fraser*, at para. 135 (per Rothstein J., concurring in the result); *Bernard*, at pp. 858-59. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty in the law: *Canada (Minister of Indian Affairs & Northern Development) v. Ranville*, [1982] 2 S.C.R. 518 (S.C.C.), at p. 528; *Bernard*, at p. 858; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.), at p. 778. In such circumstances, “following the prior decision because of *stare decisis* would be contrary to the underlying value behind that doctrine, namely, clarity and certainty in the law”: *Bernard*, at p. 858. These considerations apply here.

21 Certain aspects of the current framework are unclear and unduly complex. The practical effect of this lack of clarity is that courts sometimes struggle in conducting the standard of review analysis, and costly debates surrounding the appropriate standard and its application continue to overshadow the review on the merits in many cases, thereby

undermining access to justice. The words of Binnie J. in his concurring reasons in *Dunsmuir*, at para. 133, are still apt:

[J]udicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied .... If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is [the choice of standard analysis] .... A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome ....

Regrettably, we find ourselves in a similar position following *Dunsmuir*. As Karakatsanis J. observed in *Edmonton East*, at para. 35, "[t]he contextual approach can generate uncertainty and endless litigation concerning the standard of review." While counsel and courts attempt to work through the complexities of determining the standard of review and its proper application, litigants "still find the merits waiting in the wings for their chance to be seen and reviewed": *Wilson*, at para. 25, per Abella J.

22 As noted in *CHRC*, this Court "has for years attempted to simplify the standard of review analysis in order to 'get the parties away from arguing about the tests and back to arguing about the substantive merits of their case'": para. 27, quoting *Alberta Teachers*, at para. 36, citing *Dunsmuir*, at para. 145, per Binnie J. The principled changes set out below seek to promote the values underlying *stare decisis* and to make the law on the standard of review more certain, coherent and workable going forward.

#### **A. Presumption That Reasonableness Is the Applicable Standard**

23 Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions 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.

24 Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers: *Dunsmuir*, at para. 27. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making

from curial scrutiny entirely: *Dunsmuir*, at para. 31; *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 (S.C.C.), at pp. 236-37; *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S.*, local 298, [1988] 2 S.C.R. 1048 (S.C.C.), at p. 1090. Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.

25 For years, this Court’s jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court’s review of an administrative decision. Indeed, a presumption of reasonableness review is already a well-established feature of the standard of review analysis in cases in which administrative decision makers interpret their home statutes: see *Alberta Teachers*, at para. 30; *Saguenay*, at para. 46; *Edmonton East*, at para. 22. In our view, it is now appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker’s interpretation of its enabling statute, the presumption also applies more broadly to other aspects of its decision.

26 Before turning to an explanation of how the presumption of reasonableness review may be rebutted, we believe it is desirable to clarify one aspect of the conceptual basis for this presumption. Since *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.), the central rationale for applying a deferential standard of review in administrative law has been a respect for the legislature’s institutional design choice to delegate certain matters to non-judicial decision makers through statute: *C.U.P.E.*, at pp. 235-36. However, this Court has subsequently identified a number of other justifications for applying the reasonableness standard, some of which have taken on influential roles in the standard of review analysis at various times.

27 In particular, the Court has described one rationale for applying the reasonableness standard as being the relative expertise of administrative decision makers with respect to the questions before them: see, e.g., *C.U.P.E.*, at p. 236; *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), at paras. 32-35; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.), at pp. 591-92; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at paras. 50-53; *Dunsmuir*, at para. 49, quoting D. J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 C.J.A.L.P. 59, at p. 93; see also *Dunsmuir*, at para. 68. However, this Court’s jurisprudence has sometimes been deeply divided on the question of what expertise entails in the administrative context, how it should be assessed and how it should inform the standard of review analysis: see, e.g., *Khosa*, at paras. 23-25, per Binnie J. for the majority, compared to paras. 93-96, per Rothstein J., concurring in the result; *Edmonton East*, at para. 33, per Karakatsanis J. for the majority, compared to paras. 81-86, per Côté and Brown JJ., dissenting. In the era of what was known as the “pragmatic and functional” approach, which was first set out in *Bibeault*, a decision maker’s expertise relative to that of the reviewing court was one of the key contextual factors said to indicate legislative intent with respect to the standard of review, but the decision maker was not presumed to have relative expertise. Instead, whether a decision maker had greater

expertise than the reviewing court was assessed in relation to the specific question at issue and on the basis of a contextual analysis that could incorporate factors such as the qualification of an administrative body's members, their experience in a particular area and their involvement in policy making: see, e.g., *Pezim*, at pp. 591-92; *Southam*, at paras. 50-53; *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19, [2003] 1 S.C.R. 226 (S.C.C.), at paras. 28-29; *Deputy Minister of National Revenue v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100 (S.C.C.), at paras. 28-32; *Moreau-Bérubé c. Nouveau-Brunswick*, 2002 SCC 11, [2002] 1 S.C.R. 249 (S.C.C.), at para. 50.

28 Unfortunately, this contextual analysis proved to be unwieldy and offered limited practical guidance for courts attempting to assess an administrative decision maker's relative expertise. More recently, the dominant approach in this Court has been to accept that expertise simply inheres in an administrative body by virtue of the specialized function designated for it by the legislature: *Edmonton East*, at para. 33. However, if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not.

29 Of course, the fact that the specialized role of administrative decision makers lends itself to the development of expertise and institutional experience is not the only reason that a legislature may choose to delegate decision-making authority. Over the years, the Court has pointed to a number of other compelling rationales for the legislature to delegate the administration of a statutory scheme to a particular administrative decision maker. These rationales have included the decision maker's proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly and efficiently, and ability to provide simplified and streamlined proceedings intended to promote access to justice.

30 While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review. The Court has in fact recognized this basis for applying the reasonableness standard to administrative decisions in the past. In *Khosa*, for example, the majority understood *Dunsmuir* to stand for the proposition that "with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts": para. 25. More recently, in *Edmonton East*, Karakatsanis J. explained that a presumption of reasonableness review "respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts": para. 22. And in *CHRC*, Gascon J. explained that "the fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review": para. 50. In other words, respect for this institutional design choice and the democratic principle, as well as the need for courts to avoid "undue interference" with the

administrative decision maker's discharge of its functions, is what justifies the presumptive application of the reasonableness standard: *Dunsmuir*, at para. 27.

31 We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.

32 That being said, our starting position that the applicable standard of review is reasonableness is not incompatible with the rule of law. However, because this approach is grounded in respect for legislative choice, it also requires courts to give effect to clear legislative direction that a different standard was intended. Similarly, a reviewing court must be prepared to derogate from the presumption of reasonableness review where respect for the rule of law requires a singular, determinate and final answer to the question before it. Each of these situations will be discussed in turn below.

### ***B. Derogation From the Presumption of Reasonableness Review on the Basis of Legislative Intent***

33 This Court has described respect for legislative intent as the “polar star” of judicial review: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 (S.C.C.), at para. 149. This description remains apt. The presumption of reasonableness review discussed above is intended to give effect to the legislature’s choice to leave certain matters with administrative decision makers rather than the courts. It follows that this presumption will be rebutted where a legislature has indicated that a different standard should apply. The legislature can do so in two ways. First, it may explicitly prescribe through statute what standard courts should apply when reviewing decisions of a particular administrative decision maker. Second, it may direct that derogation from the presumption of reasonableness review is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards.

#### *(1) Legislated Standards of Review*

34 Any framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review. This Court has consistently affirmed that legislated standards of review should be given effect: see, e.g., *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779 (S.C.C.), at paras. 31-32; *Khosa*, at paras. 18-19; *British Columbia (Workers’ Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2011 SCC 52, [2011] 3 S.C.R. 422 (S.C.C.), at para. 20; *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 (S.C.C.), at para. 55; *McCormick v. Fasken Martineau Dumoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108 (S.C.C.), at para. 16; *British Columbia (Workers’ Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587 (S.C.C.), at paras. 8 and 29; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795 (S.C.C.), at para. 28.

35 It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied. In British Columbia, the legislature has established the applicable standard of review for many tribunals by reference to the *Administrative Tribunals Act*, S.B.C. 2004, c. 45: see ss. 58 and 59. For example, it has provided that the standard of review applicable to decisions on questions of statutory interpretation by the B.C. Human Rights Tribunal is to be correctness: *ibid.*, s. 59(1); *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 32. We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.

### (2) Statutory Appeal Mechanisms

36 We have reaffirmed that, to the extent possible, the standard of review analysis requires courts to give effect to the legislature's institutional design choices to delegate authority through statute. In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision. Just as a legislature may, within constitutional limits, insulate administrative decisions from judicial interference, it may also choose to establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery": *Bhadauria v. Seneca College of Applied Arts & Technology*, [1981] 2 S.C.R. 181 (S.C.C.), at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court. This intention should be given effect. As noted by the intervener Attorney General of Quebec in its factum, [TRANSLATION] "[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place": para. 2.

37 It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

38 We acknowledge that giving effect to statutory appeal mechanisms in this way departs from the Court’s recent jurisprudence. However, after careful consideration, we are of the view that this shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by a weighing of the values of certainty and correctness: *Craig*, at para. 27. Our conclusion is based on the following considerations.

39 First, there has been significant judicial and academic criticism of this Court’s recent approach to statutory appeal rights: see, e.g., Y.-M. Morissette, “What is a ‘reasonable decision’?” (2018), 31 *C.J.A.L.P.* 225, at p. 244; the Hon. J.T. Robertson, *Administrative Deference: The Canadian Doctrine that Continues to Disappoint* (April 18, 2018) (online), at p. 8; the Hon. D. Stratas, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” (2016), 42 *Queen’s L.J.* 27, at p. 33; Daly, at pp. 541-42; Québec (*Procureure générale*) c. Montréal (Ville), 2016 QCCA 2108, 17 Admin. L.R. (6th) 328 (C.A. Que.), at paras. 36-46; *Bell Canada v. 7262591 Canada Ltd.*, 2018 FCA 174, 428 D.L.R. (4th) 311 (F.C.A.), at paras. 190-92, per Nadon J.A., concurring, and at 66 and 69-72, per Rennie J.A., dissenting; *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1 (Alta. C.A.), at paras. 91 and 93-95, per Slatter J.A., concurring; *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22 (N.S. C.A.), at paras. 250, 255-64 and 274-302, per Beveridge J.A., dissenting; *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14 (N.S. C.A.), at paras. 9-14. These critiques seize on the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. This criticism observes that legislative choice is not one-dimensional; rather, it pulls in two directions. While a legislative choice to delegate to an administrative decision maker grounds a presumption of reasonableness on the one hand, a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts on the other hand.

40 This Court has in the past held that the existence of significant and valid judicial, academic and other criticism of its jurisprudence may justify reconsideration of a precedent: *Craig*, at para. 29; *R. v. Robinson*, [1996] 1 S.C.R. 683 (S.C.C.), at paras. 35-41. This consideration applies in the instant case. In particular, the suggestion that the recent treatment of statutory rights of appeal represents a departure from the conceptual basis underpinning the standard of review framework is itself a compelling reason to re-examine the current approach: *Khosa*, at para. 87, per Rothstein J., concurring in the result.

41 Second, there is no satisfactory justification for the recent trend in this Court’s jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis absent exceptional wording: see *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 (S.C.C.), at paras. 35-39. Indeed, this approach is itself a departure from earlier jurisprudence: the Hon. J. T. Robertson, “Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence” (2014), 66 *S.C.L.R.* (2d) 1, at pp. 91-93. Under the former “pragmatic and functional” approach to determining the applicable standard of review, the existence of a privative clause or a statutory right of appeal was one of four contextual factors that a court would consider in order to determine the standard that the legislature intended to apply to a particular

decision. Although a statutory appeal clause was not determinative, it was understood to be a key factor indicating that the legislature intended that a less deferential standard of review be applied: see, e.g., *Pezim*, at pp. 589-92; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739 (S.C.C.), at paras. 28-31; *Southam*, at paras. 30-32, 46 and 54-55; *Pushpanathan*, at paras. 30-31; *Dr. Q*, at para. 27; *Mattel*, at paras. 26-27; *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, [2003] 1 S.C.R. 247 (S.C.C.), at paras. 21 and 27-29; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476 (S.C.C.), at para. 11; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 (S.C.C.), at para. 7.

42 The Court did indeed sometimes find that, even in a statutory appeal, a deferential standard of review was warranted for the legal findings of a decision maker that lay at the heart of the decision maker's expertise: see, e.g., *Pezim*. In other instances, however, the Court concluded that the existence of a statutory appeal mechanism and the fact that the decision maker did not have greater expertise than a court on the issue being considered indicated that correctness was the appropriate standard, including on matters involving the interpretation of the administrative decision maker's home statute: see, e.g., *Mattel*, at paras. 26-33; *Barrie Public Utilities*, at paras. 9-19; *Monsanto*, at paras. 6-16.

43 Yet as, in *Dunsmuir*, *Alberta Teachers*, *Edmonton East* and subsequent cases, the standard of review analysis was simplified and shifted from a contextual analysis to an approach more focused on categories, statutory appeal mechanisms ceased to play a role in the analysis. Although this simplification of the standard of review analysis may have been a laudable change, it did not justify ceasing to give *any* effect to statutory appeal mechanisms. *Dunsmuir* itself provides little guidance on the rationale for this change. The majority in *Dunsmuir* was silent on the role of a statutory right of appeal in determining the standard of review, and did not refer to the prior treatment of statutory rights of appeal under the pragmatic and functional approach.

44 More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word “appeal” in an administrative law statute than they do in, for example, a criminal or commercial law context. Accepting that the word “appeal” refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217. Accepting that the legislature intends an appellate standard of review to be applied when it uses the word “appeal” also helps to explain why many statutes provide for *both* appeal and judicial review mechanisms in different contexts, thereby indicating two roles for reviewing courts: see, e.g., *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 27 and 28. This offers further support for giving effect to statutory rights of appeal. Our colleagues' suggestion that our position in this regard “hinges” on what they call a “textualist argument” (at para. 246) is inaccurate.

45 That there is no principled rationale for ignoring statutory appeal mechanisms becomes obvious when the broader context of those mechanisms is considered. The

existence of a limited right of appeal, such as a right of appeal on questions of law or a right of appeal with leave of a court, does not preclude a court from considering other aspects of a decision in a judicial review proceeding. However, if the same standards of review applied regardless of whether a question was covered by the appeal provision, and regardless of whether an individual subject to an administrative decision was granted leave to appeal or applied for judicial review, the appeal provision would be completely redundant — contrary to the well-established principle that the legislature does not speak in vain: *Québec (Procureur général) c. Carrières Ste-Thérèse Itée*, [1985] 1 S.C.R. 831 (S.C.C.), at p. 838.

46 Finally, and most crucially, the appeals now before the Court have allowed for a comprehensive and considered examination of the standard of review analysis with the goal of remedying the conceptual and practical difficulties that have made this area of the law challenging for litigants and courts alike. To achieve this goal, the revised framework must, for at least two reasons, give effect to statutory appeal mechanisms. The first reason is conceptual. In the past, this Court has looked past an appeal clause primarily when the decision maker possessed greater relative expertise — what it called the “specialization of duties” principle in *Pezim*, at p. 591. But, as discussed above, the presumption of reasonableness review is no longer premised upon notions of relative expertise. Instead, it is now based on respect for the legislature’s institutional design choice, according to which the authority to make a decision is vested in an administrative decision maker rather than in a court. It would be inconsistent with this conceptual basis for the presumption of reasonableness review to disregard clear indications that the legislature has intentionally chosen a more involved role for the courts. Just as recognizing a presumption of reasonableness review on all questions respects a legislature’s choice to leave some matters first and foremost to an administrative decision maker, departing from that blanket presumption in the context of a statutory appeal respects the legislature’s choice of a more involved role for the courts in supervising administrative decision making.

47 The second reason is that, building on developments in the case law over the past several years, this decision conclusively closes the door on the application of a contextual analysis to determine the applicable standard, and in doing so streamlines and simplifies the standard of review framework. With the elimination of the contextual approach to selecting the standard of review, the need for statutory rights of appeal to play a role becomes clearer. Eliminating the contextual approach means that statutory rights of appeal must now either play no role in administrative law or be accepted as directing a departure from the default position of reasonableness review. The latter must prevail.

48 Our colleagues agree that the time has come to put the contextual approach espoused in *Dunsmuir* to rest and adopt a presumption of reasonableness review. We part company on the extent to which the departure from the contextual approach requires corresponding modifications to other aspects of the standard of review jurisprudence. We consider that the elimination of the contextual approach represents an incremental yet important adjustment to Canada’s judicial review roots. While it is true that this Court has, in the past several years of jurisprudential development, warned that the contextual approach should be applied “sparingly” (*CHRC*, at para. 46), it is incorrect to suggest that our jurisprudence was such that the elimination of the contextual analysis was “all but

complete”: reasons of Abella and Karakatsanis JJ., at para. 277; see, in this regard, *CHRC*, at paras. 44-54; *Saguenay*, at para. 46; *Tervita*, at para. 35; *McLean*, at para. 22; *Edmonton East*, at para. 32; *Public Performance of Musical Works, Re*, 2012 SCC 35, [2012] 2 S.C.R. 283 (S.C.C.), at para. 15. The contextual analysis was one part of the broader standard of review framework set out in *Dunsmuir*. A departure from this aspect of the *Dunsmuir* framework requires a principled rebalancing of the framework as a whole in order to maintain the equilibrium between the roles of administrative decision makers and reviewing courts that is fundamental to administrative law.

49 In our view, with the starting position of this presumption of reasonableness review, and in the absence of a searching contextual analysis, legislative intent can only be given effect in this framework if statutory appeal mechanisms, as clear signals of legislative intent with respect to the applicable standard of review, are given effect through the application of appellate standards by reviewing courts. Conversely, 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.

50 We wish, at this juncture, to make three points regarding how the presence of a statutory appeal mechanism should inform the choice of standard analysis. First, we note that statutory regimes that provide for parties to appeal to a court from an administrative decision may allow them to do so in all cases (that is, as of right) or only with leave of the court. While the existence of a leave requirement will affect whether a court will hear an appeal from a particular decision, it does not affect the standard to be applied if leave is given and the appeal is heard.

51 Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give courts an appellate function, they do not authorize the application of appellate standards. Some examples of such provisions are ss. 18 to 18.2, 18.4 and 28 of the *Federal Courts Act*, which confer jurisdiction on the Federal Court and the Federal Court of Appeal to hear and determine applications for judicial review of decisions of federal bodies and grant remedies, and also address procedural aspects of such applications: see *Khosa*, at para. 34. Another example is the current version of s. 470 of Alberta’s *Municipal Government Act*, R.S.A. 2000, c. M-26, which does not provide for an appeal to a court, but addresses procedural considerations and consequences that apply “[w]here a decision of an assessment review board is the subject of an application for judicial review”: s. 470(1).

52 Third, we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, the existence of a circumscribed right of appeal in a

statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal. But any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.

### **C. The Applicable Standard Is Correctness Where Required by the Rule of Law**

53 In our view, respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir*, at para. 58.

54 When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir*, at para. 50. While it should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.

#### *(1) Constitutional Questions*

55 Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in reviewing such questions: *Dunsmuir*, para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.).

56 The Constitution — both written and unwritten — dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it. A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

57 Although the *amici* questioned the approach to the standard of review set out in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.), a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the

administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the *Charter* (see, e.g., *Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54, [2003] 2 S.C.R. 504 (S.C.C.), at para. 65). Our jurisprudence holds that an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.

(2) *General Questions of Law of Central Importance to the Legal System as a Whole*

58 In *Dunsmuir*, a majority of the Court held that, in addition to constitutional questions, general questions of law which are “both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise” will require the application of the correctness standard: para. 60, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at para. 62, per LeBel J., concurring. We remain of the view that the rule of law requires courts to have the final word with regard to general questions of law that are “of central importance to the legal system as a whole”. However, a return to first principles reveals that it is not necessary to evaluate the decision maker’s specialized expertise in order to determine whether the correctness standard must be applied in cases involving such questions. As indicated above (at para. 31) of the reasons, the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review.

59 As the majority of the Court recognized in *Dunsmuir*, the key underlying rationale for this category of questions is the reality that certain general questions of law “require uniform and consistent answers” as a result of “their impact on the administration of justice as a whole”: *Dunsmuir*, para. 60. In these cases, correctness review is necessary to resolve general questions of law that are of “fundamental importance and broad applicability”, with significant legal consequences for the justice system as a whole or for other institutions of government: see *Toronto (City)*, at para. 70; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 (S.C.C.), at para. 20; *Canadian National Railway*, at para. 60; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687 (S.C.C.), at para. 17; *Saguenay*, at para. 51; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.) (“*Mowat*”), at para. 22; *Commission scolaire de Laval c. Syndicat de l’enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29 (S.C.C.), at para. 38. For example, the question in *University of Calgary* could not be resolved by applying the reasonableness standard, because the decision would have had legal implications for a wide variety of other statutes and because the uniform protection of solicitor-client privilege — at issue in that case — is necessary for the proper functioning of the justice system: *University of Calgary*, at paras. 19-26. As this shows, the resolution of general questions of law “of central importance to the legal system as a whole” has implications beyond the decision at hand, hence the need for “uniform and consistent answers”.

60 This Court’s jurisprudence continues to provide important guidance regarding what constitutes a general question of law of central importance to the legal system as a whole. For example, the following general questions of law have been held to be of central importance to the legal system as a whole: when an administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process (*Toronto (City)*, at para. 15); the scope of the state’s duty of religious neutrality (*Saguenay*, at para. 49); the appropriateness of limits on solicitor-client privilege (*University of Calgary*, at para. 20); and the scope of parliamentary privilege (*Chagnon*, at para. 17). We caution, however, that this jurisprudence must be read carefully, given that expertise is no longer a consideration in identifying such questions: see, e.g., *CHRC*, at para. 43.

61 We would stress that the mere fact that a dispute is “of wider public concern” is not sufficient for a question to fall into this category — nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue: see, e.g., *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34, [2013] 2 S.C.R. 458 (S.C.C.), at para. 66; *McLean*, at para. 28; *Barreau du Québec c. Québec (Procureure générale)*, 2017 SCC 56, [2017] 2 S.C.R. 488 (S.C.C.), at para. 18. The case law reveals many examples of questions this Court has concluded are *not* general questions of law of central importance to the legal system as a whole. These include whether a certain tribunal can grant a particular type of compensation (*Mowat*, at para. 25); when estoppel may be applied as an arbitral remedy (*M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, 2011 SCC 59, [2011] 3 S.C.R. 616 (S.C.C.), at paras. 37-38); the interpretation of a statutory provision prescribing timelines for an investigation (*Alberta Teachers*, at para. 32); the scope of a management rights clause in a collective agreement (*Irving Pulp & Paper*, at paras. 7, 15-16 and 66, per Rothstein and Moldaver JJ., dissenting but not on this point); whether a limitation period had been triggered under securities legislation (*McLean*, at paras. 28-31); whether a party to a confidential contract could bring a complaint under a particular regulatory regime (*Canadian National Railway*, at para. 60); and the scope of an exception allowing non-advocates to represent a minister in certain proceedings (*Barreau du Québec*, at paras. 17-18). As these comments and examples indicate, this does not mean that simply because expertise no longer plays a role in the selection of the standard of review, questions of central importance are now transformed into a broad catch-all category for correctness review.

62 In short, general questions of law of central importance to the legal system as a whole require a single determinate answer. In cases involving such questions, the rule of law requires courts to provide a greater degree of legal certainty than reasonableness review allows.

### *(3) Questions Regarding the Jurisdictional Boundaries Between Two or More Administrative Bodies*

63 Finally, the rule of law requires that the correctness standard be applied in order to resolve questions regarding the jurisdictional boundaries between two or more administrative bodies: *Dunsmuir*, para. 61. One such question arose in *Regina Police Assn. v. Regina (City) Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360 (S.C.C.), in which the

issue was the jurisdiction of a labour arbitrator to consider matters of police discipline and dismissal that were otherwise subject to a comprehensive legislative regime. Similarly, in *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Québec (Procureure générale)*, 2004 SCC 39, [2004] 2 S.C.R. 185 (S.C.C.), the Court considered a jurisdictional dispute between a labour arbitrator and the Quebec Human Rights Tribunal.

64 Administrative decisions are rarely contested on this basis. Where they are, however, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another. The rationale for this category of questions is simple: the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions: see *British Columbia Telephone Co.*, at para. 80, per McLachlin J. (as she then was), concurring. Members of the public must know where to turn in order to resolve a dispute. As with general questions of law of central importance to the legal system as a whole, the application of the correctness standard in these cases safeguards predictability, finality and certainty in the law of administrative decision making.

#### **D. A Note Regarding Jurisdictional Questions**

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; *Québec (Procureure générale) c. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3 (S.C.C.), at para. 32. Since *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 v. Federal Communications Commission*, 569 U.S. 290 (U.S. Sup. Ct. 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 (S.C.C.) ; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635 (S.C.C.).

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.

68 Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect. Without seeking to import the U.S. jurisprudence on this issue wholesale, we find that the following comments of the Supreme Court of the United States in *Arlington*, at p. 307, are apt:

The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision-making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional" ....

### **E. Other Circumstances Requiring a Derogation from the Presumption of Reasonableness Review**

69 In these reasons, we have identified five situations in which a derogation from the presumption of reasonableness review is warranted either on the basis of legislative intent (i.e., legislated standards of review and statutory appeal mechanisms) or because correctness review is required by the rule of law (i.e., constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies). This framework is the product of careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence. We are of the view, at this time, that these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review. As previously indicated, courts should no longer engage in a contextual inquiry to determine the standard of review or to rebut the presumption of reasonableness review. Letting go of this contextual approach will, we hope, “get the parties away from arguing about the tests and back to arguing about the substantive merits of their case”: *Alberta Teachers*, at para. 36, quoting *Dunsmuir*, at para. 145, per Binnie J., concurring.

70 However, we would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case. But our reluctance to pronounce that the list of exceptions to the application of a reasonableness standard is closed should not be understood as inviting the routine establishment of new categories requiring correctness review. Rather, it is a recognition that it would be unrealistic to declare that we have contemplated every possible set of circumstances in which legislative intent or the rule of law will require a derogation from the presumption of reasonableness review. That being said, the recognition of any new basis for correctness review would be exceptional and would need to be consistent with the framework and the overarching principles set out in these reasons. In other words, any new category warranting a derogation from the presumption of reasonableness review on the basis of legislative intent would require a signal of legislative intent as strong and compelling as those identified in these reasons (i.e., a legislated standard of review or a statutory appeal mechanism). Similarly, the recognition of a new category of questions requiring correctness review that is based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in these reasons.

71 The *amici curiae* suggest that, in addition to the three categories of legal questions identified above, the Court should recognize an additional category of legal questions that would require correctness review on the basis of the rule of law: legal questions regarding which there is persistent discord or internal disagreement within an administrative body leading to legal incoherence. They argue that correctness review is necessary in such situations because the rule of law breaks down where legal inconsistency becomes the norm and the law’s meaning comes to depend on the identity of the decision maker. The *amici curiae* submit that, where competing reasonable legal interpretations linger over time

at the administrative level — such that a statute comes to mean, simultaneously, both “yes” and “no” — the courts must step in to provide a determinative answer to the question without according deference to the administrative decision maker: *factum of the amici curiae*, at para. 91.

72 We are not persuaded that the Court should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. In *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 (S.C.C.), this Court held that “a lack of unanimity [within a tribunal] is the price to pay for the decision-making freedom and independence given to the members of these tribunals”: p. 800; see also *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, 2001 SCC 4, [2001] 1 S.C.R. 221 (S.C.C.), at para. 28. That said, we agree that the hypothetical scenario suggested by the *amici curiae* — in which the law’s meaning depends on the identity of the individual decision maker, thereby leading to legal incoherence — is antithetical to the rule of law. In our view, however, the more robust form of reasonableness review set out below, which accounts for the value of consistency and the threat of arbitrariness, is capable, in tandem with internal administrative processes to promote consistency and with legislative oversight (see *Domtar*, at p. 801), of guarding against threats to the rule of law. Moreover, the precise point at which internal discord on a point of law would be so serious, persistent and unresolvable that the resulting situation would amount to “legal incoherence” and require a court to step in is not obvious. Given these practical difficulties, this Court’s binding jurisprudence and the hypothetical nature of the problem, we decline to recognize such a category in this appeal.

(...)

[The majority’s discussion of what reasonableness review entails is reproduced in full in the following chapter – “Applying the Standard of Review”. The majority noted that the Registrar’s decision had come before the Federal Court by way of judicial review and that the *Citizenship Act* did not provide a statutory right of appeal or a statutorily-prescribed standard of review. Moreover, the question of statutory interpretation at issue in the case fell into none of the categories of questions for which the rule of law required review on a correctness standard. Accordingly, the presumption of reasonableness review was not rebutted and the applicable standard was reasonableness.]

### **The following are the reasons delivered by**

#### **Abella, Karakatsanis JJ.:**

[Footnotes have been omitted.]

198 Forty years ago, in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.), this Court embarked on a course to recognize the unique and valuable role of administrative decision-makers within the Canadian legal order. Breaking away from the court-centric theories of years past, the Court encouraged judges to show deference when specialized administrative decision-makers provided reasonable answers to legal questions

within their mandates. Building on this more mature understanding of administrative law, subsequent decisions of this Court sought to operationalize deference and explain its relationship to core democratic principles. These appeals offered a platform to clarify and refine our administrative law jurisprudence, while remaining faithful to the deferential path it has travelled for four decades.

199 Regrettably, the majority shows our precedents no such fidelity. Presented with an opportunity to steady the ship, the majority instead dramatically reverses course — away from this generation’s deferential approach and back towards a prior generation’s more intrusive one. Rather than confirming a meaningful presumption of deference for administrative decision-makers, as our common law has increasingly done for decades, the majority’s reasons strip away deference from hundreds of administrative actors subject to statutory rights of appeal; rather than following the consistent path of this Court’s jurisprudence in understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely and reformulates legislative intent as an overriding intention to provide — or not provide — appeal routes; and rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the pre-*C.U.P.E.* era. In other words, instead of *reforming* this generation’s evolutionary approach to administrative law, the majority *reverses* it, taking it back to the formalistic judge-centred approach this Court has spent decades dismantling.

200 We support the majority’s decision to eliminate the vexing contextual factors analysis from the standard of review framework and to abolish the shibboleth category of “true questions of jurisdiction”. These improvements, accompanied by a meaningful presumption of deference for administrative decision-makers, would have simplified our judicial review framework and addressed many of the criticisms levied against our jurisprudence since *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (S.C.C.).

201 But the majority goes much further and fundamentally reorients the decades-old relationship between administrative actors and the judiciary, by dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis. In so doing, the majority advocates a profoundly different philosophy of administrative law than the one which has guided our Court’s jurisprudence for the last four decades. The majority’s reasons are an encomium for correctness and a eulogy for deference.

### **The Evolution of Canadian Administrative Law**

202 The modern Canadian state “could not function without the many and varied administrative tribunals that people the legal landscape” (The Rt. Hon. Beverley McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online)). Parliament and the provincial legislatures have entrusted a broad array of complex social and economic challenges to administrative actors, including regulation of labour relations, welfare programs, food and drug safety, agriculture, property assessments, liquor service and production, infrastructure, the financial markets, foreign

investment, professional discipline, insurance, broadcasting, transportation and environmental protection, among many others. Without these administrative decision-makers, “government would be paralyzed, and so would the courts” (Guy Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at p. 3).

203 In exercising their mandates, administrative decision-makers often resolve claims and disputes within their areas of specialization (Gus Van Harten et al., *Administrative Law: Cases, Text, and Materials* (7th ed. 2015), at p. 13). These claims and disputes vary greatly in scope and subject-matter. Corporate merger requests, professional discipline complaints by dissatisfied clients, requests for property reassessments and applications for welfare benefits, among many other matters, all fall within the purview of the administrative justice system.

204 The administrative decision-makers tasked to resolve these issues come from many different walks of life (Van Harten et al., at p. 15). Some have legal backgrounds, some do not. The diverse pool of decision-makers in the administrative system responds to the diversity of issues that it must resolve. To address this broad range of issues, administrative dispute-resolution processes are generally “[d]esigned to be less cumbersome, less expensive, less formal and less delayed” than their judicial counterparts — but “no less effectiv[e] or credibl[e]” (*Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (Ont. C.A.), at p. 279). In the field of labour relations, for example, Parliament explicitly rejected a court-based system to resolve workplace disputes in favour of a Labour Board, staffed with representatives from management and labour alongside an independent member (Bora Laskin, “Collective Bargaining in Ontario: A New Legislative Approach” (1943), 21 *Can. Bar Rev.* 684; John A. Willes, *The Ontario Labour Court: 1943-1944* (1979); Katherine Munro, “A ‘Unique Experiment’: The Ontario Labour Court, 1943-1944” (2014), 74 *Labour/Le Travail* 199). Other administrative processes — license renewals, zoning permit issuances and tax reassessments, for example — bear even less resemblance to the traditional judicial model.

205 Courts, through judicial review, monitor the boundaries of administrative decision making. Questions about the standards of judicial review have been an enduring feature of Canadian administrative law. The debate, in recent times, has revolved around “reasonableness” and “correctness”, and determining when each standard applies. On the one hand, “reasonableness” review expects courts to defer to decisions by specialized decision-makers that “are defensible in respect of the facts and law”; on the other, “correctness” review allows courts to substitute their own opinions for those of the initial decision-maker (*Dunsmuir*, at paras. 47-50). This standard of review debate has profound implications for the extent to which reviewing courts may substitute their views for those of administrative decision-makers. At its core, it is a debate over two distinct philosophies of administrative law.

206 The story of modern Canadian administrative law is the story of a shift away from the court-centric philosophy which denied administrative bodies the authority to interpret or shape the law. This approach found forceful expression in the work of Albert Venn Dicey. For Dicey, the rule of law meant the rule of courts. Dicey developed his philosophy at the

end of the 19th century to encourage the House of Lords to restrain the government from implementing ameliorative social and welfare reforms administered by new regulatory agencies. Famously, Dicey asserted that administrative law was anathema to the English legal system (Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at pp. 334-35). Because, in his view, only the judiciary had the authority to interpret law, there was no reason for a court to defer to legal interpretations proffered by administrative bodies, since their decisions did not constitute “law” (Kevin M. Stack, “Overcoming Dicey in Administrative Law” (2018), 68 *U.T.L.J.* 293, at p. 294).

207 The canonical example of Dicey’s approach at work is the House of Lords’ decision in *Anisminic Ltd. v. Foreign Compensation Commission* (1968), [1969] 2 A.C. 147 (U.K. H.L.), the judicial progenitor of “jurisdictional error”. *Anisminic* entrenched non-deferential judicial review by endorsing a lengthy checklist of “jurisdictional errors” capable of undermining administrative decisions. Lord Reid noted that there were two scenarios in which an administrative decision-maker would lose jurisdiction. The first was narrow and asked whether the legislature had empowered the administrative decision-maker to “enter on the inquiry in question” (p. 171). The second was wider:

[T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. *It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.* [Emphasis added; p. 171.]

208 The broad “jurisdictional error” approach in *Anisminic* initially found favour with this Court in cases like *Metropolitan Life Insurance Co. v. I.U.O.E., Local 796*, [1970] S.C.R. 425 (S.C.C.), and *Bell v. Ontario (Human Rights Commission)*, [1971] S.C.R. 756 (S.C.C.). These cases “took the position that a definition of jurisdictional error should include any question pertaining to the interpretation of a statute made by an administrative tribunal”, and in each case, “th[e] Court substituted what was, in its opinion, the correct interpretation of the enabling provision of the tribunal’s statute for that of the tribunal” (*Canada (Attorney General) v. P.S.A.C.*, [1991] 1 S.C.R. 614 (S.C.C.), at p. 650, per Cory J., dissenting, but not on this point). In *Metropolitan Life*, for example, this Court quashed a labour board’s decision to certify a union, concluding that the Board had “ask[ed] itself the wrong question” and “decided a question which was not remitted to it” (p. 435). In *Bell*, this Court held that a human rights commission had strayed beyond its jurisdiction by deciding to investigate a complaint of racial discrimination filed against a landlord. The Court held that the Commission had incorrectly interpreted the term “self-contained dwelling uni[t]” found in s. 3 of the *Ontario Human Rights Code, 1961-62*, S.O. 1961-62, c. 93, and by so doing, had lost jurisdiction to inquire into the complaint of discrimination (pp. 767 and 775).

209 As these cases illustrate, the *Anisminic* approach proved easy to manipulate, allowing courts to characterize any question as “jurisdictional” and thereby give themselves latitude to substitute their own view of the appropriate answer without regard for the original decision-maker’s decision or reasoning. The *Anisminic* era and the “jurisdictional error” approach were and continue to be subject to significant judicial and academic criticism (*Public Service Alliance*, at p. 650; *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324 (S.C.C.), at p. 1335, per Wilson J., concurring; Beverley McLachlin, P.C., “Administrative Law is Not for Sissies’: Finding a Path Through the Thicket” (2016), 29 C.J.A.L.P. 127, at pp. 129-30; Jocelyn Stacey and Alice Woolley, “Can Pragmatism Function in Administrative Law?” (2016), 74 S.C.L.R. (2d) 211, at pp. 215-16; R.A. MacDonald, “Absence of Jurisdiction: A Perspective” (1983), 43 R. du B. 307).

210 In 1979, the Court signaled a turn to a more deferential approach to judicial review with its watershed decision in *C.U.P.E.* There, the Court challenged the “jurisdictional error” model and planted the seeds of a home-grown approach to administrative law in Canada. In a frequently-cited passage, Dickson J., writing for a unanimous Court, cautioned that courts “should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so” (p. 233; cited in nearly 20 decisions of this Court, including *Dunsmuir*, at para. 35; *Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 (S.C.C.), at para. 45; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, [2011] 3 S.C.R. 654 (S.C.C.), at para. 33; *Canada (Human Rights Commission) v. Canada (Attorney General)*, [2018] 2 S.C.R. 230 (S.C.C.), at para. 31). The Court instead endorsed an approach that respected the legislature’s decision to assign legal policy issues in some areas to specialized, non-judicial decision-makers. The Court recognized that legislative language could “bristl[e] with ambiguities” and that the interpretive choices made by administrative tribunals deserved respect from courts, particularly when, as in *C.U.P.E.*, the decision was protected by a privative clause (pp. 230 and 234-36).

211 By championing “curial deference” to administrative bodies, *C.U.P.E.* embraced “a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state” (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc. c. Québec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 (S.C.C.), at p. 800). As one scholar has observed:

... legislatures and courts in ... Canada have come to settle on the idea that the functional capacities of administrative agencies — their expertise, investment in understanding the practical circumstances at issue, openness to participation, and level of responsiveness to political change — justify not only their law-making powers but also judicial deference to their interpretations and decisions. *Law-making and legal interpretation are shared enterprises in the administrative state.* [Emphasis added.]

(Stack, at p. 310)

212 In explaining why courts must sometimes defer to administrative actors, *C.U.P.E.* embraced two related foundational justifications for Canada’s approach to administrative

law — one based on the legislature’s express choice to have an administrative body decide the issues arising from its mandate; and one animated by the recognition that an administrative justice system could offer institutional advantages in relation to proximity, efficiency, and specialized expertise (David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 304).

213 A new institutional relationship between the courts and administrative actors was thus being forged, based on “an understanding of the role of expertise in the modern administrative state” which “acknowledge[d] that judges are not always in the best position to interpret the law” (The Hon. Frank Iacobucci, “Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis” (2002), 27 *Queen’s L.J.* 859, at p. 866).

214 In subsequent decades, the Court attempted to reconcile the deference urged by C.U.P.E. with the lingering concept of “jurisdictional error”. In *Syndicat national des employés de la commission scolaire régionale de l’Outaouais v. U.E.S.*, local 298, [1988] 2 S.C.R. 1048 (S.C.C.), the Court introduced the “pragmatic and functional” approach for deciding when a matter was within the jurisdiction of an administrative body. Instead of describing jurisdiction as a preliminary or collateral matter, the *Bibeault* test directed reviewing courts to consider the wording of the enactment conferring jurisdiction on the administrative body, the purpose of the statute creating the tribunal, the reason for the tribunal’s existence, the area of expertise of its members, and the nature of the question the tribunal had to decide — all to determine whether the legislator “intend[ed] the question to be within the jurisdiction conferred on the tribunal” (p. 1087; see also p. 1088). If so, the tribunal’s decision could only be set aside if it was “patently unreasonable” (p. 1086).

215 Although still rooted in a formalistic search for jurisdictional errors, the pragmatic and functional approach recognized that legislatures had assigned courts and administrative decision-makers distinct roles, and that the specialization and expertise of administrative decision-makers deserved deference. In her concurring reasons in *National Corn Growers*, Wilson J. noted that part of the process of moving away from Dicey’s framework and towards a more sophisticated understanding of the role of administrative tribunals:

... has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise. [p. 1336]

216 By the mid-1990s, the Court had accepted that specialization and the legislative intent to leave issues to administrative decision-makers were inextricable and essential factors in the standard of review analysis. It stressed that “the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the

degree of deference to be shown to a tribunal’s decision ... [e]ven where the tribunal’s enabling statute provides explicitly for appellate review” (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at p. 335). Of the factors relevant to setting the standard of review, expertise was held to be “the most important” (*Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 50).

217 Consistent with these judgments, this Court invoked the specialized expertise of a securities commission to explain why its decisions were entitled to deference on judicial review even when there was a statutory right of appeal. Writing for a unanimous Court, Iacobucci J. explained that “the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal’s expertise” (*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.), at p. 591; see also *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722 (S.C.C.), at pp. 1745-46). Critically, the Court’s willingness to show deference demonstrated that specialization outweighed a statutory appeal as the most significant indicator of legislative intent.

218 In *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), the Court reformulated the pragmatic and functional approach, engaging four slightly different factors from those in *Bibeault*, namely: (1) whether there was a privative clause, or conversely, a right of appeal; (2) the expertise of the decision-maker on the matter in question relative to the reviewing court; (3) the purpose of the statute as a whole, and of the provision in particular; and (4) the nature of the problem, i.e., whether it was a question of law, fact, or mixed law and fact (paras. 29-37). Instead of using these factors to answer whether a question was jurisdictional, *Pushpanathan* deployed them to discern how much deference the legislature intended an administrative decision to receive on judicial review. *Pushpanathan* confirmed three standards of review: patent unreasonableness, reasonableness *simpliciter*, and correctness (para. 27; see also *Southam*, at paras. 55-56).

219 Significantly, *Pushpanathan* did not disturb the finding reaffirmed in *Southam* that specialized expertise was the most important factor in determining whether a deferential standard applied. Specialized expertise thus remained integral to the calibration of legislative intent, even in the face of statutory rights of appeal (see *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247 (S.C.C.), at paras. 21 and 29-34; *Cartaway Resources Corp., Re*, [2004] 1 S.C.R. 672 (S.C.C.), at para. 45; *VIA Rail Canada Inc. v. Canadian Transportation Agency*, [2007] 1 S.C.R. 650 (S.C.C.), at paras. 88-92 and 100).

220 Next came *Dunsmuir*, which sought to simplify the pragmatic and functional analysis while maintaining respect for the specialized expertise of administrative decision-makers. The Court merged the three standards of review into two: reasonableness and correctness. *Dunsmuir* also wove together the deferential threads running through the Court’s administrative law jurisprudence, setting out a presumption of deferential review for certain categories of questions, including those where the decision-maker had expertise or was interpreting its “home” statute (paras. 53-54, per Bastarache and LeBel JJ., and para. 124, per Binnie J., concurring). Certain categories of issues remained subject to correctness

review, including constitutional questions regarding the division of powers, true questions of jurisdiction, questions of law that were both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, and questions about jurisdictional lines between tribunals (paras. 58-61). Where the standard of review had not been satisfactorily determined in the jurisprudence, four contextual factors — the presence or absence of a privative clause, the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal — remained relevant to the standard of review analysis (para. 64).

221 Notably, *Dunsmuir* did not mention statutory rights of appeal as one of the contextual factors, and left undisturbed their marginal role in the standard of review analysis. Instead, the Court explicitly affirmed the links between deference, the specialized expertise of administrative decision-makers and legislative intent. Justices LeBel and Bastarache held that “deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system” (para. 49). They noted that “in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” (para. 49, citing David J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 *C.J.A.L.P.* 59, at p. 93).

222 Post-*Dunsmuir*, this Court continued to stress that specialized expertise is the basis for making administrative decision-makers, rather than the courts, the appropriate forum to decide issues falling within their mandates (see *Khosa*, at para. 25; *R. v. Conway*, [2010] 1 S.C.R. 765 (S.C.C.), at para. 53; *British Columbia (Securities Commission) v. McLean*, [2013] 3 S.C.R. 895 (S.C.C.), at paras. 30-33). Drawing on the concept of specialized expertise, the Court’s post-*Dunsmuir* cases expressly confirmed a presumption of reasonableness review for an administrative decision-maker’s interpretation of its home or closely-related statutes (see *Alberta Teachers’ Association*, at paras. 39-41). As Gascon J. explained in *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3 (S.C.C.), at para. 46:

Deference is in order where the Tribunal acts within its specialized area of expertise ... (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists’ Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 (“NGC”), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Dunsmuir*, at para. 54).

223 And in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293 (S.C.C.), the majority recognized:

The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer .... [E]xpertise is something that inheres in a tribunal itself as an institution: "... at an institutional level, adjudicators ... can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions". [Citation omitted; para. 33.]

224 The presumption of deference, therefore, operationalized the Court's longstanding jurisprudential acceptance of the "specialized expertise" principle in a workable manner, continuing the deferential path Dickson J. first laid out in *C.U.P.E.*

225 As for statutory rights of appeal, they continued to be seen as either an irrelevant factor in the standard of review analysis or one that yielded to specialized expertise. So firmly entrenched was this principle that in cases like *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [2009] 2 S.C.R. 764 (S.C.C.), *Alliance Pipeline Ltd. v. Smith*, [2011] 1 S.C.R. 160 (S.C.C.), *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, [2015] 3 S.C.R. 219 (S.C.C.), and *Canada (Attorney General) v. Igloo Vikski Inc.*, [2016] 2 S.C.R. 80 (S.C.C.), the Court applied the reasonableness standard without even referring to the presence of an appeal clause. When appeal clauses were discussed, the Court consistently confirmed that they did not oust the application of judicial review principles.

226 In *Khosa*, Binnie J. explicitly endorsed *Pezim* and rejected "the idea that in the absence of express statutory language ... a reviewing court is 'to apply a correctness standard as it does in the regular appellate context'" (para. 26). This reasoning was followed in *Canada (Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471 (S.C.C.) ("Mowat"), where the Court confirmed that "care should be taken not to conflate" judicial and appellate review (para. 30; see also para. 31). In *McLean*, decided two years after *Mowat*, the majority cited *Pezim* and other cases for the proposition that "general administrative law principles still apply" on a statutory appeal (see para. 21, fn. 2). Similarly, in *Mouvement laïque*, Gascon J. affirmed that

[w]here a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal .... [para. 38]

227 In *Edmonton East*, the Court considered — and again rejected — the argument that statutory appeals should form a new category of correctness review. As the majority noted, "recognizing issues arising on statutory appeals as a new category to which the correctness standard applies — as the Court of Appeal did in this case — would go against strong

jurisprudence from this Court” (para. 28). Even the dissenting judges in *Edmonton East*, although of the view that the wording of the relevant statutory appeal clause and legislative scheme pointed to the correctness standard, nonetheless unequivocally stated that “a statutory right of appeal is not a new ‘category’ of correctness review” (para. 70).

228 By the time these appeals were heard, contextual factors had practically disappeared from the standard of review analysis, replaced by a presumption of deference subject only to the correctness exceptions set out in *Dunsmuir* — which explicitly did *not* include statutory rights of appeal. In other words, the Court was well on its way to realizing *Dunsmuir*’s promise of a simplified analysis. Justice Gascon recognized as much last year in *Canadian Human Rights Commission*:

*This contextual approach should be applied sparingly.* As held by the majority of this Court in *Alberta Teachers*, it is inappropriate to “retreat to the application of a full standard of review analysis where it can be determined summarily” .... After all, the “contextual approach can generate uncertainty and endless litigation concerning the standard of review” (*Capilano [Edmonton East]*, at para. 35). The presumption of reasonableness review and the identified categories will generally be sufficient to determine the applicable standard. In the exceptional cases where such a contextual analysis may be justified to rebut the presumption, it need not be a long and detailed one (*Capilano [Edmonton East]*, at para. 34). Where it has been done or referred to in the past, the analysis has been limited to determinative factors that showed a clear legislative intent justifying the rebuttal of the presumption (see, e.g., *Rogers*, at para. 15; *Tervita*, at paras. 35-36; see also, *Saguenay*, at paras. 50-51). [Emphasis added; para. 46.]

229 In sum, for four decades, our standard of review jurisprudence has been clear and unwavering about the foundational role of specialized expertise and the limited role of statutory rights of appeal. Where confusion persists, it concerns the relevance of the contextual factors in *Dunsmuir*, the meaning of “true questions of jurisdiction” and how best to conduct reasonableness review. That was the backdrop against which these appeals were heard and argued. But rather than ushering in a simplified next act, these appeals have been used to rewrite the whole script, reassigning to the courts the starring role Dicey ordained a century ago.

### The Majority’s Reasons

230 The majority’s framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers. Although the majority uses language endorsing a “presumption of reasonableness review”, this presumption now rests on a totally new understanding of legislative intent and the rule of law. By prohibiting any consideration of well-established foundations for deference, such as “expertise ... institutional experience ... proximity and responsiveness to stakeholders ... prompt[ness], flexib[ility], and efficien[cy]; and ... access to justice”, the majority reads out the foundations of the modern understanding of legislative intent in administrative law.

231 In particular, such an approach ignores the possibility that specialization and other advantages are embedded into the legislative choice to delegate particular subject matters to administrative decision-makers. Giving proper effect to the legislature's choice to "delegate authority" to an administrative decision-maker requires understanding the *advantages* that the decision-maker may enjoy in exercising its mandate (*Dunsmuir*, at para. 49). As Iacobucci J. observed in *Southam*:

Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, *it is because the tribunal enjoys some advantage that judges do not*. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. [Emphasis added; para. 55.]

232 Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. Those appointed to administrative tribunals are often chosen precisely because their backgrounds and experience align with their mandate (Van Harten et al., at p. 15; Régimbald, at p. 463). Some administrative schemes explicitly require a degree of expertise from new members as a condition of appointment (*Edmonton East*, at para. 33; *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226 (S.C.C.), at para. 29; Régimbald, at p. 462). As institutions, administrative bodies also benefit from specialization as they develop "habitual familiarity with the legislative scheme they administer" (*Edmonton East*, at para. 33) and "grappl[e] with issues on a repeated basis" (*Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157 (S.C.C.), at para. 53). Specialization and expertise are further enhanced by continuing education and through meetings of the membership of an administrative body to discuss policies and best practices (Finn Makela, "Acquired Expertise of Administrative Tribunals and the Standard of Judicial Review: The Case of Grievance Arbitrators and Human Rights Law" (2013), 17 *C.L.E.L.J.* 345, at p. 349). In addition, the blended membership of some tribunals fosters special institutional competence in resolving "polycentric" disputes (*Pushpanathan*, at para. 36; *Dr. Q* at paras. 29-30; *Pezim*, at pp. 591-92 and 596).

233 All this equips administrative decision-makers to tackle questions of law arising from their mandates. In interpreting their enabling statutes, for example, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations; of statutory context; of the purposes that a provision or legislative scheme are meant to serve; and of specialized terminology used in their administrative setting. Coupled with this Court's acknowledgment that legislative provisions often admit of multiple reasonable interpretations, the advantages stemming from specialization and expertise provide a robust foundation for deference to administrative decision-makers on legal questions within their mandate (*C.U.P.E.*, at p. 236; *McLean*, at para. 37). As Professor H.W. Arthurs said:

There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the

various alternate interpretations. There is no reason to believe that a legally-trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation.

(“Protection against Judicial Review” (1983), 43 R. du B. 277, at p. 289)

234 Judges of this Court have endorsed both this passage and the broader proposition that specialization and expertise justify the deference owed to administrative decision-makers (*National Corn Growers*, at p. 1343, per Wilson J., concurring). As early as *C.U.P.E.*, Dickson J. fused expertise and legislative intent by explaining that an administrative body’s specialized expertise can be essential to achieving the purposes of a statutory scheme:

The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met. [p. 236]

235 Over time, specialized expertise would become the core rationale for deferring to administrative decision-makers (*Bradco Construction*, at p. 335; *Southam*, at para. 50; Audrey Macklin, “Standard of Review: Back to the Future?”, in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 381 at pp. 397-98). Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the “interpretative upper hand” on questions of law (*McLean*, at para. 40; see also *Conway*, at para. 53; *Mowat*, at para. 30; *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, [2011] 3 S.C.R. 708 (S.C.C.), at para. 13; *Doré c. Québec (Tribunal des professions)*, [2012] 1 S.C.R. 395 (S.C.C.), at para. 35; *Mouvement laïque*, at para. 46; *Khosa*, at para. 25; *Edmonton East*, at para. 33).

236 Although the majority’s approach extolls respect for the legislature’s “institutional design choices”, it accords no weight to the institutional advantages of specialization and expertise that administrative decision-makers possess in resolving questions of law. In so doing, the majority disregards the historically accepted reason *why* the legislature intended to delegate authority to an administrative actor.

237 Nor are we persuaded by the majority’s claim that “if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not”. Here, the majority sets up a false choice: expertise must either be assessed on a case-by-case basis or play no role at all in a theory of judicial review.

238 We disagree. While not every decision-maker necessarily has expertise on every issue raised in an administrative proceeding, reviewing courts do not engage in an individualized, case-by-case assessment of specialization and expertise. The theory of deference is based not only on the legislative choice to delegate decisions, but also on institutional expertise and on “the reality that … those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” (*Khosa*, at para. 25; see also *M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, [2011] 3 S.C.R. 616 (S.C.C.), at para. 53; *Edmonton East*, at para. 33).

239 The exclusion of expertise, specialization and other institutional advantages from the majority’s standard of review framework is not merely a theoretical concern. The removal of the current “conceptual basis” for deference opens the gates to expanded correctness review. The majority’s “presumption” of deference will yield all too easily to justifications for a correctness-oriented framework.

240 In the majority’s framework, deference gives way whenever the “rule of law” demands it. The majority’s approach to the rule of law, however, flows from a court-centric conception of the rule of law rooted in Dicey’s 19th century philosophy.

241 The rule of law is not the rule of courts. A pluralist conception of the rule of law recognizes that courts are not the exclusive guardians of law, and that others in the justice arena have shared responsibility for its development, including administrative decision-makers. *Dunsmuir* embraced this more inclusive view of the rule of law by acknowledging that the “court-centric conception of the rule of law” had to be “reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law” (para. 30). As discussed in *Dunsmuir*, the rule of law is understood as meaning that administrative decision-makers make legal determinations within their mandate, and not that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review (see McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*; The Hon. Thomas A. Cromwell, “What I Think I’ve Learned About Administrative Law” (2017), 30 C.J.A.L.P. 307, at p. 308; *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770 (S.C.C.), at para. 31, per Abella J.).

242 Moreover, central to any definition of the rule of law is access to a fair and efficient dispute resolution process, capable of dispensing timely justice (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 (S.C.C.), at para. 1). This is an important objective for all litigants, from the sophisticated consumers of administrative justice, to, most significantly, the particularly vulnerable ones (Angus Grant and Lorne Sossin, “Fairness in Context: Achieving Fairness Through Access to Administrative Justice”, in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 341, at p. 342). For this reason, access to justice is at the heart of the legislative choice to establish a robust system of administrative law (Grant and Sossin, at pp. 342 and 369-70; Van Harten, et al., at p. 17; Régimbald, at pp. 2-3; McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*). As Morissette J.A. has observed:

... the aims of administrative law ... generally gravitate towards promoting access to justice. The means contemplated are costless or inexpensive, simple and expeditious procedures, expertise of the decision-makers, coherence of reasons, consistency of results and finality of decisions.

(Yves-Marie Morissette, “What is a ‘reasonable decision’?” (2018), 31 *C.J.A.L.P.* 225, at p. 236)

243 These goals are compromised when a narrow conception of the “rule of law” is invoked to impose judicial hegemony over administrative decision-makers. Doing so perverts the purpose of establishing a parallel system of administrative justice, and adds unnecessary expense and complexity for the public.

244 The majority even calls for a reformulation of the “questions of central importance” category from *Dunsmuir* and permits courts to substitute their opinions for administrative decision-makers on “questions of central importance to the legal system as a whole”, even if those questions fall squarely within the mandate and expertise of the administrative decision-maker. As noted in *Canadian Human Rights Commission*, correctness review was permitted only for questions “of central importance to the legal system *and* outside the specialized expertise of the adjudicator” (para. 28 (emphasis in original)). Broadening this category from its original characterization unduly expands the issues available for judicial substitution. Issues of discrimination, labour rights, and economic regulation of the securities markets (among many others) theoretically raise questions of vital importance for Canada and its legal system. But by ignoring administrative decision-makers’ expertise on these matters, this category will inevitably provide more “room ... for both mistakes and manipulation” (Andrew Green, “Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law” (2014), 47 *U.B.C. L. Rev.* 443, at p. 483). We would leave *Dunsmuir*’s description of this category undisturbed.

245 We also disagree with the majority’s reformulation of “legislative intent” to include, for the first time, an invitation for courts to apply correctness review to legal questions whenever an administrative scheme includes a right of appeal. We do not see how appeal rights represent a “different institutional structure” that requires a more searching form of review. The mere fact that a statute contemplates a reviewing role for a court says nothing about the *degree of deference* required in the review process. Rights of appeal reflect different choices by different legislatures to permit review for different reasons, on issues of fact, law, mixed fact and law, and discretion, among others. Providing parties with a right of appeal can serve several purposes entirely unrelated to the standard of review, including outlining: where the appeal will take place (sometimes, at a different reviewing court than in the routes provided for judicial review); who is eligible to take part; when materials must be filed; how materials must be presented; the reviewing court’s powers on appeal; any leave requirements; and the grounds on which the parties may appeal (among other things). By providing this type of structure and guidance, statutory appeal provisions may allow legislatures to promote efficiency and access to justice, in a way that exclusive reliance on the judicial review procedure would not have.

246 In reality, the majority's position on statutory appeal rights, although couched in language about "giv[ing] effect to the legislature's institutional design choices", hinges almost entirely on a textualist argument: the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence.

247 The majority's reliance on the "presumption of consistent expression" in relation to the single word "appeal" is misplaced and disregards long-accepted institutional distinctions between how courts and administrative decision-makers function. The language in each setting is different; the mandates are different; the policy bases are different. The idea that *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.), must be inflexibly applied to every right of "appeal" within a statute — with no regard for the broader purposes of the statutory scheme or the practical implications of greater judicial involvement within it — is entirely unsupported by our jurisprudence.

248 In addition, the majority's claim that legislatures "d[o] not speak in vain" is irreconcilable with its treatment of privative clauses, which play no role in its standard of review framework. If, as the majority claims, Parliament's decision to provide appeal routes must influence the standard of review analysis, there is no principled reason why Parliament's decision via privative clauses to *prohibit* appeals should not be given comparable effect.

249 In any event, legislatures in this country have known for at least 25 years since *Pezim* that this Court has not treated statutory rights of appeal as a determinative reflection of legislative intent regarding the standard of review (*Pezim*, at p. 590). Against this reality, the continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority retroactively ascribes to it; doing so is inconsistent with the principle that legislatures are presumed to enact legislation in compliance with existing common law rules (Ruth Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 315).

250 Those legislatures, moreover, understood from our jurisprudence that this Court was committed to respecting *standards* of review that were statutorily prescribed, as British Columbia alone has done. We agree with the Attorney General of Canada's position in the companion appeals of *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66 (S.C.C.), that, absent exceptional circumstances, the existence of a statutory right of appeal does not displace the presumption that the standard of reasonableness applies. The majority, however, has inexplicably chosen the template proposed by the *amici*, recommending a sweeping overhaul of our approach to legislative intent and to the determination of the standard of review.

251 The result reached by the majority means that hundreds of administrative decision-makers subject to different kinds of statutory rights of appeal — some in highly specialized fields, such as broadcasting, securities regulation and international trade — will now be subject to an irrebuttable presumption of correctness review. This has the potential to cause a stampede of litigation. Reviewing courts will have license to freely revisit legal questions on matters squarely within the expertise of administrative decision-makers, even if they are of no broader consequence outside of their administrative regimes. Even if

specialized decision-makers provide reasonable interpretations of highly technical statutes with which they work daily, even if they provide internally consistent interpretations responsive to the parties' submissions and consistent with the text, context and purpose of the governing scheme, the administrative body's past practices and decisions, the common law, prior judicial rulings and international law, those interpretations can still be set aside by a reviewing court that simply takes a different view of the relevant statute. This risks undermining the integrity of administrative proceedings whenever there is a statutory right of appeal, rendering them little more than rehearsals for a judicial appeal — the inverse of the legislative intent to establish a specialized regime and entrust certain legal and policy questions to non-judicial actors.

252 Ironically, the majority's approach will be a roadblock to its promise of simplicity. Elevating appeal clauses to indicators of correctness review creates a two-tier system of administrative law: one tier that defers to the expertise of administrative decision-makers where there is no appeal clause; and another tier where such clauses permit judges to substitute their own views of the legal issues at the core of those decision-makers' mandates. Within the second tier, the application of appellate law principles will inevitably create confusion by encouraging segmentation in judicial review (*Mouvement laïque*, at para. 173, per Abella J., concurring in part; see also Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 *McGill L.J.* 527, at pp. 542-43; The Hon. Joseph T. Robertson, "Identifying the Review Standard: Administrative Deference in a Nutshell" (2017), 68 *U.N.B.L.J.* 145, at p. 162). Courts will be left with the task of identifying palpable and overriding errors for factual questions, extricating legal issues from questions of mixed fact and law, reviewing questions of law *de novo*, and potentially having to apply judicial review and appellate standards interchangeably if an applicant challenges in one proceeding multiple aspects of an administrative decision, some falling within an appeal clause and others not. It is an invitation to complexity and a barrier to access to justice.

253 The majority's reasons "roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess" (*Khosa*, at para. 26). The reasons elevate statutory rights of appeal to a determinative factor based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to specialized administrative decision-makers. This unravelling of Canada's carefully developed, deferential approach to administrative law returns us to the "black letter law" approach found in *Anisminic* and cases like *Metropolitan Life* whereby specialized decision-makers were subject to the pre-eminent determinations of a judge. Rather than building on *Dunsmuir*, which recognized that specialization is fundamentally intertwined with the legislative choice to delegate particular subject matters to administrative decision-makers, the majority's reasons banish expertise from the standard of review analysis entirely, opening the door to a host of new correctness categories which remain open to further expansion. The majority's approach not only erodes the presumption of deference; it erodes confidence in the existence — and desirability — of the "shared enterprises in the

administrative state” of “[l]aw-making and legal interpretation” between courts and administrative decision-makers (Stack, at p. 310).

254 But the aspect of the majority’s decision with the greatest potential to undermine both the integrity of this Court’s decisions, and public confidence in the stability of the law, is its disregard for precedent and *stare decisis*.

(...)

[The concurring judges’ lengthy and detailed discussion of the principles of *stare decisis*, while of obvious significance to the Court’s future treatment of precedent in all areas of law, is not reproduced here. Briefly, in the concurring judges’ view, the majority’s justification for overruling the Court’s prior jurisprudence affirming the roles played by tribunal expertise and the presence of statutory appeal clauses in the standard of review analysis failed to meet the high threshold to overturn the Court’s long-standing precedents, many of which were decided unanimously or by strong majorities and recently reaffirmed. Moreover, the majority’s decision had the potential to disturb settled interpretations of statutes that contained a right of appeal, by inviting parties to challenge as incorrect interpretations once held as reasonable by reviewing courts. Finally, the absence of legislative correction in response to the Court’s established approach to substantive review weakened the case for overturning the Court’s precedents in this area.]

## Going Forward

279 In our view, a more modest approach to modifying our past decisions, one that goes no further than necessary to clarify the law and its application, is justified. “[W]hen a court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine” (Garner et al., at pp. 41-42). Such an approach to changing precedent preserves the integrity of the judicial process and, at a more conceptual level, of the law itself as a social construct. ...

(...)

282 So what do we suggest? We support a standard of review framework with a meaningful rule of deference, based on *both* the legislative choice to delegate decision-making authority to an administrative actor *and* on the specialized expertise that these decision-makers possess and develop in applying their mandates. Outside of the three remaining correctness categories from *Dunsmuir* — and absent clear and explicit legislative direction on the *standard* of review — administrative decisions should be reviewed for reasonableness. Like the majority, we support eliminating the category of “true questions of jurisdiction” and foreclosing the use of the contextual factors identified in *Dunsmuir*. These developments introduce incremental changes to our judicial review framework, while respecting its underlying principles and placing the ball in the legislatures’ court to modify the standards of review if they wish.

283 To the extent that concerns were expressed about the quality of administrative decision making by some interveners who represented particularly vulnerable groups, we agree that they must be taken seriously. But the solution does not lie in authorizing more incursions into the administrative system by generalist judges who lack the expertise necessary to implement these sensitive mandates. Any perceived shortcomings in administrative decision making are not solved by permitting *de novo* review of every legal decision by a court and, as a result, adding to the delay and cost of obtaining a final decision. The solution lies instead in ensuring the proper qualifications and training of administrative decision-makers. Like courts, administrative actors are fully capable of, and responsible for, improving the quality of their own decision-making processes, thereby strengthening access to justice in the administrative justice system.

(...)

[The concurring judges' remarks on conducting reasonableness review are reproduced in the following chapter – “Applying the Standard of Review”. Applying their framework for selecting the standard to the facts of *Vavilov*, they decided that, “as a general rule”, administrative decisions were to be reviewed for reasonableness and, since none of the correctness exceptions applied to the Registrar’s interpretation of the *Citizenship Act*, the standard of review was reasonableness.]

*Appeal dismissed.*

The Supreme Court’s decision in *Vavilov* simplifies the framework for determining the standard of review. Its presumption of reasonableness may be rebutted where the rule of law requires the reviewing court to apply correctness review to determine the one possible answer to the question before the administrative decision maker or where the legislature has clearly expressed its intention that the court apply a different standard. Clear legislative intent is found in the inclusion of a statutory appeal, which signals the application of appellate standards of review or the application of a statutorily-prescribed standard of review. This new framework leaves no place for the multi-factored contextual approach which had been a feature of deciding the standard of review for over thirty years.

In this chapter, we review the main elements of the *Vavilov* framework for selecting the standard of review, examine how the framework has been applied since by lower and appellate courts, and identify some lingering issues unresolved by this landmark decision.

## GENERAL PRESUMPTION OF REASONABLENESS REVIEW

The applicable standard of review for all aspects of an administrative decision is presumed to be reasonableness. This presumption respects the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute. Because "the *very fact* that the legislature has chosen to delegate authority" justifies a presumption of reasonableness review, it is no longer necessary for reviewing courts to evaluate whether other rationales for deference to administrative decision-making apply to the decision under review. Pre-*Vavilov*, the most important of these alternative rationales was the reviewing court's assessment of the decision maker's relative expertise with respect to the question at issue based on a contextual analysis of the statutorily-mandated qualification of the decision maker's members, their experience in a particular area, and their involvement in policymaking. Other rationales for curial deference include decision makers' proximity and responsiveness to stakeholders, their ability to render decisions promptly, flexibly and efficiently, and their ability to provide simplified and streamlined proceedings that support access to justice. More broadly, in light of *Vavilov*'s general presumption in favour of reasonableness review, the contextual inquiry which once drove the selection of the standard of review – focused on the presence of a privative clause or right of appeal, the decision maker's relative expertise and its nexus to the question, the purpose of the provision and statute at issue, and the nature of the question – is no longer necessary.

The general presumption raises the question of whether it is always possible to presume from the act of delegation of statutory power to an administrative decision maker that the delegating legislature intended reviewing courts to defer to that decision maker's decisions, particularly on questions of law (including questions of statutory interpretation)? As recognized elsewhere by the Supreme Court, legislatures delegate power for many reasons. Parliament delegates to hundreds of officers the authority to decide thousands of visa applications filed annually by non-citizens. In that context, power is likely delegated because visa officers can conduct flexible and expeditious decision-making in streamlined proceedings. The decisions of visa officers, while constrained by legislation, regulations and policies, are at their core exercises of discretion based on sometimes complex and ever-changing factual matrices. Over time, visa officers will undoubtedly become adept at making these types of decisions. Yet is this a sufficient justification for presuming that, in delegating power to such decision makers, Parliament intended reviewing courts to defer to visa officers' decisions on questions of law including the interpretation of their home statute?

## REBUTTING THE GENERAL PRESUMPTION ON GROUNDS OF LEGISLATIVE INTENT

Based on *Vavilov*, the presumption of reasonableness review can be rebutted by strong and compelling signals from the legislature that it intends a different standard to apply. Legislatures may expressly prescribe standards of review in statutes. Alternatively, they may signal the application of an appellate standard of review implicitly by providing for a statutory appeal mechanism from an administrative decision maker to a court.

### Statutorily-prescribed standards of review

As noted by the *Vavilov* majority at para 35, “where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law”. In the *Administrative Tribunals Act*, SBC 2004, c 45, British Columbia’s legislature has expressly prescribed standards of review. Section 58(2) of the Act directs that in a judicial review proceeding involving an “expert tribunal”, defined as a tribunal whose authority is conferred by an Act that “contains or incorporates a privative clause”:

- (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
- (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
- (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal’s decision is correctness.

Section 59 of the ATA, which governs judicial review proceedings involving a tribunal whose decisions are not protected by a privative clause, provides:

**59 (1)** In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(...)

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

A few years after the *Administrative Tribunals Act* was enacted, the “patent unreasonableness” standard was merged, at common law, into a single “reasonableness” standard in the Supreme Court’s *Dunsmuir* decision. Yet it has lived on in the ATA. In *West Fraser Mills Ltd v British Columbia (Workers’ Compensation Appeal Tribunal)*, 2018 SCC 22, the Supreme Court defined patent unreasonableness in the context of statutory interpretation as follows:

[28] A legal determination like the interpretation of a statute will be patently unreasonable where it “almost border[s] on the absurd”: *Voice Construction Ltd. v. Construction & General Workers’ Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609, at para. 18. In the workers’ compensation context in British Columbia, a patently unreasonable decision is one that is “openly, clearly, evidently unreasonable”: *Speckling v. British Columbia (Workers’ Compensation Board)*, 2005 BCCA 80, 46 B.C.L.R. (4th) 77, at para. 33; *Vandale v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2013 BCCA 391, 342 B.C.A.C. 112, at para. 42 (emphasis deleted).

[29] By stipulating the standard of patent unreasonableness, the Legislature has indicated that courts should accord the utmost deference to the Tribunal’s interpretation of the legislation and its decision.

Relying on the Supreme Court’s pre-*Dunsmuir* decision in *Ryan v Law Society (New Brunswick)*, 2003 SCC 20, the British Columbia Court of Appeal has declared that a decision is not patently unreasonable unless it is “clearly irrational,” “evidently not in accordance with reason” or “so flawed that no amount of curial deference can justify letting it stand.” [*Cariboo Sur Sikh Temple Society (1979) v British Columbia (Employment Standards Tribunal)*, 2019 BCCA 131 at para 24.]

The Supreme Court recently considered another statutory provision speaking to standards of review. Québec’s *Courts of Justice Act*, CQLR c T-16, section 83.1 provides that in rendering decisions on statutory appeals from administrative decisions, the Court of Québec is not “required to defer to the conclusions on issues of law ruled on by the decision under appeal or on any issues regarding the decision being contested.” This provision, combined with *Vavilov*’s treatment of statutory appeals, discussed in the next section, means that the Court of Québec must apply appellate standards of review in exercising its appellate jurisdiction from administrative decisions: *Reference re Code of Civil Procedure (Que)*, art 35, [2021 SCC 27](#) at para 149.

## Statutory appeal mechanisms

We turn next to the issue of implicit legislative intent to override the general presumption of reasonableness as the standard of review. According to *Vavilov*, at para 36, where a legislature provides “that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the courts to scrutinize such administrative decisions on an appellate basis.” In such cases, the presumption of reasonableness review, premised on giving effect to the legislature’s

choice to delegate matters to an administrative body, is rebutted and courts must apply appellate standards of review. According to these appellate standards of review, defined in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para 37, courts hearing appeals from an administrative decision on an extricable question of law (including a question of statutory interpretation or concerning the scope of a decision maker's authority) apply a correctness standard. In contrast, appeals on questions of fact, or on questions of fact and law where a legal principle is not readily extricable, are subject to the appellate standard of "palpable and overriding error". In *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, [2021 SCC 7](#) at para 46, the Supreme Court refrained from deciding whether appellate standards of review apply to appeals on questions of law from commercial arbitration awards (reviewed pre-*Vavilov* for reasonableness) unless they were constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise.

Importantly, appellate standards of review apply to statutory appeals only, not to provisions that recognize that administrative decisions are subject to judicial review and address procedural or similar aspects of judicial review in a specific context. Examples of such provisions are sections 18 to 18.2, 18.4 and 28 of the *Federal Courts Act*, RSC 1985, c F-7, which confer original jurisdiction on the Federal Court and Federal Court of Appeal to hear and determine applications for judicial review of the decisions of federal boards, commissions or tribunals. Similarly, statutory provisions that incorporate these sections of the *Federal Courts Act* by reference would not establish a statutory appeal. For example, s. 34(1) of the *Federal Public Sector Labour Relations and Employment Board Act*, SC 2013, c. 40 provides that "Every order or decision of the Board is final and is not to be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(a), (b) or (e) of that Act."

This approach to implied legislative intent in *Vavilov* can be expected to raise further questions. As noted by the concurring but strongly critical reasons of Abella and Karakatsanis JJ. in *Vavilov* at para 217, the presence of a statutory right of appeal has not previously been considered as conclusive of a legislative intent that no deference be shown by an appellate court to an administrative tribunal's decision on questions of law. In *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at 591, the Supreme Court held that, even in the absence of a privative clause and in the presence of a statutory right of appeal, "the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunals' expertise." In *Pezim*, the Court found that the decision of the Securities Commission interpreting the meaning of the statutory obligation on reporting issuers to disclose "material changes" in their affairs "as soon as practicable" involved issues that went to the heart of the Commission's statutory mandate of regulating securities markets in the public's interest. Accordingly, the Court decided to apply a deferential standard of review in between correctness and patent unreasonableness. In *Vavilov*, the concurring judges, dissenting on this point at para 245, take a different view of what statutory rights of

appeal say about legislative intent. Rather than speaking to the degree of deference required in the review process, they:

... reflect different choices by different legislatures to permit review for different reasons, on issues of fact, law, mixed fact and law, and discretion, among others. Providing parties with a right of appeal can serve several purposes entirely unrelated to the standard of review, including outlining: where the appeal will take place (sometimes, at a different reviewing court than in the routes provided for judicial review); who is eligible to take part; when materials must be filed; how materials must be presented; the reviewing court's powers on appeal; any leave requirements; and the grounds on which the parties may appeal (among other things). By providing this type of structure and guidance, statutory appeal provisions may allow legislatures to promote efficiency and access to justice, in a way that exclusive reliance on the judicial review procedure would not have.

Professor Nigel Banks has agreed with this assessment, observing that appeal provisions are in many cases “coupled with strong privative clauses, narrow grounds for review (point of law or jurisdiction) frequently only with leave, provisions designed to by-pass trial-level courts, and truncated commencement times” and are more appropriately described as “‘channeling’ judicial ‘supervision’ rather than changing its character”: “Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response” (January 3, 2020), online: Ablawg, [https://ablawg.ca/wp-content/uploads/2020/01/Blog\\_NB\\_Vavilov.pdf](https://ablawg.ca/wp-content/uploads/2020/01/Blog_NB_Vavilov.pdf).

The statutory appeal from decisions by the Canadian Radio-television and Telecommunications Commission under the *Broadcasting Act*, SC 1991, c 11, examined by the Supreme Court in *Bell Canada v Canada (Attorney General)*, 2019 SCC 66, *Vavilov*'s companion case, is illustrative:

31 (1) Except as provided in this Part, every decision and order of the Commission is final and conclusive.

(2) An appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction if leave therefor is obtained from that Court on application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows.

Here, the CRTC legally grounded its decision to prohibit simultaneous substitution of advertising during the Super Bowl in its statutory power, under s. 9(1)(h) of the *Broadcasting Act*, to “in furtherance of its objects, require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.” Under the Court’s new approach in *Vavilov*, Parliament is taken, in enacting s. 31, as intending the Federal Court of Appeal to show no deference to the CRTC on interpretive issues, such as the meaning of “programming services”,

on which the Court does not have relative expertise. As noted by the dissenting judges at para 83:

As an archetype of an expert administrative body, the CRTC's specialized expertise is well-settled. Extensive statutory powers have been granted to this regulatory body, and an exceptionally specialized mandate requires the CRTC to consider and balance complex public interest considerations in regulating an entire industry. The need for an expert body to balance sensitive public interest issues in a highly technical context is particularly evident in this case, with the record containing a series of public notices, consultations and policies spanning almost three years and leading to the decision at issue.

Importantly, individuals may seek judicial review of a decision or an aspect of a decision to which a circumscribed right of appeal does not apply or where an appeal does not apply to them. In such circumstances, under *Vavilov*, the presumption of reasonableness review is not rebutted by the existence of a statutory right of appeal. Accordingly, appellants who have access to a statutory appeal on a question of law or jurisdiction may find advantage in characterizing the impugned decision as raising an extricable question of law that would then be amenable to appeal on a correctness standard, rather than as a question of mixed fact and law that would be amenable to judicial review on a reasonableness standard. For example, decisions of the Appeals Commission established under Alberta's *Workers Compensation Act*, RSA 2000, c W-15 may be appealed on a question of law or jurisdiction to the Alberta Court of Queen's Bench (s 13.4(1)), while issues of mixed fact and law or pure fact are subject only to judicial review in that same court: *Tompkins v Alberta (Workers Compensation Act, Appeals Commission)*, 2012 ABQB 418 at para 23. In such cases, parties could launch an application for judicial review and an appeal under the same Originating Notice and the Court of Queen's Bench would address both processes of review using the applicable (and differing) standards: *Buckley v Entz Estate*, 2007 ABCA 7 at para 31. Things become more complicated still where a statutory appeal provision channels appeals on questions of law and jurisdiction to the Court of Appeal and applications for judicial review are heard before the Court of Queen's Bench. (Based on pre-*Vavilov* case law, where the Court of Queen's Bench finds that a statutory appeal to the Court of Appeal is available, the former declines to hear an application for judicial review because there is an adequate alternative remedy in the Court of Appeal: *Foster v Alberta (Transportation and Safety Board)*, 2006 ABCA 282.) *Neptune Wellness Solutions v Canada (Border Services Agency)*, [2020 FCA 151](#), at paras 14-18 is an example of an appellate court, in the case of a circumscribed right of appeal, gaining "a realistic appreciation" of the appeal's "essential character" to determine whether the grounds of appeal raised by a party disclose an extricable question of law that triggers the right of appeal and attracts correctness review under the appellate standard.

Where rights of appeal are not circumscribed, the courts' application of appellate standards based on *Vavilov* will undoubtedly encourage segmentation in judicial review. That is, litigants will be encouraged to distinguish between various aspects of a decision to separate questions of law from other types of questions even if all are integral to the overall decision. In the words of the concurring judges in *Vavilov* at para 252:

Courts will be left with the task of identifying palpable and overriding errors for factual questions, extricating legal issues from questions of mixed fact and law, reviewing questions of law *de novo*, and potentially having to apply judicial review and appellate standards interchangeably if an applicant challenges in one proceeding multiple aspects of an administrative decision, some falling within an appeal clause and others not. It is an invitation to complexity and a barrier to access to justice.

Another implication of *Vavilov*'s emphasis on statutory rights of appeal – as reflecting legislatures' intent that courts apply appellate standards to questions covered by the appeal – is the renewed significance of the concept of "jurisdiction", which has a long and vexing history in the law of judicial review. As examined in the following section, the Supreme Court in *Vavilov* abandoned jurisdictional questions as a distinct category attracting correctness review. Noting that the concept of jurisdiction "was inherently slippery", the Court appears therefore to have assimilated questions about the scope of administrative decision makers' statutory authority to ordinary questions of statutory interpretation, which are presumptively reviewable on a reasonableness standard. Difficulties do not appear to arise where a statute creates an appeal on a question of law or jurisdiction, since appellate standards of review apply regardless and courts would not in this context be called on to distinguish questions of law from questions of jurisdiction. Yet, as Mark Mancini observes, regimes that make distinctions between questions of law and questions of jurisdiction will raise several difficulties – some of them constitutional:

Take the example of the *Act respecting access to documents held by public bodies and the protection of personal information*. That statute creates an appeal right over questions of law and jurisdiction to the Court of Quebec. It also includes a privative clause ousting Superior Court review on questions of law, but not on "jurisdiction," which means litigants can seek Superior Court review on questions of jurisdiction. This means that, on questions of jurisdiction, one could pursue the right of appeal to the Court of Quebec or an application for judicial review in the Superior Court... [If questions of jurisdiction are subsumed into questions of law]... then courts will not be asked to differentiate jurisdictional questions from other legal questions for the purposes of standard of review. This creates two problems. First, it does not honour the distinction drawn in the statutes between "law" and "jurisdiction", which means that the legislature would be speaking in vain when it comes to "jurisdiction", contrary to principles of statutory interpretation. Second, this also throws doubt on the preclusive effect of privative clauses. If jurisdiction does not have independent meaning, then what is the meaning of a privative clause ousting review on questions of law? What is to become of the Quebec Court of Appeal's conclusion that privative clauses ousting review on law do not oust review on jurisdiction? One option, consistent with *Vavilov*'s treatment of privative clauses regarding the standard of review, is that they have no preclusive meaning on questions of jurisdiction. If jurisdiction is just a type of law, one reading could provide that there is no meaningful difference between law and jurisdiction, so that certain questions of law that a litigant believes are "jurisdictional" could be reviewable via the right of appeal or by application for judicial review. Put differently, the same legal question could be reviewable in both the Superior Court and the Court of Quebec, on different standards of review. This seems anomalous because it renders privative clauses useless, but it also means that the same legal question could be reviewable on two different standards, depending on the court in

which it is brought. But equally anomalous is the possibility that, if jurisdiction means nothing, then the privative clause in a particular case could cover off all legal questions, meaning that the Superior Court loses its original jurisdiction over legal matters. For constitutional reasons, this interpretation also cannot stand.

Mark Mancini, “The Quebec Reference and *Vavilov* – Statutory Rights of Appeal and the Core of Superior Court Jurisdiction” (2020) 33 Can. J. Admin. L. & Prac. 101 at 109-110.

### Privative clauses

The *Vavilov* majority recognized statutory rights of appeal as clear signals of legislative intent that appellate standards be applied to those aspects of an administrative decision that are subject to the appeal. Yet it gave no such recognition to privative clauses, which have for decades been included by legislators in statutory regimes to *limit* judicial intervention in administrative decision making. According to the *Vavilov* majority, at para 49: “in ... 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.” But to the concurring judges, at para 248, there was no “principled reason why Parliament’s decision via privative clauses to prohibit appeals should not be given comparable effect” to its inclusion of statutory appeals. This apparent double standard has also been noted by various commentators. Professor David Mullan describes the majority’s “vacillating approach” to legislative intention as follows:

[T]he adoption of a presumption of reasonableness review is based on assumptions about legislative intention in creating administrative bodies; they are the choice of the legislature for carrying out governmental tasks and deferential review represents respect for that choice. Once again, when there is a right of appeal, the majority makes an assumption about legislative intention: that in that context the legislature intends non-deferential correctness review for all questions of pure law, and this is not apparently a rebuttable presumption; there can be no arguments. Yet when it comes to the clearest of legislative indicators that abstention or deference is required, the privative clause, the majority simply shrugs them off as no longer having an “independent or additional function” in the selection of the standard of review...

David Mullan, “Judicial Scrutiny of Administrative Decision Making: Principled Simplification or Continuing Angst” (2020) 50 Advocates’ Quarterly 423 at 426, note 19 [*Judicial Scrutiny*].

How is it that explicit legislative intention to exclude judicial review, in the form of a privative clause, can be subsumed into a general presumption of reasonableness review, while legislative intent to override the general presumption of judicial deference can be implied from the presence of a statutory appeal? Considering the principle of legislative supremacy over the courts, acting under the common law, the answer to this question appears central to the justification of the majority’s approach in *Vavilov*.

## **DEROGATION FROM THE PRESUMPTION OF REASONABLENESS BASED ON RESPECT FOR THE RULE OF LAW**

The presumption of reasonableness review may also be rebutted where respect for the rule of law requires “a singular, determinate and final answer to the question before it.” [at para 32] According to the *Vavilov* majority, at para 53, correctness review of (a) constitutional questions, (b) general questions of law of central importance to the legal system as a whole, and (c) questions regarding the jurisdictional boundaries between two or more administrative bodies “respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.”

Before *Dunsmuir*, the Supreme Court defined correctness review as allowing a reviewing court “to undertake its own reasoning process to arrive at the result it judges correct,” looking at the administrative decision under scrutiny only to check whether the decision maker arrived at the correct result: *Law Society of New Brunswick v Ryan*, 2003 SCC 20, [2003] 1 SCR 247 at para 50. In *Dunsmuir*, this approach was described, at para 50, as follows:

When applying a correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer.

Unlike these previous descriptions of correctness review, the *Vavilov* majority emphasized, at para 54, that the tribunal’s reasoning should not be ignored:

While it should take the administrative decision maker’s reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.

This admonition that courts reviewing decisions on a correctness standard should consider the administrative decision maker’s reasons arguably alleviates one concern expressed by the concurring judges (at para 251), which is that the generalist courts’ application of correctness review on statutory appeals may allow judges casually to set aside decisions of expert tribunals on matters going to the heart of their special expertise and potentially render administrative proceedings “little more than rehearsals for a judicial appeal.”

### **Constitutional questions**

According to *Vavilov*, at para 56, the constitutional authority of legislatures and administrative decision makers to act “must have determinate, defined and consistent limits.” Accordingly, reviewing courts must apply the standard of correctness to administrative decisions on questions about the division of powers between Parliament and the provinces, the

relationship between the legislature and other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters including whether a provision of the decision maker's enabling statute violates the *Charter of Rights and Freedoms*.

The standard of review that applies to a decision alleged to limit rights unjustifiably under the *Charter* is governed by the framework in *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395, which is discussed in detail in Chapter 15. In such cases, the reviewing court's role is to determine whether the decision maker has reasonably (and proportionately) balanced the relevant *Charter* protection with the statutory objectives underlying the decision. In *Vavilov*, the majority expressly declined, at para 57, an invitation from the *amici* to revisit *Doré*. Yet the question of whether *Charter* rights are even engaged by an administrative decision, and whether they should be considered in the exercise of a statutory power, was recently held by the Ontario Court of Appeal to be reviewable on a correctness standard.

In *Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025, the Thunder Bay Police Services Board decided to hold a closed meeting into an application for an extension of time allowing it to serve a notice of hearing to consider a complaint of misconduct against several police officers. In doing so, the Board applied s. 35(4) of the *Police Services Act*, which defined the circumstances in which the presumption of an open hearing under s. 35(3) could be rebutted and a closed hearing held. It refused to apply the "*Dagenais/Mentuk*" test, developed in the context of criminal proceedings, which held that restrictions on the open court principle and freedom of the press could be ordered only if they were necessary to prevent a serious risk to the proper administration of justice and if the salutary effects of a publication ban outweighed its deleterious effects, including on the right to free expression, the right of an accused to a fair and public trial, and the efficacy of the administration of justice. The Board opined that the test did not supersede s. 35(4) and applied only to judicial or quasi-judicial proceedings rather than to administrative proceedings, including the decision to extend time. The Ontario Court of Appeal held that the Board's decision that the *Dagenais/Mentuk* test, which took into account the impact of a closed hearing on s. 2(b) of the *Charter*, did not apply was reviewable on a correctness standard:

34 If the *Charter* rights are considered by the administrative decision maker, the standard of reasonableness will ordinarily apply. In *Doré*, the Disciplinary Council of the Barreau du Québec considered and rejected the argument that the Code of ethics of advocates requirement that advocates conduct themselves with "objectivity, moderation and dignity" infringed the s. 2(b) *Charter* right to freedom of expression. Similarly, in *Episcopal Corp. of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry Commissioner*, 2007 ONCA 20, 278 D.L.R. (4th) 550 (Ont. C.A.), the commissioner of inquiry considered the *Dagenais/Mentuck* test and rejected the argument that he should issue a publication ban regarding an alleged wrong-doer. In both cases, a reasonableness standard of review was applied when the decisions were challenged.

35 On the other hand, the refusal or failure to consider an applicable *Charter* right should, in my opinion, attract a correctness standard of review. As the Supreme Court explained in *Dunsmuir* at para. 60... : "where the question at issue is one of general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise' . . . uniform and consistent" answers are required... This is confirmed by *Vavilov*, at para. 17: "[T]he presumption of reasonableness review will be rebutted... where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies".

36 The s. 2(b) *Charter* right to freedom of expression and freedom of the press relied upon by the appellants is both a matter of central importance to the legal system and a constitutional question. As confirmed by *Vavilov*, at para. 53, the application of the correctness standard to "constitutional questions, general questions of law of central importance to the legal system as a whole . . . respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary".

37 The issue before the decision maker was whether the *Dagenais/Mentuck* test had a bearing on the discretionary decision he had to make. That is not the same as the issue presented in *Doré* and *Episcopal* of how the s. 2(b) *Charter* right impacted or affected the discretionary decision he had to make. The decision maker did not reach the point of factoring the *Dagenais/Mentuck* test into his discretionary decision because he decided that it did not apply. A reasonableness standard assumes a range of possible outcomes all of which are defensible in law: see *Vavilov*, at para. 83. That standard is inappropriate here. The *Dagenais/Mentuck* test either applied or it did not.

Ultimately, the Court of Appeal decided that the Police Services Board had correctly decided that the *Dagenais/Mentuck* test did not apply to its decision. However, the Court noted that, in *Langenfeld v Toronto Police Services Board*, 2019 ONCA 716 (a decision that post-dated the Police Services Board's decision to hold the hearing *in camera*), the Court had decided that the right to attend police services board meetings was protected by s. 2(b) of the *Charter*. Thus, while the *Dagenais/Mentuck* test did not apply, the presumption of an open hearing under s. 35(3) of the *Police Services Act* and the s. 2(b) *Charter* right, as recognized in *Langenfeld*, did apply:

60 While I reach that conclusion on a correctness standard, I add here that even if a reasonableness standard of review applies, I fail to see how a decision resulting from an unexplained refusal or failure to consider an applicable *Charter* right could be considered reasonable. This court's application of s. 2(b) in *Langenfeld* means that the decision ordering a closed hearing, through no fault of the decision maker, failed to consider an applicable right protected by the *Charter*. That decision cannot survive

scrutiny under the *Vavilov* test for reasonableness. The reasonableness standard requires “an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker”; *Vavilov*, at para. 85. A decision that fails to consider an applicable *Charter* right cannot satisfy that standard or “the principle that the exercise of public power must be justified, intelligible and transparent”: *Vavilov*, at para. 95.

The *Doré* reasonableness review of discretionary decisions engaging the *Charter* is also displaced in the presence of a statutory right of appeal which, according to *Vavilov*, calls for correctness review: *Strom v Saskatchewan Registered Nurses' Association*, [2020 SKCA 112](#) at paras 132-140.

### **General Questions of Law of Central Importance to the Legal System as a Whole**

According to *Vavilov*, at para 59, “general questions of law of central importance to the legal system as a whole” are questions of law that require “uniform and consistent answers”. They must be reviewed on a correctness standard because they are of “fundamental importance and broad applicability” with “significant legal consequences for the justice system as a whole or for other institutions of government” – implications “beyond the decision at hand.” Before *Vavilov*, correctness review was warranted only where such general questions of law raised issues falling outside the specialized expertise of the administrative decision maker. The *Vavilov* majority abandoned this precondition to correctness review, reasoning that any consideration of expertise was now folded into the general presumption of reasonableness review. The concurring judges (dissenting on this point) opined that this approach would “unduly expand” the “issues available for judicial substitution” and noted, at para 244, that “issues of discrimination, labour rights and economic regulation of the securities market (among many others) theoretically raise issues of vital importance for Canada and its legal system.” Responding to this concern, the majority, at para 61, stressed that “the mere fact that a dispute is ‘of wider public concern’ is not sufficient for a question to fall into this category - nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue....”

It seems that this concern by the *Vavilov* concurring judges may be unwarranted. In various cases, the Supreme Court has narrowly defined the category of general questions of law of central importance to the legal system as a whole. For example, in *Canadian National Railway Co. v Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 at para 60, the Court stated that questions centred on a provision specific to a statutory regime with no precedential value outside of issues arising under that scheme, were not of central importance to the legal system as a whole. Accordingly, a question of law relating to the meaning of a provision from a statutory scheme regulating securities or labour relations would not qualify as a question for which the presumption of reasonableness review is rebutted. We elaborate below.

***Pre-Vavilov Supreme Court jurisprudence on questions of general law of central importance to the legal system***

As noted by the *Vavilov* majority, the Supreme Court has so far identified a general question of law of central importance to the legal system as a whole (and, based on the pre-*Vavilov* approach, outside the expertise of the decision maker) in only four decisions. Of these, *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77 most clearly illustrates how an administrative decision can have legal consequences for the legal system as a whole. A recreation instructor employed by the City of Toronto was terminated following a conviction for sexually assaulting a boy under his supervision. An arbitrator found that the employee was dismissed without just cause, ruling that the criminal conviction, while admissible evidence, was not conclusive as to whether the employee had sexually assaulted the boy. Writing for the Court on this point, Justice Arbour decided, at para 15, that the appropriate standard of review for the question of whether a criminal conviction could be re-litigated in a grievance proceeding was correctness:

In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she must correctly answer the question of law raised.

Therefore, although the arbitrator's award was grounded in labour relations, the Court recognized its significant spillover effects for the wider legal system. The award undermined principles of consistency, finality and integrity of judicial decision-making as a branch of the administration of justice. In reading the remaining case extracts and summaries, note how the administrative decision maker's answer to the question at issue may have spillover effects on aspects of the legal system beyond that for which the decision maker is responsible.

In *Mouvement Laïque Québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3, a majority of the Court applied a correctness standard of review to the Québec Human Rights Tribunal's interpretation of s. 3 of Québec's *Charter of human rights and freedoms* which guarantees freedom of conscience and religion. The case involved a complaint that the recital of a prayer before council meetings of the City of Saguenay and the presence of religious symbols in the council chambers violated the state's duty of religious neutrality that flowed from freedom of conscience and religion. Writing for the majority, Justice Gascon determined that, on the question of the scope of the state's duty of religious neutrality under s. 3 of the Québec *Charter*,

the appropriate standard of review was correctness because this was a general question of law of central importance to the legal system falling outside the Tribunal's expertise and because first instance jurisdiction over complaints brought under the Québec *Charter* was shared by the Tribunal and the Superior Court.

Gascon J. —

(...)

(2) Standards of Review Applicable in the Instant Case

[45] ...[T]he choice of the applicable standard depends primarily on the nature of the questions that have been raised, which is why it is important to identify those questions correctly... For the purposes of this appeal, it will suffice to mention the following in this regard.

[46] Deference is in order where the Tribunal acts within its specialized area of expertise, interprets the *Quebec Charter* and applies that charter's provisions to the facts to determine whether a complainant has been discriminated against (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 (CanLII), [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness... In such situations, deference should normally be shown, although this presumption can sometimes be rebutted. One case in which it can be rebutted is where a contextual analysis reveals that the legislature clearly intended not to protect the tribunal's jurisdiction in relation to certain matters; the existence of concurrent and non-exclusive jurisdiction on a given point of law is an important factor in this regard (*Tervita*, at paras. 35-36 and 38-39; *McLean*, at para. 22; *Rogers*, at para. 15).

[47] Another such case is where general questions of law are raised that are of importance to the legal system and fall outside the specialized administrative tribunal's area of expertise (*Dunsmuir*, at paras. 55 and 60). Moldaver J. noted the following on this point in *McLean* (at para. 27):

The logic underlying the “general question” exception is simple. As Bastarache and LeBel JJ. explained in *Dunsmuir*, “[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers” (para. 60). Or, as LeBel and Cromwell JJ. put it in *Mowat*, correctness review for such questions “safeguard[s] a basic consistency in the fundamental legal order of our country” (para. 22).

[48] As LeBel and Cromwell JJ. pointed out in *Mowat* (at para. 23), however, it is important to resist the temptation to apply the correctness standard to all questions of law of general interest that are brought before the Tribunal:

There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of these questions, the application of the *Dunsmuir* standard of review analysis could well lead to the application of the standard of correctness. But, not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized area of expertise.

[49] In the instant case, an important question concerns the scope of the state's duty of religious neutrality that flows from the freedom of conscience and religion protected by the *Quebec Charter*. The Tribunal and the Court of Appeal each dealt with this question of law, but they disagreed on how it should be answered. Whereas the Tribunal found that the state has an [translation] "obligation to maintain neutrality" (paras. 209-11), the Court of Appeal preferred the more nuanced concept of [translation] "benevolent neutrality" (paras. 76-79). Although I agree with the Tribunal on this point, I am of the opinion that, in this case, the Court of Appeal properly applied the correctness standard on this question.

[50] However, it was not open to the Court of Appeal to apply that standard to the entire appeal and to disregard those of the Tribunal's determinations that require deference and are therefore subject to the reasonableness standard. For example, the question whether the prayer was religious in nature, the extent to which the prayer interfered with the complainant's freedom and the determination of whether it was discriminatory fall squarely within the Tribunal's area of expertise. The same is true of the qualification of the experts and the assessment of the probative value of their testimony, which concerned the assessment of the evidence that had been submitted (*NGC*, at para. 30; *Mission Institution v. Khela*, 2014 SCC 24 (CanLII), [2014] 1 S.C.R. 502, at para. 74; *Khosa*, at paras. 59 and 65-67). The Tribunal is entitled to deference on such matters. The only requirement is that its reasoning be transparent and intelligible. Its decision must be considered reasonable if its conclusions fall within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47).

It should be noted that in light of *Vavilov*, statutory appeals of decisions of the Quebec Human Rights Tribunal are now subject to appellate standards of review: "correctness" for extricable questions of law and "palpable and overriding error" for questions of fact or mixed fact and law.

In *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, a majority of the Supreme Court held that the Information and Privacy Commissioner's interpretation of a provision of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (FOIPPA) that engaged the protection of solicitor-client privilege should be reviewed on a correctness standard because the Commissioner's interpretation fell within the category of general questions of law of central importance to the legal system and outside of the adjudicator's area of expertise. In wrongful dismissal litigation with the University of Calgary, an employee had sought disclosure of records over which the University claimed solicitor-client privilege. The University had complied with the law and practice regarding the identification of solicitor-client privileged documents in civil litigation in Alberta by providing a

list of documents. However, the Information and Privacy Commissioner ordered production of the documents for review under s. 56(3) of the FOIPPA, which provided that “despite... any privilege of the law of evidence, a public body must produce to the Commissioner... any record or a copy of any record...” The Commissioner claimed that “solicitor-client privilege was a ‘privilege of the law of evidence’.” For the majority, Justice Côté wrote as follows:

A. *Standard of Review*

[19] The application judge and the Court of Appeal concluded that the applicable standard of review was correctness. I agree.

[20] Whether *FOIPP* allows solicitor-client privilege to be set aside is a question of central importance to the legal system as a whole and outside the Commissioner’s specialized area of expertise. As this Court said in *Blood Tribe*, solicitor-client privilege is “fundamental to the proper functioning of our legal system” (para. 9). It is also a privilege that has acquired constitutional dimensions as both a principle of fundamental justice and a part of a client’s fundamental right to privacy (*R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 S.C.R. 445, at para. 41; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 (CanLII), [2002] 3 S.C.R. 209, at para. 46; see also *Canada (National Revenue) v. Thompson*, 2016 SCC 21 (CanLII), [2016] 1 S.C.R. 381, at para. 17). Further, as the Court of Appeal observed, the question of what statutory language is sufficient to authorize administrative tribunals to infringe solicitor-client privilege is a question that has potentially wide implications on other statutes.

[21] In *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 (CanLII), [2014] 2 S.C.R. 135, Rothstein J., writing for the Court, discussed how a question of statutory interpretation that does *not* have wide implications on other statutes would *not* be of central importance to the legal system as a whole and would thus attract a reasonableness standard. Paragraph 60 of *National Railway* reads as follows:

This is also not a question of central importance to the legal system as a whole. The question at issue centres on the interpretation of s. 120.1 of the [*Canada Transportation Act*, S.C. 1996, c. 10 (“CTA”)]. The question is particular to this specific regulatory regime as it involves confidential contracts as provided for under the CTA and the availability of a complaint-based mechanism that is limited to shippers that meet the statutory conditions under s. 120.1(1). This question does not have precedential value outside of issues arising under this statutory scheme.

Conversely, it follows that where — as in this case — the question *does* have wide implications on other statutes, the appropriate standard of review is correctness.

[22] In addition, there is nothing to suggest that the Commissioner has particular expertise with respect to solicitor-client privilege, an issue which has traditionally been adjudicated by courts (see *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278(CanLII), 226 D.L.R. (4th) 20, at para. 25). Therefore, the applicable standard of review is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC

9 (CanLII), [2008] 1 S.C.R. 190, at para. 60), for both (i) the decision that the Commissioner has the authority to require the production of records over which solicitor-client privilege is asserted, and (ii) the decision to issue the Notice to Produce Records.

[23] My colleague Justice Abella thinks otherwise. Drawing from six judgments of this Court involving disclosure decisions by Information and Privacy Commissioners, she suggests that there is a “clear lineage” of cases dictating that the standard of review in this appeal should be reasonableness. With respect, I cannot agree.

[24] Of the six decisions identified by Abella J., only two mention solicitor-client privilege. One of them is *Blood Tribe*, in which Binnie J. in effect reviewed the impugned decision on the standard of correctness, although he did not expressly state so. The other is *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815, which addressed, as a secondary issue, whether the Assistant Commissioner properly exercised his discretion under a provision explicitly permitting him to exempt from disclosure documents subject to solicitor-client privilege. That was it. Resolution of that question had few ramifications on the principle of solicitor-client privilege and its application beyond the particular exercise of discretion in that case.

[25] The question here is different. It does not just ask whether the Commissioner exercised her discretion appropriately in the instant case. It asks whether the phrase “privilege of the law of evidence” suffices to identify, for the purpose of abrogation, the substantive features of solicitor-client privilege. This necessitates an inquiry into both the substantive and evidentiary qualities of the privilege.

[26] The importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole. In *R. v. Gruenke*, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263, Chief Justice Lamer described its rationale as follows:

The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication . . . [Emphasis added; p. 289.]

As noted in the majority judgment, Justice Abella was of the view that reasonableness review was appropriate:

[130] Most legal decisions made by tribunals touch on important legal questions, such as limitation periods in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895, or estoppel in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 (CanLII), [2011] 3 S.C.R. 616. They have been found nonetheless to fall within the reasonableness test created in *Dunsmuir* for adjudicators applying their expertise in interpreting their own specialized mandates. We have not, before this case, excavated the legal concept from its statutory context in order to give it the singular stature *Dunsmuir* says attracts correctness.

[131] This Court has decided six cases in recent years involving disclosure decisions by Information and Privacy Commissioners. [A description of these cases is omitted]...

[132] In each case, a Commissioner was interpreting his or her home statute. Under *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, and its progeny, that means the standard of review is reasonableness unless the question raised falls into one of the categories to which the correctness standard applies, such as questions of central importance to the legal system as a whole which are outside the tribunal's expertise.

[133] Despite this clear lineage, we now find ourselves being asked to depart from what has been the accepted path for Information and Privacy Commissioners applying their specialized expertise in interpreting their own statutes, including when solicitor-client privilege is at issue, and asked to follow a new route for no discernible reason.

[134] Solicitor-client privilege is neither more nor less important now than it was when we decided all of the previous cases under a reasonableness standard. That standard applied because, as here, the issue, while important, was well within the statutory mandate the Commissioner works with on a daily basis. It falls, in other words, within her expertise.

[135] The Commissioner's mandate is to monitor the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, and ensure that its purposes are achieved. The Act gives individuals access to certain types of information held by public bodies, subject to specific exceptions. One of those exceptions is solicitor-client privilege, as set out in s. 27(1)(a) of the Act which states:

**27(1)** The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, *including solicitor-client privilege* or parliamentary privilege,

It seems to me to be logically questionable to conclude that even though the legislature has given the Commissioner the express mandate to consider the application of solicitor-client privilege, it is nonetheless deemed to be outside her expertise. Such an approach inexplicably eliminates the conjunctive "and" from the *Dunsmuir* test that requires that the issue be both of central importance to the legal system *and* outside the expertise of the adjudicator. It also has the disruptive potential for rendering meaningless the presumption of deference to home statute expertise.

[136] Moreover, she is not being asked to explain the content of solicitor-client privilege for the whole legal system, she is being asked to apply it in the context of one provision — s. 56(3) — of the *Freedom of Information and Protection of Privacy Act*, her enabling legislation. This is classic "reasonableness review" territory.

Most recently, albeit still pre-*Vavilov*, in *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, the Court unanimously held that a labour arbitrator's conclusions on the existence and scope of Parliamentary privilege in a labour dispute involving Québec's National Assembly was a general question of law of central importance to the legal

system as a whole. The President of the National Assembly had fired security guards employed by the National Assembly for misusing their employer's surveillance cameras. The guards, as employees of the National Assembly, were deemed under the *Act Respecting the National Assembly*, CQLR, c A-23.1 to be members of the civil service. When their union grieved the terminations before a labour arbitrator, the President claimed that his decision to dismiss the guards was protected by Parliamentary privilege and that the arbitrator lacked jurisdiction to hear the grievances. Rejecting this argument, the arbitrator allowed the grievances to proceed. For the majority, Justice Karakatsanis held, at para 17, that the arbitrator's decision on that question was reviewable on a correctness standard, a conclusion shared by all nine judges of the Court:

The existence and scope of parliamentary privilege is a question of central importance to the legal system and outside the expertise of the arbitrator... Labour arbitrators do not have specialized expertise in relation to parliamentary privilege. Moreover, while this appeal involves only the National Assembly of Québec, the conclusions regarding parliamentary privilege will affect all other legislative bodies.

### ***Post-Vavilov jurisprudence on questions of general law of central importance to the legal system***

Thus far, post-*Vavilov*, lower court decisions do not support the *Vavilov* concurring judges' concern that, by removing the decision maker's expertise as a limiting factor, the majority's judgment would materially broaden the category of general questions of law of central importance to the legal system. That said, applicants do continue to argue for an expansive reading of this category. In *Beach Place Ventures Ltd. v British Columbia (Employment Standards Tribunal)*, 2020 BCSC 327, the applicants sought judicial review and an order staying the decision of the Employment Standards Tribunal that they were the employers of several individual complainants and that they owed the complainants unpaid wages and interest. To assess whether the applicants had shown a serious question to be tried on judicial review, the BC Supreme Court considered the standard of review and rejected the applicants' claim that the nature of "employment" was a question of general law of central importance to the legal system:

32 Prior to *Vavilov*, general questions of law of central importance to the legal system were subject to a correctness standard of review only if they were outside the decision maker's expertise: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.) at para. 60. Post-*Vavilov*, there is no requirement that the matter be outside the decision maker's expertise to be subject to the standard of correctness: para. 58. Consequently, the Applicants argue the question of what constitutes "employment" is a question of general law of central importance to the legal system and is therefore subject to a standard of correctness.

33 I agree that what constitutes "employment" is an important societal question. However, I am not persuaded this turns the question of who is an employee into a question of general law of central importance to the legal system. As the Court noted in *Vavilov*, "the

mere fact that a dispute is 'of wider public concern' is not sufficient for a question to fall into this category": para. 61. By creating the ESA and its administrative and enforcement regime, the legislature has determined that employment is defined by statutory provisions rather than left to principles of general law. As stated by Justice Harris in *Canwood International Inc. v. Bork*, 2012 BCSC 578 (B.C. S.C.) [Canwood]:

[102] The ESA provides statutory protection for entitlements such as wages owing to employees. What and who is entitled to protection under the ESA is a matter of statutory interpretation. The question whether someone is an employee for the purposes of the ESA and whether they are entitled to wages for the purposes of the ESA are also matters of statutory interpretation. Those questions cannot be reduced to the application of common law principles, although those principles may inform the analysis of whether the statute applies to a given relationship or issue.

34 The question of whether someone is an employee for the purposes of the ESA is to be decided in the context of this statutory regime. It is not open to me to disregard the legislative intention and hold what constitutes employment is a matter of general law of central importance to the legal system. I decline to do so.

The court concluded that, in light of the strong privative clause in the *Employment Standards Act*, the determination of whether the complainants were employed raised questions of fact and law within the Tribunal's jurisdiction, which were subject to a standard of patent unreasonableness.

The Federal Court of Appeal has also refrained from characterizing questions of law arising from a specific statutory scheme as general questions of law of central importance to the legal system. In *Bank of Montreal v Li*, 2020 FCA 22, an unjust dismissal adjudicator under the *Canada Labour Code*, RSC 1985, c L-2 followed a Federal Court of Appeal precedent which had held that adjudicators have jurisdiction to hear unjust dismissal complaints even where the employer and employee sign a release agreement. The Court of Appeal's conclusion was based on its interpretation of s. 168(1) of the *Code* providing that "this Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement..." The Bank of Montreal characterized the issue before the adjudicator – "when may parties validly waive statutory entitlements" – as a question of central importance to the legal system. The Federal Court of Appeal resolutely dismissed this argument:

27 The appellant argues that the issue as to when parties may validly waive statutory entitlements is a question of central importance to the legal system as a whole because it extends well beyond the employment context and has wide implications for many other enactments in addition to the *Code*. The appellant relies for that proposition on *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 (S.C.C.) [University of Calgary], a case involving solicitor-client privilege.

28 In my view, the question at issue in the case at bar is not one of fundamental importance, "with significant legal consequences for the justice system as a whole or for other institutions of government" (*Vavilov*, at para. 59). Unlike solicitor-client privilege, there is no constitutional dimension to the question of whether an employee can contract

out of a specific provision of the Code. The answer to that question will not have legal implications for a wide variety of other statutes. Indeed, this question bears no similarity to the type of questions identified by the Supreme Court as falling into that category: scope of parliamentary privilege (*Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687 (S.C.C.)); scope of the state's duty of religious neutrality (*Saguenay*); application of the doctrines of res judicata and abuse of process (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.)); limits on solicitor-client privilege (*University of Calgary*). It is not sufficient to dress the issue as a matter of broad statutory interpretation relating to the distinction between prospective and retrospective waiver, as attempted by the appellant; as the Supreme Court cautioned, framing an issue in a general or abstract sense is not sufficient to make it a question of central importance to the legal system as a whole (*Vavilov*, at para. 61).

Reviewing courts have also resisted attempts to clothe questions of mixed fact and law as general questions of law. *Wawanesa Mutual Insurance Company v Renwick*, 2020 ONSC 2226 concerned a dispute between Renwick and her insurer over statutory accident benefits following a motor vehicle accident. The dispute was considered by an arbitrator under Ontario's *Insurance Act*, RSO 1990, c. I.8 who, after a six-day hearing involving extensive expert evidence on the chronic pain and psychological problems experienced by Renwick following the accident, decided that Renwick had failed to establish that she was entitled to receive an income replacement benefit or a medical benefit under her medical treatment plan. Renwick successfully appealed the decision to the Delegate of the Director of Arbitrations who concluded that the arbitrator had failed to give adequate reasons for his decision and failed to fairly consider the evidence from both parties. The Director's Delegate found that:

Ms. Renwick was unable to determine from the Arbitrator's decision what "factors the Arbitrator considered relevant to the issues of entitlement, how they were applied, and which of [her] submissions he accepted." Thus, his decision did "not provide the basis for meaningful appellate review and she has been denied her right to natural justice and procedural fairness. [at para 34]

In doing so, it was found by the Director's Delegate, the arbitrator had committed a reversible error of law. The insurer then sought judicial review of the Director's Delegate's decision before Ontario's Divisional Court. Relying on precedent, the insurer argued that the question of whether reasons were "adequate" raised a general question of law of central importance to the legal system as a whole. The Divisional Court disagreed, noting that the answer to that question depended on the circumstances of each case:

45 In *Kanareitsev, supra*, the Divisional Court found that "[t]he issue of the adequacy of reasons involves the application of general principles of law." (para. 23). Therefore, pursuant to the contextual approach for selecting the standard of review mandated by *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.), the applicable standard of review was held to be correctness.

46 *Kanareitsev* was decided before *Vavilov*. In addition to doing away with *Dunsmuir's* contextual approach in favour of the presumption of reasonableness, *Vavilov* provides considerable guidance on the issue of what is a general question of law that is of central importance to the legal system. Essentially, it is a question that requires a uniform and consistent answer because of its impact on the administration of justice as a whole. Examples of such questions include the appropriateness of limits on solicitor-client privilege and the scope of parliamentary privilege.

47 As the Court of Appeal noted in *Lawson v. Lawson* (2006), 81 O.R. (3d) 321 (Ont. C.A.), determining the adequacy of reasons is a contextual exercise. Similarly, in *VIA Rail Canada Inc. v. Canada (National Transportation Agency)* (2000), [2001] 2 F.C. 25 (Fed. C.A.), the Federal Court of Appeal commented that:

What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A. "[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons" (citing J. M. Evans, *Administrative Law: Cases, Text and Materials* (4th ed.), (Toronto: Emond Montgomery, 1995), at p. 507).

48 Whether reasons are adequate is not a question that is amenable to a single and determinate answer. Thus, while delivering adequate reasons plays a central role in the administration of justice, whether reasons are adequate is not a general question of law of central importance to the legal system as a whole that would attract the standard of correctness.

49 For these reasons, I find that the standard that this Court must apply to the Director's Delegate's decision is reasonableness.

In *Rahman v Canada (Citizenship and Immigration)*, 2020 FC 138, the Federal Court similarly refused to hold that, in arriving at a finding of fact, a decision maker had misinterpreted the applicable standard of proof and therefore made an error of law that was reviewable on a correctness standard. *Rahman* involved the judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board upholding the finding of the Refugee Protection Division that, while it believed that the applicant's wife and daughter had been kidnapped and held for ransom, they had a viable internal flight alternative because there was insufficient probative evidence to find the kidnappers were members of the Bangladeshi police or security forces. The applicants had argued that the RAD should infer from the circumstances (e.g., the kidnappers had crewcuts, the van used in the kidnapping had no plates, the kidnappers appeared calm, phone calls from the kidnappers were from a number listed as 00000) that the kidnappers were members of the police or security forces in Bangladesh. The RAD, while accepting the applicants' evidence, refused to draw the inference suggested by the applicants. The applicants

argued that in doing so the RAD had applied the wrong standard of proof and that, “by raising doubts as to whether the kidnappers were members of the police or security forces in the face of the Applicants’ evidence, the RAD was imposing a requirement of ‘beyond a reasonable doubt’ as the standard of proof.”

The applicants argued that the RAD’s “decision as regards the applicable standard of proof” was a general question of law of central importance to the legal system as a whole and should be reviewed on a correctness standard. The Federal Court rejected this claim for two reasons:

22 ... First, the RAD's treatment of the burden of proof issue does not engage with the type of rare circumstances that warrant correctness review. The RAD's choice of burden of proof falls within the scope of its delegated authority and is unlikely to produce ripple effects outside of the RAD context (*Vavilov* at paras 58-62). Second, the Applicants' framing of the issues relies on a contrived distinction between the RAD's factual findings and the manner in which the RAD arrived at those findings. Such a distinction is inconsistent with the *Vavilov* approach that urges reviewing courts to evaluate the decision maker's chain of analysis leading to the outcome and the outcome itself, and ask whether the decision is acceptable (*Vavilov* at paras 83, 85).

23 Consequently, the RAD decision must be examined according to a reasonableness standard (*Vavilov* at paras 73-143). The mere fact that a decision is "of wider public concern" does not automatically imply correctness review (*Vavilov* at para 61).

These cases indicate that reviewing courts have resisted attempts by applicants for judicial review to recast ordinary questions of statutory interpretation and questions of mixed fact and law as general questions of law of central importance to the legal system as a whole. They have instead heeded the *Vavilov* majority's warning that such questions will be exceptional and have continued to interpret the category restrictively.

### **Questions regarding the jurisdictional boundaries between two or more administrative bodies**

In *Vavilov*, the majority stated, at para 64, that the rule of law “cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions.” Where an administrative body interprets its authority in a manner that is incompatible with the jurisdiction of another decision maker, a reviewing court will apply a correctness standard to ensure that the dividing line between the two decision makers’ authority is predictable, final and certain.

This rule is illustrated in *British Columbia Telephone Co. v Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 SCR 739, where an apparent conflict arose between the authority of a labour arbitrator and the Canadian Radio-television and Telecommunications Commission (CRTC). The labour arbitrator ruled that, by allowing cable company employees to install cable on BC Tel’s telephone poles, BC Tel violated its collective agreement with the Telecommunications Workers’ Union,

which reserved to TWU workers any work having to do with maintenance, repair, alteration or construction of its “telephone plant”. For its part, the CRTC confirmed its own prior decisions that, pursuant to its statutory mandate to regulate telephone rates, cable companies had to have the option, on reasonable terms, to use their own contractors to install their cable facilities on BC Tel’s support structure. A majority of the Supreme Court concluded that the orders of the CRTC and labour arbitrator created inconsistent legal obligations for BC Tel and that only a reviewing court could finally resolve the inconsistency:

...[T]he parties involved in problems of this sort are often providing services of considerable importance to the public. It is the task of the legal system to provide them with clear guidance as to their legal obligations so that they can provide the services that they are required to provide in an efficacious and legal manner. When two different boards have given conflicting definitions of a body's legal obligations, it is important that the body be afforded means of determining which obligation prevails and which it must obey. The boards themselves cannot determine this. The only body which can do it is the court. (...)

The orders in this case impose inconsistent legal obligations on BC Tel. The CRTC has ruled that BC Tel has a legal obligation to permit Shaw Cable Systems to work on its lines. The labour arbitration board, on the other hand, has ruled that BC Tel has a legal obligation to refuse to permit Shaw Cable Systems to work on its lines. BC Tel cannot fulfil both obligations. It follows that BC Tel should be able to ask the courts which has priority. I agree with L'Heureux-Dubé J. that the CRTC's decision, being an expression of the broad policy-making role accorded to it by Parliament, should take precedence over the decision of the labour arbitration board to the extent of the inconsistency. [at paras 79-80]

### **Other circumstances requiring a derogation from the presumption of reasonableness review**

The *Vavilov* majority did not foreclose the possibility that courts might recognize other circumstances warranting derogation from the presumption of reasonableness review, either on the basis of legislative intent or because correctness review is required by the rule of law. However, the *Vavilov* majority ruled, at para 70, that such recognition would be “exceptional”:

[A]ny new category warranting a derogation from the presumption of reasonableness review on the basis of legislative intent would require a signal of legislative intent as strong and compelling as those identified in these reasons (i.e., a legislated standard of review or a statutory appeal mechanism). Similarly, the recognition of a new category of questions requiring correctness review that is based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in these reasons.

In particular, the Court declined an invitation by the *amici curiae* to recognize legal questions on which there is persistent discord within an administrative body as a category of legal questions that requires correctness review. In its intervener's factum in *Vavilov*, the

Canadian Council for Refugees argued that the reasonableness review of administrative decision makers' interpretations of provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (intended to implement Canada's international obligations under the Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85) had, over time, allowed these decision makers to develop divergent lines of authority about the legal framework governing key aspects of refugee protection in Canada, including the meaning of state protection and whether persons subject to gang and gender-based violence are "in need of protection". The Canadian Council for Refugees argued that administrative decision makers' interpretation of statutory provisions that implement human rights conferred by international treaties should be reviewed on a correctness standard in order to avoid such divergent interpretations:

Reasonableness review tolerates divergent interpretations of legal rules, which threaten the integrity of the rule of law. Under the rule of law, the meaning of the law should not differ depending on the decision maker's identity. Given the impact of protection decisions on claimants' life and security of the person, such divergences are arbitrary, antithetical to the rule of law and must be immediately resolved through correctness review. This is especially true in the refugee context and thus, the interests at stake in protection decisions warrant correctness review. In the refugee context, decision makers should not be afforded the luxury of "working inconsistencies pure" over time and, in so doing, place protection claimants' lives at risk.

*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (Factum of the intervener Canadian Council of Refugees at para 19).

The Court agreed in *Vavilov* that, in cases of persistent discord, the meaning of a law may come to depend on the identity of the decision maker, a scenario "antithetical to the rule of law". However, it stated, at para 72, that reasonableness review "accounts for the value of consistency and the threat of arbitrariness" and, as such, "is capable, in tandem with internal administrative processes to promote consistency and with legislative oversight..., of guarding against threats to the rule of law."

Since *Vavilov*, reviewing courts have heeded the majority's admonition that new categories of legal questions requiring correctness review should be recognized only in exceptional circumstances. In *G.S.R. Capital Group Inc. v The City of White Rock*, 2020 BCSC 489 [*G.S.R. Capital Group*], for example, the BC Supreme Court declined the applicant's invitation to recognize municipal councils' interpretation of their enabling legislation as a category of legal questions requiring correctness review. The applicant relied on pre-*Vavilov* jurisprudence that categorized councils' interpretation of their statutory authority as a "jurisdictional" question. [See, for example, *Canadian Plastic Bag Association v Victoria (City)*, 2019 BCCA 254 at para 37, citing *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19, [2004] 1 SCR 485 at para 5.] The BC Supreme Court observed, at para 65, that *Vavilov* had done away with

jurisdictional questions as a category of legal questions requiring correctness review and that the applicant had not made out a case for recognizing a new category:

70 I would also decline to recognize a new category of decisions subject to correctness review. I agree with the City's submission that all of the case law cited by G.S.R. was decided pre-*Vavilov* and, therefore, cannot be relied upon. Those cases were premised on the notion of true questions of jurisdiction warranting correctness review and on the lack of expertise of local governments relative to courts in interpreting its enabling legislation. *Vavilov* substantially changed the law with respect to how expertise is considered and with respect to true questions of jurisdiction.

71 *Vavilov* was very clear and deliberate about the decision to remove true questions of jurisdiction as a distinct category of correctness review. The fact that the reasons did not expressly discuss the line of jurisprudence applying correctness review to municipalities interpreting their enabling legislation is not surprising given the fact that this decision undertook a fundamental overhaul of the law on substantive review of administrative decisions; it would be impossible to discuss every previous line of case law that came before it. In my view, the Court in *Vavilov* was very clear that reasonableness review applies to questions on whether administrative decision makers have acted within the scope of their lawful authority, and that the basis for recognizing any new category of correctness review would be exceptional: paras. 67, 70. I do not think that such an exceptional circumstance can be said to arise here.

In *Entertainment Software Association v Society Composers, Authors and Music Publishers of Canada*, [2020 FCA 100](#) at paras 17-19, the Federal Court of Appeal suggested that the pre-*Vavilov* shared jurisdiction exception (a correctness category established in *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, [2012 SCC 35](#) and discussed at p 727 of the casebook), whereby the legislator's choice to give an administrative tribunal and a court concurrent jurisdiction to interpret statutory provisions at first instance requires correctness review of the tribunal's decisions on a question of statutory interpretation, could be an example of an "institutional design choice" requiring correctness review post-*Vavilov*.

### True questions of jurisdiction

As noted in *G.S.R. Capital Group*, the Supreme Court's elimination of "true questions of jurisdiction" as a category of questions requiring correctness review is one of the most significant aspects of *Vavilov*. About twelve years before, in *Dunsmuir*, the Supreme Court had determined that – in addition to constitutional questions, general questions of law of central importance to the legal system as a whole and outside the expertise of the adjudicator, and questions regarding the jurisdictional lines between one or more specialized tribunals – "true questions of jurisdiction or *vires*", defined as questions where a tribunal "must explicitly determine whether a statutory grant of power gives it the authority to decide a particular matter", attracted correctness review.

However, in judgements after *Dunsmuir*, several Supreme Court judges openly questioned whether true questions of jurisdiction even existed and suggested that this category should be eliminated: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 34; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31, [2018] 2 SCR 230 at paras 31-41.

In *Vavilov*, the Supreme Court did just that. Noting the absence of clear markers to distinguish true questions of jurisdiction from other questions related to the interpretation of administrative decision makers' enabling statute and the ensuing uncertainty in the law, the Court concluded, at para 67, that it was "no longer necessary to maintain this category of correctness review." In doing so, the court addressed the main argument that supported maintaining the category of true questions of jurisdiction: its recognition in *Crevier v A.G. (Quebec)*, [1981] 2 SCR 220 at 236-7 that superior courts have an inherent constitutionally-guaranteed power to judicially review the decisions of an administrative tribunal regarding the limits of its jurisdiction. This defence of "jurisdictional questions" had been forcefully advanced by Justice Cromwell in *Alberta Teachers, supra*, at paras 102-103:

[102] I do not join my colleague in asking whether the category of true questions of jurisdiction exists. I have signalled above that the language of "jurisdiction" or "vires" might be unhelpful in the standard of review analysis. But I remain of the view that correctness review exists, both as a matter of constitutional law and statutory interpretation. This will be true, on occasion, with respect to a tribunal's interpretation of its "home" statute. As the Court affirmed in *Dunsmuir*, "judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits" (para. 31).

[103] In the face of such a clear and recent statement by the Court, I am not ready to suggest, as my colleague does, at para. 34, that this constitutional guarantee may in fact be an empty shell. To be clear, this constitutional guarantee does not merely assure judicial review for reasonableness; it guarantees jurisdictional review on the correctness standard. *Dunsmuir* was clear and unequivocal on this point as the passage I have just cited demonstrates. I think it unfortunate that the Court should be seen to be engaging in casual questioning of the ongoing authority of what it said so clearly and so recently. Parliament and the legislatures, as a matter of constitutional law, cannot oust judicial review for correctness of a tribunal's interpretation of jurisdiction limiting provisions.

Responding to Justice Cromwell's observation that removing the category of jurisdictional questions could make the constitutional guarantee of judicial review of such questions an empty shell, Justice Rothstein stated, at para 43:

All decisions of tribunals are subject to judicial review, including decisions dealing with the scope of their statutory mandate, even if this Court were to eliminate true questions of jurisdiction as a separate category attracting a correctness review. This change would simply end the need for debate around whether the issue in any given case can be properly characterized as jurisdictional. It would not preclude judicial review on a reasonableness

standard when interpretation of the home statute of the tribunal is at issue. Nor would it eliminate correctness review of decisions of tribunals interpreting their home statute where the issue is a constitutional question, a question of law that is of central importance to the legal system as a whole and that is outside the adjudicator's expertise, or a question regarding the jurisdictional lines between competing specialized tribunals.

In *Vavilov*, at paras 67-68, the Court reiterated this view:

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.

Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it [to] one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect.

*Vavilov* appears to have put to rest a further vexed question. The question is what standard of review should apply to an administrative decision maker's interpretation of the scope of its broad statutory authority to promulgate regulations in pursuance of the objects of the enabling statute. Such a question was involved in *United Taxicab Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19, [2004] 1 SCR 485, the only decision identified in *Dunsmuir* as an example of a true question of jurisdiction or *vires*. Noting at para 5 that municipalities “do not possess any greater institutional competence or expertise than the courts in delineating their jurisdiction”, the Court reviewed on a correctness basis the question of whether Alberta's *Municipal Government Act* gave Calgary's Municipal Council the authority to enact a bylaw freezing the issuance of taxi plate licenses. Before deciding *Vavilov*, the Court had most recently revisited this question in *West Fraser Mills Ltd. v British Columbia (Workers Compensation Appeal Tribunal)*, 2018 SCC 22, which involved the judicial review of the Workers' Compensation Board's exercise of its authority under s. 225 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 to “make regulations the Board considers necessary or advisable in relation to occupational health and safety and occupational environment.” At issue was s. 26.2(1) of the *Occupational Health and Safety Regulation*, B.C. Reg. 296/97:

**26.2 (1)** The owner of a forestry operation must ensure that all activities of the forestry operation are both planned and conducted in a manner consistent with this Regulation and with safe work practices acceptable to the Board.

Noting that it had adopted a flexible standard of reasonableness where an enabling statute grants a large discretion to a subordinate body to craft regulations, the majority reviewed the decision as a question of statutory interpretation:

[10] The question before us is whether s. 26.2(1) of the Regulation represents a reasonable exercise of the Board's delegated regulatory authority. Is s. 26.2(1) of the Regulation within the ambit of s. 225 of the Act? Section 225 of the Act is very broad. Subsection (1) empowers the Board to make "regulations the Board considers necessary or advisable in relation to occupational health and safety and occupational environment". This makes it clear that the Legislature wanted the Board to decide what was necessary or advisable to achieve the goal of healthy and safe worksites and pass regulations to accomplish just that. The opening words of subsection (2) — "Without limiting subsection (1)" — confirm that this plenary power is not limited by anything that follows. In short, the Legislature indicated it wanted the Board to enact whatever regulations it deemed necessary to accomplish its goals of workplace health and safety. The delegation of power to the Board could not be broader.

[11] From this broad and unrestricted delegation of power we may conclude that any regulation that may reasonably be construed to be related to workplace health and safety is authorized by s. 225 of the Act. The Legislature, through s. 225 of the Act, is asking the Board to use its good judgment about what regulations are necessary or advisable to accomplish the goals of workplace health and safety. A regulation that represents a reasonable exercise of that judgment is valid: *Catalyst*, at para. 24; *Green*, at para. 20.

[12] Determining whether the regulation at issue represents a reasonable exercise of the delegated power is, at its core, an exercise in statutory interpretation, considering not only the text of the laws, but also their purpose and the context. The reviewing court must determine if the regulation is "inconsistent with the objective of the enabling statute or the scope of the statutory mandate" to the point, for example, of being "'irrelevant', 'extraneous' or 'completely unrelated)": *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 24 and 28. To do this, the Court should turn its mind to the typical purposive approach to statutory interpretation and seek an "interpretative approach that reconciles the regulation with its enabling statute": *Katz*, at para. 25.

[13] First, applying the usual principles of statutory interpretation to s. 225 of the Act, it is clear that it authorizes s. 26.2(1). I have already discussed the broad wording of s. 225 of the Act. The Board is expected to craft such regulations as it deems necessary or appropriate in order to promote workplace health and safety. Section 26.2(1) is clearly linked to workplace safety and meets this requirement.

[14] Second, the Regulation fits with other provisions of the statute. Section 26.2(1) is consistent with s. 230(2)(a) of the Act, which allows the Board to make regulations that

apply to any “persons working in or contributing to the production of an industry”. This would include forest license owners like the appellant. Section 26.2(1) is also consistent with s. 111 of the Act, which provides that the Board’s mandate includes making regulations in support of the purpose of Part 3 of the Act. The purpose of Part 3 is captured in s. 107: it aims to promote occupational health and safety in the workplace in broad terms. Section 26.2(1) shares that purpose.

(...)

[19] Finally, two additional external contextual factors are relevant for this inquiry... These considerations are both within the expertise and capacity of the Board.

[20] First, the Board adopted s. 26.2(1) of the Regulation in its present form in 2008 in response to a concern in the province about the growing rate of workplace fatalities in the forestry sector. This concern is plainly one of “occupational health and safety and occupational environment”, the focus of s. 225. The Board’s adoption of s. 26.2(1) of the Regulation in response to this significant workplace safety concern provides a clear illustration of why a legislature chooses to delegate regulation-making authority to expert bodies — so that gaps can be addressed efficiently.

[21] Second, s. 26.2(1) is a natural extension of an owner’s duty under s. 119(a) to maintain the worksite. Forestry worksites are constantly changing due to weather and other natural occurrences. To maintain the worksite in the face of the dynamic interaction of natural forces and work practices, the owner must ensure that the work in question is planned and conducted safely. Therefore, to fulfill the duty of maintaining a safe worksite under s. 119 of the Act, the owner must ensure that the work is planned and conducted safely. The two go hand in hand.

[22] I conclude that s. 26.2(1) represents a reasonable exercise of the delegated power conferred on the Board by s. 225 of the Act to “make regulations [it] considers necessary or advisable in relation to occupational health and safety and occupational environment”.

[23] It is true that this Court, in *Dunsmuir*, referred to prior jurisprudence to indicate that true questions of jurisdiction, which some suggest the present matter raises, are subject to review on a standard of correctness — noting, however, the importance of taking a robust view of jurisdiction. Post-*Dunsmuir*, it has been suggested that such cases will be rare: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 33. We need not delve into this debate in the present appeal. Where the statute confers a broad power on a board to determine what regulations are necessary or advisable to accomplish the statute’s goals, the question the court must answer is not one of *vires* in the traditional sense, but whether the regulation at issue represents a reasonable exercise of the delegated power, having regard to those goals, as we explained in *Catalyst* and *Green*, two recent post-*Dunsmuir* decisions of this Court where the Court unanimously identified the applicable standard of review in this regard to be reasonableness. In any event, s. 26.2(1) of the Regulation plainly falls within the broad authority granted by s. 225 of the Act as an exercise of statutory interpretation. This is so

even if no deference is accorded to the Board and if we disregard all of the external policy considerations offered in support of its position.

In contrast, Côté, Rowe and Brown JJ, each writing a dissenting judgment, would have applied a correctness standard to the question of whether the Board had the authority to enact s. 26.2(1). Justice Côté’s judgment is illustrative:

A. *Standard of Review*

[56] Correctness is the appropriate standard of review for determining whether a regulator exceeded the scope of its statutory authority to promulgate regulations. The first question in this appeal is jurisdictional in nature: whether the Board has the authority to adopt a regulation of this nature *at all*. This is not a challenge to the merits or the substance of a regulation. This inquiry lends itself to only one answer: either the Board acted within its powers, or it did not. There is no “reasonable” range of outcomes when a court is asked to determine whether the Board — which possesses only the authority that is delegated to it by statute — exercised its legislative powers in accordance with its mandate. In this context, correctness simply means that a reviewing court must engage in a *de novo* analysis of the regulator’s statutory authority to promulgate regulations, applying the usual approach to statutory interpretation, and determine whether the impugned regulation falls within that grant of authority.

[57] This appeal highlights an important distinction between actions taken by a regulator in an adjudicative capacity and actions taken by a regulator in a legislative capacity — a distinction that is central to the policy concerns that animate judicial review and the traditional standard of review analysis.

[58] A regulator (in this case, the Board) acts in an adjudicative capacity when it resolves case-specific disputes that are brought before it in accordance with its statutory mandate and applicable law. It is in this context that a tribunal may bring technical expertise to bear or exercise discretion in accordance with policy preferences. It is also in this context that there may exist a range of reasonable conclusions, as it may not be possible to say that there is one “single ‘correct’ outcome” for any given dispute (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2009] 1 S.C.R. 190, at para. 146, per Binnie J.).

[59] On the other hand, a regulator acts in a legislative capacity when it enacts subordinate legislation pursuant to a statutory grant of power. The scope of the body’s regulation-making authority is a question of pure statutory interpretation: Did the legislature permit that body to enact the regulation at issue, or did the body exceed the scope of its powers? A regulator does not possess greater expertise than the courts in answering this question. Moreover, a challenge to a regulator’s exercise of legislative powers involves no case-specific facts and no direct considerations of policy, as the merits of the impugned regulation are not at issue. In this context, respect for legislative intent — a cornerstone of judicial review — requires that courts accurately police the boundaries of delegated power.

[60] Here, the Board was unquestionably engaged in an exercise of legislative rather than adjudicative power when it enacted s. 26.2(1) of the Regulation, as the Board itself

concedes. To determine the standard of review, the question the Court must answer is whether this Board is entitled to any deference as to its own conclusion that it had the authority to enact the impugned regulation.

[61] The standard of review framework established in *Dunsmuir* was developed in the context of a challenge to a tribunal's exercise of adjudicative power. The issue there was the validity of an adjudicator's conclusions regarding an employee's dismissal and the standard of review that should apply. *Dunsmuir*'s categories of reasonableness review and correctness review must be understood in that context. In contrast, this case does not raise the issue of whether a case-specific dispute was resolved appropriately. Rather, the issue it raises is whether a regulator exceeded its authority when it enacted an impugned regulation, which is an exercise of legislative power.

[62] However, *Dunsmuir* is instructive. It recognized that “[a]dministrative bodies must . . . be correct in their determinations of true questions of jurisdiction or *vires*” (para. 59 (emphasis added)). It also cited approvingly to *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, in which this Court considered whether a Calgary bylaw that froze the issuance of taxi plate licences was within the city's statutory powers under the *Municipal Government Act*, S.A. 1994, c. M-26. Writing for a unanimous court, Bastarache J. stated, at para. 5:

The only question in this case is whether the freeze on the issuance of taxi plate licences was *ultra vires* the City under the *Municipal Government Act*. Municipalities do not possess any greater institutional competence or expertise than the courts in delineating their jurisdiction. Such a question will always be reviewed on a standard of correctness: *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 29. There is no need to engage in the pragmatic and functional approach in a review for *vires*; such an inquiry is only required where a municipality's adjudicative or policy-making function is being exercised. [Emphasis added.]

[63] *United Taxi* squarely governs this case. It recognized the distinction between legislative and adjudicative power (see also *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 51) and the imperative of applying correctness review where there is a direct challenge to the *vires* of a regulation. This is why *Dunsmuir* held that true questions of jurisdiction *must* be reviewed on the standard of correctness. Unlike exercises of adjudicative power, which may be reviewed for reasonableness under *Dunsmuir* and its progeny, depending on the particular context, questions of *vires* can attract only one answer. As a result, lower courts have generally understood the enactment of subordinate legislation to be subject to correctness review. [citations omitted]... Indeed, in this case, it is instructive that the trial court (2015 BCSC 1098, 2 Admin. L.R. (6th) 148), the Court of Appeal (2016 BCCA 473, 405 D.L.R. (4th) 621), West Fraser, and the Board all agreed that correctness was the appropriate standard of review for the *vires* question.

[64] *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, and *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, are not to the

contrary. Neither case addressed the question at issue here: whether a regulator had the *authority* to adopt a particular regulation. Rather, both involved challenges to the *substance or merits* of an impugned regulation. In *Catalyst*, the issue was whether a municipality had exercised its taxation powers in a reasonable manner by imposing a particular tax rate for a certain class of property (para. 7). There was no question as to the municipality's authority to impose the tax rate, since the relevant enabling legislation gave municipalities "a broad and virtually unfettered legislative discretion to establish property tax rates" (para. 26). In *Green*, the issue was whether the Law Society of Manitoba had acted reasonably in imposing particular rules of conduct. As in *Catalyst*, there was no question that the enabling legislation provided "clear authority for the Law Society to create a [continuing professional development] program" (para. 44).

[65] Moreover, there were policy considerations in both cases that militated against correctness review. In *Catalyst*, where the parties agreed that reasonableness was the appropriate standard of review, the Court relied on the fact that municipalities are democratic institutions. Applying reasonableness review in this context ensures that courts "respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable" (para. 19). This was especially compelling given that a "deferential approach to judicial review of municipal bylaws has been in place for over a century" (para. 21) — a historical tradition that does not exist here. *Green* invoked the same democratic accountability rationale in the context of an impugned Law Society rule because benchers "are elected by and accountable to members of the legal profession", the only persons to whom the rules apply (para. 23).

[66] Here, the democratic accountability rationale counsels in favour of the correctness standard. The Board is an unelected institution that may exercise only the powers the legislature chose to delegate to it. The correctness standard ensures that the Board acts within the boundaries of that delegation and does not aggrandize its regulation-making power against the wishes of the province's elected representatives.

[67] I take no issue with the notion that courts should interpret statutory authorization to promulgate regulations in a broad and purposive manner, in accordance with modern principles of interpretation. This is precisely how the Court approached the issue in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810. But that proposition is quite different from the idea that courts should defer to a regulator's incorrect conclusion as to its authority to enact a particular regulation. It is still possible to interpret statutory mandates broadly and purposively while recognizing that there can be only one answer to the question of whether a regulator exceeded its mandate in promulgating an impugned regulation.

(...)

[70] For these reasons, I am of the view that correctness is the appropriate standard of review...

[Justice Côté noted that the majority had not, in her view, adequately explained the basis for applying a reasonableness analysis, nor had it addressed its previous decision in *United Taxi*

or commented on the distinction between a decision maker's exercise of legislative power and adjudicative power.]

Justice Brown agreed that a correctness standard applied to the question of *whether* the Board had the authority to adopt the regulation, but faulted the majority for its overly intrusive review of *how* the Board had exercised its authority:

[117] Thirdly, I respectfully disagree with the Chief Justice's framing of the issue before the Court as being whether the Board's adoption of s. 26.2(1) represents a reasonable exercise of its delegated power under the *Workers' Compensation Act*, R.S.B.C. 1996, c. 492. While the judicial role properly and necessarily includes seeing that statutory delegates operate within the bounds of their grant of authority, the overall "reasonableness" of *how* a statutory delegate has chosen to exercise its lawful authority is *not* the proper subject of judicial attention. In short, while the Board's *authority* to regulate is (and must be) reviewable, the Board's chosen *means* of regulation are — subject to what I say below about *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 — a matter for the Board, and not for this or any other court.

[118] The Chief Justice's reasons on this point go well beyond this Court's judgment in *Catalyst* by effectively recognizing a new generalized basis for judicial review of the regulatory means chosen by statutory delegates acting within the bounds of their grant of legal authority. By way of explanation, unreasonableness, as a ground recognized in *Catalyst* for invalidating an action by a statutory delegate, operates narrowly (and only once *vires* has been established). As this Court explained in *Catalyst*, at paras. 21 and 24, the sorts of measures which, in the context of municipal bylaws, would be illegitimate for municipal councillors to take are those which are unreasonable in the sense described by Lord Russell C.J. in *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.):

But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*." [pp. 99-100]

Unreasonableness, in the sense affirmed in *Catalyst*, therefore concerns factors or considerations which have long been understood as illegitimate in the context of municipal governance (e.g. *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299), and not factors which might lead a reviewing court to think a measure "unreasonable" in the sense of being merely unnecessary or inadvisable in light of the goals of a particular enabling statute.

[119] The point merits restating: the issue before us is not directed to whether the regulation "represents a reasonable exercise of the delegated power": Chief Justice McLachlin's reasons, at para. 23. Rather, the issue is whether the Board is *authorized to adopt* the Regulation at issue. I note that the parties in the present appeal and the courts below all viewed the s. 26.2(1) issue as a matter of jurisdiction or *vires*.

[120] It follows that I also reject the Chief Justice's sidestepping of the jurisdictional inquiry in favour of a review of various contextual factors which are said to support reasonableness review: Chief Justice McLachlin's reasons, at paras. 19-21. If the Board's adoption of s. 26.2(1) presents a jurisdictional question — which the Chief Justice does not deny — such contextual factors are irrelevant.

In Justice Rowe's view, the review of the validity of the Board's regulation should proceed in two steps:

[127] ... The first relates to jurisdiction "in the narrow sense of whether or not the [board] had the authority to make the inquiry" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 59). The second is a substantive inquiry into the exercise of the grant of authority: "... the substance of [the regulations] must conform to the rationale of the statutory regime set up by the legislature" (*Catalyst*, at para. 25). Both steps involve interpretation of the authorizing statute, the first focusing more on the grant of regulation-making authority, the second having regard more generally to the scheme and objects of the statute.

[128] Without referring to the two steps I have noted above, in effect the Chief Justice addresses the first in paras. 10-11 and the second in paras. 12-22. With the foregoing comment, I concur with her analysis that s. 26.2(1) of the *Occupational Health and Safety Regulation*, B.C. Reg. 296/97, is *intra vires*.

It now appears that questions relating to the interpretation of decision makers' authority to enact by-laws or regulations will be subject to the robust approach to reasonableness review laid out in *Vavilov*. This is apparent because both *Green*, discussed in the preceding extract, and *West Fraser Mills* were cited by the *Vavilov* majority, at para 66, as cases illustrating most clearly the difficulty in distinguishing "exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute." This approach was also recently confirmed by the British Columbia courts in *1120732 B.C. Ltd. v Whistler (Resort Municipality)*, 2019 BCSC 984, aff'd 2020 BCCA 101. In a pre-*Vavilov* decision, the chambers judge, applying the two-step approach described by the Supreme Court in *United Taxicab Drivers'*, had used a correctness standard to determine whether the municipality had the statutory authority to adopt a Zoning Amendment Bylaw and a reasonableness standard to determine whether the Bylaw itself was reasonable. The British Columbia Court of Appeal rejected this segmented approach:

34 In *Vavilov*, the Supreme Court of Canada instituted a major change to the framework of judicial review, in addition to providing guidance on the application of the reasonableness standard of review. The change is that there will now be a presumption that reasonableness is the applicable standard in all cases and that the presumption can be rebutted only in two types of situations. The first way the presumption can be rebutted is when the legislature has indicated that a different standard should apply. The second way is when the rule of law requires that the standard of correctness should be applied.

35 For the purposes of this appeal, the Court decided that, while the rule of law requires the correctness standard to be applied to questions related to the jurisdictional boundaries between two or more administrative bodies, it does not require the correctness standard to be applied to all jurisdictional questions. The Court specifically stated that jurisdictional questions will no longer be recognized as a distinct category attracting correctness review: para. 65. The result is that the jurisdictional power of an administrative body is to now be reviewed on the reasonableness standard unless there is a competing administrative body that may have jurisdiction.

36 The appellants submit that *Vavilov* does not change the two-step process used by the chambers judge and that, as the council gave no reasons to justify the statutory authority for its enactment of the Zoning Amendment Bylaw, it is for this Court to interpret the legislation and determine whether there was statutory authority. They say that, under the reasonableness analysis dictated by *Vavilov*, a bylaw that exceeds the statutory authority is unreasonable.

37 The Municipality says there is no longer a two-step process and the sole question is whether the outcome is reasonable. In my view, this is a matter of semantics. Where, as here, no reasons for the decision are given, the focus of a reasonableness analysis will be on the outcome (*Vavilov* at para. 138). However, a decision can be challenged as being unreasonable on two or more bases, and it may be appropriate to the reviewing court to consider each basis separately. The important point is that the two-step process used by the chambers judge is no longer necessary as a result of a different standard of review being applicable to different types of challenges to the decision.

38 The effect of the appellants' submissions on the standard of review is that this Court must interpret the relevant provision of the *Local Government Act* (s. 479) and decide whether the adoption of the Zoning Amendment Bylaw exceeded the statutory authority given to the Municipality. In my view, this approach would be contrary to *Vavilov*.

39 If this Court were to itself interpret the *Local Government Act* to determine whether the Zoning Amendment Bylaw falls within the statutory authority of the Municipality, it would be applying a correctness standard. That is the opposite of the direction of the Supreme Court of Canada that there is now to be a presumption in favour of the reasonableness standard on all questions, and contrary to the express statement in *Vavilov* that jurisdictional questions will no longer be a distinct category attracting the correctness standard.

40 At para. 83 of *Vavilov*, the Court commented that the role of the reviewing court is to review and, as a general rule, the reviewing court should refrain from deciding the issue itself. Later in its reasons, the Court specifically addressed the topics of statutory interpretation and municipal bylaws.

41 At para. 123 of *Vavilov*, in discussing the application of the reasonableness standard to questions of statutory interpretation, the Court commented that there will be cases where the administrative body did not explicitly consider the relevant statutory provisions. Rather than permitting the reviewing court to embark on its own interpretation, the Court

stated that the reviewing court may be able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable.

42 At para. 137 of *Vavilov*, the Court referred to bylaws passed by a municipality as an example of a situation where the administrative body will typically not give reasons for its decision. The Court did not say that this is a basis for the reviewing court itself to interpret the enabling legislation but, instead, the Court made the point that the reviewing court must look at the record as a whole to understand the municipality's decision.

43 The appellants particularly rely on two passages in *Vavilov*. The first passage is contained in the section of the reasons in which the Court discussed its decision to cease recognizing jurisdictional questions as a distinct category attracting correctness review:

[68] Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it [to] one.

[Emphasis in original.]

The observation that there may be only one reasonable interpretation of a statutory provision was previously made by the Court in *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 (S.C.C.) at para. 38.

44 There may be only one reasonable interpretation of the relevant statutory provisions in the present case and, if so, the application of the reasonableness standard of review will produce the same result as the correctness standard. However, that does not mean that we should apply the correctness standard. If the appellants' argument were taken to its natural conclusion, there would be only one reasonable interpretation of all statutory provisions. That is not the law.

45 The other passage in *Vavilov* particularly relied upon by the appellants is contained in the section of the reasons in which the Court discussed the interpretation of the statutory scheme governing administrative bodies:

[110] Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other

language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

46 The appellants say that, in the present case, the Legislature used precise and narrow language that delineated the power given to the Municipality in the governing statutory provision (s. 479 of the *Local Government Act*) and that, according to the above passage, the Municipality's ability to interpret the provision was tightly constrained. That may be the case, but it does not affect which standard of review is to be applied. The reasonableness standard is the standard that must be applied and, if the language is as narrow as the appellants contend, there may be only one reasonable interpretation of the provision. In a similar vein, at para. 112 of *Vavilov*, the Court discussed the constraining effect of precedents on the issue in question, and the appellants say there are binding precedents in the case at bar that make the Municipality's interpretation of its statutory power unreasonable. These matters go to the application of the reasonableness standard, not to the choice of which standard of review applies.

[The Court of Appeal determined that as there were at least three ways the Municipality's Council could have reasonably concluded that s. 479 of the *Local Government Act* gave it the power to adopt its Zoning Amendment Bylaw and the reasonableness of the Council's decision to adopt the Bylaw was not otherwise being challenged, its decision to enact the Bylaw would not be disturbed on judicial review.]

### Note

*Innovative Medicines Canada v Canada (AG)*, [2020 FC 725](#) at paras 64-72 is another example of a Court applying the reasonableness standard to review delegated legislation, this time, regulations under the *Patent Act*.

## LINGERING QUESTIONS

As discussed earlier in this chapter, the Supreme Court in *Vavilov* has grappled with many of the uncertainties associated with the standard of review framework as it developed in the years following *Dunsmuir*. These have included issues such as the role of a factor-based contextual analysis and the relevance of the category of jurisdictional questions. Yet *Vavilov* has both raised its own new questions and left others unresolved. New questions include the scope of the constitutional guarantee of judicial review after *Vavilov* and whether the concept of jurisdiction, despite its “elimination” as a category of questions requiring correctness review, will continue to play a role based on privative clauses and statutory rights of appeal. Among the questions left unresolved is that of the relationship between the *Vavilov* standard of review framework and review for breaches of procedural fairness.

### Limited appeal rights and “questions of jurisdiction”

Considering *Vavilov*'s elimination of the category of true questions of jurisdiction, how should reviewing courts now address statutory rights of appeal that are limited to questions of “law and jurisdiction” or to “questions of jurisdiction”? *Vavilov* arguably subsumes, at para 109, questions of jurisdiction into the more general category of questions of law relating to the interpretation by a decision maker of its statutory grant of authority. To illustrate, in *Bell Canada, supra*, s. 31(2) of the *Broadcasting Act* provided for an appeal, with leave, of CRTC decisions or orders on a question of law or a question of jurisdiction. Rather than differentiating between questions of law and jurisdiction, the Court simply observed, at para 35, that the question of whether the CRTC lacked the authority to issue a specific order prohibiting simultaneous substitution for the Super Bowl under s. 9(1)(h) of the *Broadcasting Act* raised a question “that goes directly to the limits of the CRTC’s statutory grant of power, and therefore plainly falls within the scope of the statutory appeal mechanism of s. 31(2).” If questions of jurisdiction are simply a subspecies of questions of law, should the inclusion of the term of “jurisdiction” in a statutory right of appeal on questions of law and jurisdiction be ignored as redundant?

### Scope of the constitutional guarantee of judicial review

Relying on *Crevier, supra*, the majority in *Dunsmuir*, at para 31, held that “judicial review is constitutionally guaranteed in Canada, particularly with regards to the definition and enforcement of jurisdictional limits.” When this constitutional guarantee was first formulated by the Supreme Court in 1981, in *Crevier*, Laskin CJC opined, at 238, that issues of jurisdiction were not far removed from issues of constitutionality and “rose above and are different from errors of law, whether involving statutory construction or evidentiary matters or other matters.” Yet in *Vavilov*, while recognizing that *Dunsmuir* and *Crevier* established that judicial review is protected by s 96 of the *Constitution Act, 1867*, the Court appears to have given up on drawing a boundary

between jurisdictional questions and questions of law, deciding that, absent a statutorily-defined standard of review or statutory right of appeal, these are all reviewable on a robust reasonableness standard, provided they were not questions of constitutionality, general questions of law of central importance to the legal system as a whole, or questions relating to the dividing line between the competing jurisdictions of two or more administrative decision makers. As Professor David Mullan notes, this “declaration of confidence” that questions of authority should be incorporated into a robust reasonableness review:

... begs the question as to the precise nature of the constitutional guarantee with respect to questions as to whether a tribunal has kept within its “lawful authority”.

In *Dunsmuir*, Bastarache and LeBel JJ. described the judicial review role of the courts in a general sense as that of mediating the sometimes competing claims of legislative supremacy and the protection of the rule of law. In *Vavilov*, the majority also sets up the rule of law as the general principle on which the court should be relying in the conduct of judicial review. They then assert that “respect for the rule of law requires courts to apply the standard of correctness” to the three correctness categories that for the moment anyway continue to exist. Read together with the majority’s reconceptualizing of issues of authority, what this might amount to is the following articulation of the constitutional guarantee; the territory which is immune from legislative derogation or a minimum which cannot be diminished:

1. correctness review for constitutional questions, questions of central importance to the legal system as a whole, and issues involving the jurisdictional boundaries between two or more administrative decision makers; and
2. particularly robust reasonableness review for issues which bear upon the lawful authority of an administrative decision maker.

It is unfortunate, however, that the court has left this core or foundational question to this kind of speculation.

David Mullan, *Judicial Scrutiny, supra*, at 436-437.

If robust reasonableness review is a new constitutional minimum for questions of law falling outside the correctness categories (including questions bearing on the scope of an administrative decision maker’s authority), could it be argued that statutes expressly providing for patent unreasonableness review – including British Columbia’s *Administrative Tribunals Act* – fall short of this minimum standard and are unconstitutional? This would arguably be the case unless it could be shown that courts interpret and apply patent unreasonableness review in a manner consistent with the *Vavilov* majority’s definition of reasonableness. Indeed, in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 339, the Supreme Court noted that, while legislatures may specify a statutory standard of review, the terms of the statute must be read purposefully in light of its text, context, and objectives and that a key part of this statutory context is the common law of judicial review:

[19] Generally speaking, most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them, such as the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45, can only sensibly be interpreted in the common law context because, for example, it provides in s. 58(2)(a) that “a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable”. The expression “patently unreasonable” did not spring unassisted from the mind of the legislator. It was obviously intended to be understood in the context of the common law jurisprudence, although a number of *indicia* of patent unreasonableness are given in s. 58(3). Despite *Dunsmuir*, “patent unreasonableness” will live on in British Columbia, but the *content* of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law. That said, of course, the legislature in s. 58 was and is directing the B.C. courts to afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention.

For an analysis of this question which concludes that the ATA is unconstitutional because, by preserving patent unreasonableness review, it is inconsistent with the rule of law which requires reasonableness review as a constitutional floor, see: Connor Bildfell, “Reasonableness as a Constitutional Floor: Is the Standard of Patent Unreasonableness Inconsistent with the Rule of Law?” (2020), 33 C.J.A.L.P. 229.

As a further indicator of how *Vavilov*’s changes to the *Dunsmuir* reasonableness standard may impact the standard of patent unreasonableness, the British Columbia Supreme Court, in *Team Transport Services Ltd. v Unifor*, 2020 BCSC 91 at para 15, noted that “to the extent that *Dunsmuir* reasonableness prescribes a methodology of judicial deference to the reasoning in the decision under review, review on the basis of patent unreasonableness must be at least as methodologically deferential”.

### **Review of decisions for breach of procedural fairness**

In *Vavilov*, the Court failed to address expressly and resolve an issue that has attracted controversy in lower and appellate courts. The issue is whether the standard of review framework applies to the review of decisions for breach of procedural fairness and, if so, what standard of review applies to such review. This issue has been debated vigorously among judges of the Federal Court of Appeal. The case for reasonableness review of breaches of procedural fairness was laid out by Justice David Stratas in *Maritime Broadcasting System Ltd. v Canadian Media Guild*, 2014 FCA 59, which involved the judicial review of a decision of the Canadian Industrial Relations Board to certify the respondent CMG as the bargaining agent for the applicant’s employees. Maritime Broadcasting had claimed that the CIRB breached procedural fairness by allowing the CMG to file submissions to which it did not have an opportunity to reply:

50 Looking at the matter from first principles, there is a case for the application of the reasonableness standard. As is often said, the concept of procedural fairness is "eminently variable and its content is to be decided in the specific context of each case" (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at paragraph 21). The Board is best placed to decide this. It, not the reviewing court, is the fact-finder. It knows the circumstances in particular proceedings before it. It has expertise in the dynamics of labour relations and has policy appreciation. Armed with these advantages, the Board is master of its own procedure, free to design, vary, apply and, in reconsideration proceedings, assess its procedures to ensure they are fair, efficient and effective...

51 Looking at the matter from the standpoint of the decided cases, the case for the reasonableness standard is also strong. Perhaps the best support for this is in *Dunsmuir, supra*, the recent authority that changed the direction of Canadian administrative law. An administrative decision maker's decision regarding the procedures to be followed in a particular case is often a discretionary one. What does *Dunsmuir* say about discretionary decisions? Paragraph 53 of *Dunsmuir* tells us that discretionary decisions are presumptively subject to reasonableness review. Further, paragraph 54 of *Dunsmuir* tells us that where an administrative decision maker has "developed particular expertise in the application of a general common law...rule in relation to a specific statutory context" — in the case of the Board, the common law of procedural fairness in relation to the specific statutory context of the *Canada Labour Code* — it is entitled to deference. For good measure, in paragraph 54 of *Dunsmuir*, the Supreme Court added that "[a]djuration in labour law" was a "good example of the relevance of this approach." In the case at bar, the Board's application of the law of procedural fairness to the particular facts before it is indistinguishable from any other decision where an administrative decision maker applies law with which it is familiar, such as its home statute, to a set of facts before it...

[Justice Stratas noted that while the Court found that procedural fairness did not apply to the decision at issue in *Dunsmuir*, it said nothing about what standard of review would apply if it did.]

53 I note that six years have passed since *Dunsmuir* and the Supreme Court has not addressed the standard of review of an adjudicative tribunal's decision on procedural matters. I acknowledge that in *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.) at paragraph 43, the Supreme Court said in passing and in *obiter* (in a case not involving procedural fairness) that *Dunsmuir* affirmed correctness as the standard of review for procedural matters. But *Dunsmuir* did not actually do that: see the similar observation of Evans J.A. in *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 (F.C.A.) at paragraph 38. Looking only at *Dunsmuir*, paragraphs 53 and 54 stand alone.

54 Many pre-*Dunsmuir* authorities are consistent with the position taken in paragraphs 53 and 54 of *Dunsmuir*. These pre-*Dunsmuir* authorities have never been the subject of judicial criticism and remain good law today.

55 By my count, six of these are from the Supreme Court. In *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at paragraph 27, the Supreme Court

held that in deciding whether an administrative decision maker has been procedurally fair, a reviewing court must take into account and respect the particular choices made by the decision maker: see also *Prasad v. Canada (Minister of Employment & Immigration)*, [1989] 1 S.C.R. 560 (S.C.C.) at pages 568-569. On other occasions, the Supreme Court has deferred to administrators' procedural choices: see, e.g., *Deloitte & Touche LLP v. Ontario (Securities Commission)*, 2003 SCC 61, [2003] 2 S.C.R. 713 (S.C.C.) (decided at almost the same time as C.U.P.E.); *McCaffrey v. Bibeault*, [1984] 1 S.C.R. 176 (S.C.C.) (labour tribunal decision about participatory rights in a bargaining unit determination). The Supreme Court has also stated that "[c]onsiderable deference is owed to procedural rulings made by a tribunal with the authority to control its own process": *VIA Rail Canada Inc. v. Canadian Transportation Agency*, 2007 SCC 15, [2007] 1 S.C.R. 650 (S.C.C.) at paragraph 231. Even the very case that marked the birth of the modern law of procedural fairness — *Nicholson v. Halldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311 (S.C.C.) — suggests the appropriateness of deference. There, the Supreme Court found that Nicholson was entitled to a hearing as a matter of procedural fairness but declined to go further. It left the manner of hearing — oral or written — to the choice of the Board of Commissioners. Reviewing procedural decisions of administrative decision makers on the basis of correctness sits uneasily with these authorities. (...)

[A review of authorities from appellate and lower courts is omitted]

57 Does reasonableness review undercut the ability of this Court in appropriate circumstances to enforce fundamental matters of procedural fairness? Definitely not. Reasonableness review does not take anything away from reviewing courts' responsibility to enforce the minimum standards required by the rule of law. In other words, it is not unduly deferential. Indeed, in some cases, the nature or importance of the procedural fairness issue, the severe effect of the alleged procedural defect upon the aggrieved party, the similarity of the procedures under review to court procedures, or any combination of these may severely constrain or eliminate the range of acceptable and defensible options or margin of appreciation open to the administrative decision maker on the facts and the law (see paragraphs 34-35, above)...

58 Further, legislative standards and legal standards worked out in the jurisprudence can constrain the range of acceptable and defensible options or margin of appreciation open to the administrative decision maker on the facts and the law... Given the well-defined legal standards set by the existing case law on procedural fairness, the range of acceptable and defensible options or margin of appreciation open to the administrative decision maker often will be constrained. There will be cases, however, where the nature of the matter and the circumstances before the administrative decision maker should prompt the reviewing court to give the decision maker a wider margin of appreciation.

59 Before applying these principles to the facts of this case, I note the reasons of my colleague, Justice Evans, released just this week in *Re:Sound, supra*. In *Re:Sound*, Justice Evans acknowledged the "black-letter rule" that "courts review allegations of procedural unfairness by administrative decision makers on a standard of correctness" (at paragraph 34). But, after considering some of the same authorities I have considered above — and

consistent with the above analysis — he modified the "black-letter rule" by endorsing the need for deference when reviewing procedural matters in certain circumstances (at paragraph 42):

[W]hether an agency's procedural arrangements, general or specific, comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient decision-making on the other. In recognition of the agency's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar. [my emphasis]

60 In that passage, I do not see Justice Evans as advocating a new standard of review, alongside correctness review and reasonableness review, called "respectful correctness" or "correctness with a degree of deference." *Dunsmuir* simplified the standard of review to two categories — a non-deferential one called correctness and a deferential one called reasonableness — and there is no room for us to introduce a new third one. Nor do I see Justice Evans as applying the correctness standard that is understood in the cases. Correctness review has always been review without any deference. "Correctness with a degree of deference" is a *non-sequitur*. It would be like describing a car as stationary but moving.

61 I prefer to interpret Justice Evans' words in *Re:Sound* in a manner faithful to *Dunsmuir*, the later cases of the Supreme Court and the settled cases of this Court, all of which bind us (summarized in paragraphs 34-35 and 50-58 above). These cases tell us that review conducted in a manner "respectful of the agency's choices" or with a "degree of deference" to those choices is really a species of deferential review — i.e., the reasonableness standard, a standard the Supreme Court in *Dunsmuir*, *supra* described (at paragraphs 47-48) as the only "respectful" or "deferential" one.

62 In *Re:Sound*, Justice Evans considered the decision maker to be entitled to some leeway — a certain range of acceptability and defensibility — i.e., the standard of reasonableness described in *Dunsmuir*, *supra* at paragraphs 47-48. But, in the particular circumstances of *Re:Sound*, he has allowed only a little leeway, consistent with the view of the Supreme Court and this Court that the range of acceptability and defensibility can be narrow (see paragraphs 57-58 above). In *Xwave Solutions*, *supra*, Justice Evans gave the decision maker a much broader leeway. I am not inclined to call that "correctness review with plenty of deference," but rather reasonableness review in circumstances where the decision maker has a broad range of acceptable and defensible options open to it, or a wider margin of appreciation.

63 In my view, the case at bar is one where the Board should be given some leeway under reasonableness review. The Board understood the requirements of procedural fairness, citing two of its own decisions that were based on relevant jurisprudence from the Supreme Court of Canada. The Board's task in this case was to apply those standards in a

discretionary way to the factually complex matrix before it, a task informed by its appreciation of the dynamics of the case before it and its knowledge of how its procedures should and must work, all in discharge of its responsibility to administer labour relations matters fairly, justly and in an orderly and timely way. It did so under the umbrella of legislation empowering the Board to consider its own procedures based on its appreciation of the particular circumstances of cases and to vary or depart from those procedures when it considers it appropriate: *Canada Industrial Relations Board Regulations 2001, supra*, section 46.

64 Maritime Broadcasting does not point to any particular misunderstanding of the Board as to the relevant legal concepts. Rather, it invites us to stand in the shoes of the Board and apply the principles in this case. As I have said, this is inapt.

65 In my view, there are no grounds to quash the Board's procedural decision. As is seen in paragraphs 15-31 above, the Board had ample reason based on law and evidence to conclude that its original decision was procedurally fair. I would add that if I, an appellate judge with no labour relations experience, were forced to step into the shoes of the Board and assess the fairness of the Board's original decision on a correctness standard, I would have agreed with the Board largely for the reasons it gave.

Justice Stratas's two colleagues expressly disagreed with his conclusions on the standard of review and applied a correctness standard. However, in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, a panel of the Federal Court of Appeal unanimously supported the application of the reasonableness standard, though it recognized, at para 71, that the Court was divided on the question, creating a "jurisprudential muddle." Since then, it appears that most Federal Court of Appeal judges have accepted the conventional position – reflected in Justice Donald Rennie's judgment in *Canadian Pacific Railway v Canada (Attorney General)*, 2018 FCA 69 – that the standard of review analysis does *not* apply to the review of decisions on procedural fairness grounds, a position also held by most appellate and lower courts in Canada:

34 Procedural fairness is a matter for the reviewing court to determine and, in so doing, "the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be 'correctness'" (*Khela v. Mission Institution*, 2014 SCC 24 (S.C.C.) at para. 79, [2014] 1 S.C.R. 502 (S.C.C.) (*Khela*)). The use of the word "continues" is instructive. *Khela* did not change what Evans J.A. previously characterized as "[t]he black-letter rule" that allegations of procedural fairness are reviewed on a standard of correctness...

35 What "correctness" means in the context of procedural fairness is a question which I will address shortly.

36 Judgments of this Court subsequent to *Khela* have confirmed that the standard of review with respect to procedural fairness matters is correctness... [A list of supporting decisions is omitted].

37 There is commentary in some decisions of this Court that the law on this question is unsettled. Closer examination, however, reveals that this is not the case...

[A discussion of Maritime Broadcasting and the cases relying on that decision is omitted.]

39 The argument advanced before this Court is that procedural fairness is assessed on a correctness basis with considerable deference to the tribunal's procedural choices. As long as the procedural choices are reasonable, the correctness standard is met. The assertion, which is not infrequently heard, is circular and in my view, confuses two separate parts in the analysis of an alleged breach of procedural fairness.

40 I return to the core principles of procedural fairness. It is understood that the answer to what fairness requires in any particular circumstance is highly variable and contextual... The content or degree of fairness required is informed by the five, non-exhaustive contextual factors identified in *Baker v. Canada (Minister of Citizenship & Immigration)*... Of those factors, the fifth, the degree of deference accorded to the decision maker, is relevant here.

41 We know from *Baker* that the deference paid to a tribunal's choice of procedure is one factor which assists in calibrating the degree of procedural fairness required. It assists, but it does not control. The deference that may be shown to tribunals to make procedural choices does not mean that the ultimate question of whether the proceedings were, on a whole, fair is assessed on a reasonableness standard. This argument equates the contextual factors which are directed to determining the content of fairness (e.g., the sufficiency of a written versus an oral hearing) with the ultimate question - whether the party knew the case they had to meet, had an opportunity to respond and had an impartial decision maker consider their case fully and fairly. To contend that the standard of review is correctness with an element of deference thus marries two discrete questions.

(...)

[Justice Rennie observed that the Supreme Court's decision in *Khela, supra*, that some deference was owed to the Commissioner of Corrections' judgment as to whether documents should be disclosed was not directed to the question of standard of review but instead based on the specific language used in the *Corrections and Conditional Release Act*, SC 1992, c 20 which authorized the withholding of information when the Commissioner had "reasonable grounds to believe" that disclosure might threaten prison security, personal safety or the conduct of an investigation.]

44 The suggestion that procedural fairness is reviewed on a correctness standard with some deference is both confusing and unhelpful. It is confusing because the standard of review is applied to consideration of outcomes, and, as a doctrine, is not applied to the procedure by which they are reached. This is neither a new, nor startling observation. The point was made by Binnie J. in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 (S.C.C.):

[102] The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.

45 In *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27 (N.S. C.A.) at paras. 20-21, (2006), 241 N.S.R. (2d) 300 (N.S. C.A.), Cromwell J. (then at the Nova Scotia Court of Appeal) observed, to the same effect, that deference is owed to the decision maker's choice of procedure in determining the content of the duty of fairness but none is owed in determining whether the decision maker fulfilled that duty. Again, this reasoning recognizes that references to deference in the context of procedural fairness arise not in considering the standard of review, but in considering the fifth factor from *Baker*, informing the content of the duty of fairness.

46 Procedural fairness has been described as "the cornerstone of modern Canadian administrative law" ... and whether that duty has been fulfilled has, for decades, been treated as a legal question for the Court to answer... Deference is but one criterion amongst many that informs the content of fairness, but it is irrelevant in answering the question as to whether fairness has been met. *Dunsmuir* itself is an authority for the point.

47 It is useful to recall that in *Dunsmuir* there were two issues before the Court. The first concerned the adjudicator's decision as to whether provincial legislation permitted an inquiry into the employer's reason for dismissing an employee with notice or pay in lieu of notice. It was in relation to this issue that the Court considered the standard of review and determined that it should be reasonableness. But there was a second issue in *Dunsmuir*, long lost in the decade long debate precipitated by that decision. This orphaned issue concerned the nature of procedural fairness to be given to a public office holder when dismissed. The analysis of the procedural fairness question was considered discretely, hermetically sealed from the discussion of the standard of review. The standard of review played no role in answering the second question.

48 The point is made more clearly if reference is made to the measures of reasonableness articulated in *Dunsmuir* - justification, transparency and intelligibility. Those criteria allow a reviewing court to test the reasonableness of a decision and whether it falls "within a range of reasonable outcomes". They are devices by which a reviewing court conducts substantive review. As tools, they are of no avail in assessing whether the duty of fairness has been met. The reasonableness of a decision is of no consequence if it was reached in a procedurally unfair manner.

49 I note, parenthetically, the observation of Binnie J. in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (S.C.C.) at para. 102, [2009] 1 S.C.R. 339 (S.C.C.) (*Khosa*), that *Dunsmuir* says procedural fairness issues are determined on a correctness basis. As was observed in *Maritime Broadcasting*, at paragraph 79, this comment was made in passing and is *obiter*. There has also been academic commentary that this statement is in error, and that nothing in *Dunsmuir* merges the standard of review of decisions into procedural fairness (Edward Clark, "Reasonably Unified: The Hidden Convergence of Standards of Review in the Wake of *Baker*" (2018) 31 Can. J. Admin. L. & Prac. 1 at 8-9; The Hon. Simon Ruel, "What is the Standard of Review to Be Applied to Issues of Procedural Fairness?" (2016) 29 Can. J. Admin. L. & Prac. 259 at 268 (The Hon. Simon Ruel)). Nonetheless, the substance of the point, as opposed to its provenance, is consistent with the observation in *Khela* that correctness in the context of procedural fairness simply

means a court must be satisfied that the right to procedural fairness has been met. Nor do I understand Binnie J. to be departing from the distinction he drew in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 (S.C.C.), between substantive and procedural review.

50 This is why the Ontario Court of Appeal has recognized that "no standard of review analysis is necessary" in assessing procedural fairness (*Brooks v. Ontario Racing Commission*, 2017 ONCA 833 (Ont. C.A.) at para. 5). This conclusion is consistent with the observation that issues of procedural fairness have not been entangled in standard of review analysis (The Hon. John M. Evans, "View from the Top: Administrative Law in the Supreme Court of Canada 2016-2017" in Donald J.M. Brown & the Hon. John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Thomson Reuters Canada Limited, 2017) at 2017VT-14).

51 Other appellate courts have also, appropriately, questioned the role, if any, of the standard of review analysis in assessing procedural fairness. They have, in the end, used correctness to express the measure of whether the duty to provide procedural fairness has been met (*Boeing Canada Operations Ltd v. Winnipeg (City) Assessor*, 2017 MBCA 83 (Man. C.A.) at paras. 31-36, (2017), 23 Admin. L.R. (6th) 87 (Man. C.A.); *Eagle's Nest Youth Ranch Inc. v. Corman Park No. 344 (Rural Municipality)*, 2016 SKCA 20 (Sask. C.A.) at paras. 21, 26-29, (2016), 476 Sask. R. 18 (Sask. C.A.) (*Eagle's Nest*); *Spinks v. Alberta (Law Enforcement Review Board)*, 2011 ABCA 162 (Alta. C.A.) at paras. 23, 27, (2011), 46 Alta. L.R. (5th) 84 (Alta. C.A.) (*Spinks*)).

52 In *Khela*, the Supreme Court did not subsume or collapse a discrete doctrine of administrative law, the law of procedural fairness, into the standard of review applicable to substantive review...

53 In the same vein, the Court in *Khela* is very clear about the demarcation between the principles that govern substantive as opposed to procedural review (at paras. 79-80), in holding that reasonableness has no relevance to the question whether the duty of procedural fairness has been met:

[79] Third, the ability to challenge a decision on the basis that it is unreasonable does not necessarily change the standard of review that applies to other flaws in the decision or in the decision-making process. For instance, the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be "correctness".

[80] It will not be necessary to determine whether the decision made by the Warden in the instant case was unlawful on the basis of unreasonableness. As I will explain below, the decision was unlawful because it was procedurally unfair.

54 A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an

individual, whether a fair and just process was followed. I agree with Caldwell J.A.'s observation in *Eagle's Nest* (at para. 21) that, even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.

55 Attempting to shoehorn the question of procedural fairness into a standard of review analysis is also, at the end of the day, an unprofitable exercise. Procedural review and substantive review serve different objectives in administrative law. While there is overlap, the former focuses on the nature of the rights involved and the consequences for affected parties, while the latter focuses on the relationship between the court and the administrative decision maker. Further, certain procedural matters do not lend themselves to a standard of review analysis at all, such as when bias is alleged...

56 No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an *a priori* decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice - was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.

In *Vavilov*, the Supreme Court did not directly address the question of whether the standard of review framework applied to review for procedural fairness, although some aspects of its judgement may relate to the issue. In setting up the presumption of reasonableness review, the *Vavilov* majority appeared to indicate, at para 23, that its framework applied to merits review and not to procedural review:

Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions 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. [emphasis added]

Even so, at para 13, the majority described reasonableness review as "an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (emphasis added). Also, at para 25, the majority declared that "it is now appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of the decision will be reasonableness" (emphasis added). Finally, in examining the relationship between the duty to provide reasons (an aspect of the duty of procedural fairness) and reasonableness review, the Court noted at para 77 that the duty of procedural fairness was "eminently variable", inherently flexible and context-specific and

that, where a particular administrative decision making context gave rise to a duty of procedural fairness, “the specific procedural requirements that the duty imposed are determined with reference to all of the circumstances.”

Since *Vavilov*, Federal Court judges have on occasion struggled with the majority’s apparently conflicting signals on this issue (see, e.g., *Likhi v Canada (Citizenship and Immigration)*, 2020 FC 171). Yet they have in most cases emphasized paragraph 23 of that judgment to conclude that *Vavilov* did not change the law of judicial review for procedural fairness. Accordingly, for the most part, Federal Court judges continue to rely on the Federal Court of Appeal’s decision in *Canadian Pacific, supra*, noting that while the standard of review for procedural fairness most closely aligns with correctness, reviewing courts are essentially deciding whether the process is fair, having regard to all the circumstances: *Iqbal v Canada (Citizenship and Immigration)*, 2020 FC 170; *Alsaloussi v Canada (Attorney General)*, 2020 FC 364; *Naggayi v Canada (Citizenship and Immigration)*, 2020 FC 216.

Courts in other Canadian jurisdictions also have preserved the *status quo* by following pre-*Vavilov* jurisprudence or finding support in *Vavilov* itself. For example, in *Haddad Pour v The National Dental Examining Board of Canada*, 2020 ONSC 555, the Ontario Divisional Court observed, at para 6, that: “There is no standard of review that applies to issues of procedural fairness; rather, as held in *Vavilov*, the procedural requirements applicable to particular cases are to be determined in accordance with the five factors in *Baker*....” Similarly, in *Feng v Saskatchewan (Economy)*, 2020 SKCA 6, the Saskatchewan Court of Appeal held, at para 45, that correctness review of procedural aspects of a decision required reviewing judges to engage in a fresh inquiry to determine, based on the five non-exhaustive *Baker* factors, what degree of procedural fairness was required in the circumstances of the case and whether these requirements were met. Finally, in *1765662 Alberta Ltd. (Windermere Registry) v Edmonton (City)*, 2020 ABCA 137, the Alberta Court of Appeal held, at para 13, that, although a standard of correctness applied to the ground of procedural unfairness, the language of “standard of review” did not tell the whole story:

In one sense, it seems inaccurate to describe this as a matter of standard of review since the ultimate decision is not being reviewed under such a ground. What is being reviewed is the process that got there. And the line of inquiry is different. While it may be that a decision might be reached in an unfair way due to errors of law by the decision maker, the occurrence of such errors is not a necessary condition to the outcome of the review. Arguably, the real question is not "was the process incorrect?" but "was the process reversibly unfair?": see *FortisAlberta Inc. v. Alberta (Utilities Commission)*, 2015 ABCA 295 (Alta. C.A.) at para 180, (2015), 389 D.L.R. (4th) 1 (Alta. C.A.), leave denied (2016), [2015] S.C.C.A. No. 474 (S.C.C.) (SCC Nos 36728, 36730).

## Applying the Standard of Review

For the past few decades, the selection of the standard of review, the first stage of merits review, has been the focus of judicial attention. Characterized by complex tests involving the consideration of multiple contextual factors that led reviewing courts to select one of several possible standards of review, this approach was later supplemented and then partially replaced by a presumption of reasonableness review for any question falling within one of several categories of questions. The presumption could be rebutted if the question also fell within one of several categories of questions that required correctness review. As Professor David Mullan has observed, the “reformation” of the selection of the standard in *Vavilov* “in most respects has the merit of simplicity”: David Mullan, “Judicial Scrutiny of Administrative Decision Making: Principled Simplification or Continuing Angst” (2020) 50 Advocates’ Quarterly 423 at 438 [*Judicial Scrutiny*]. The Court begins with a presumption of reasonableness review for all administrative decisions. This presumption is rebutted and appellate standards apply where a statutory right of appeal is present. Similarly, the presumption of reasonableness gives way to a statutorily prescribed standard of review. The rule of law will require correctness review where an administrative decision raises a constitutional question, a general question of central importance to the legal system as a whole or dueling board jurisdictions. As acknowledged by the *Vavilov* majority, at para 73, a recurring criticism of the Supreme Court’s pre-*Vavilov* merits review framework centred on the lack of guidance it provided regarding the *application* of the appropriate standard of review. Writing several years before *Vavilov*, Justice David Stratas described the Court’s case law on the application of the reasonableness standard – the dominant standard of review after *Dunsmuir* – in the following terms:

The reasonableness standard of review means entirely different things in different cases, but we know not why.

Often the Supreme Court of Canada purports to engage in reasonableness review – a “deferential standard” – but acts non-deferentially, imposing its own view of the facts or the law or both over the view of the administrative decision maker, without explanation.

There are sometimes exceptions where the Supreme Court of Canada defers to administrative decision making quite consistently with the words of *Dunsmuir*. Why deference prevails in these cases but not in so many others has never been explained.

(...)

What does the reasonableness standard mean and how should it be applied? After reading the decisions of the Supreme Court of Canada, many are baffled.

David Stratas, “The Canadian Law of Judicial Review: a Plea for Doctrinal Coherence and Consistency” (2016) 42 Queen’s L.J. 27 at 35-36.

*Vavilov* has at least in one sense complicated things. Because administrative decisions open to a statutory appeal are now subject to appellate review, three distinct standards now operate

in merits review: correctness review, review for palpable and overriding error and reasonableness review. Moreover, as noted by Professor Mullan, *Vavilov*'s simplification of the standard of review selection exercise "has in many respects been carried out by way of transferral of some of the difficult or intransigent issues to the refining of the elements of reasonableness review": Mullan, *Judicial Scrutiny, supra*, at 439. For example, a decision makers' special expertise is no longer an operative concept in selecting the appropriate standard because of the general presumption of reasonableness review. However, a decision maker may demonstrate through its reasons that it is bringing its institutional expertise and experience to bear, for example, on its interpretation of a provision of its enabling statute, something that reviewing courts will take into account in determining whether the decision is reasonable. The fact that a statutory provision defines the scope of a decision maker's statutory authority may impact what reasonableness review of the decision maker's interpretation of that provision entails. But despite some additional complexity, as our discussion of reasonableness review will show, the *Vavilov* majority provides much in the way of guidance to lower courts on what makes a decision reasonable or unreasonable. Before discussing reasonableness review in greater detail, we first turn to a description of the two other standards of review: correctness review and review for palpable and overriding error.

## CORRECTNESS REVIEW

Under the *Vavilov* framework, correctness is the applicable standard of review in three circumstances: when correctness review is prescribed by statute; on a statutory appeal from an administrative decision maker's decision on a question of law; and where correctness review is required by the rule of law. The application of correctness for constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.

Correctness review was described by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50 in the following terms:

When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

In contrast, under the deferential standards of reasonableness review and review for palpable and overriding error, the reviewing court focuses on the decision that the administrative decision maker actually made and the justification offered for it, not the conclusion the court would have reached in the administrative decision maker's place. In their concurring judgement in *Vavilov*, at para 201, Justices Karakatsanis and Abella were very critical of the majority's decision to review for correctness all questions of law in the context of a statutory appeal. In their view, this would have the effect of "dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis" making the majority's reasons "an encomium for correctness and a eulogy for deference." They issued, at para 251, a dire prediction as to the likely outcome of this change:

The result reached by the majority means that hundreds of administrative decision-makers subject to different kinds of statutory rights of appeal — some in highly specialized fields, such as broadcasting, securities regulation and international trade — will now be subject to an irrebuttable presumption of correctness review. This has the potential to cause a stampede of litigation. Reviewing courts will have license to freely revisit legal questions on matters squarely within the expertise of administrative decision-makers, even if they are of no broader consequence outside of their administrative regimes. Even if specialized decision-makers provide reasonable interpretations of highly technical statutes with which they work daily, even if they provide internally consistent interpretations responsive to the parties' submissions and consistent with the text, context and purpose of the governing scheme, the administrative body's past practices and decisions, the common law, prior judicial rulings and international law, those interpretations can still be set aside by a reviewing court that simply takes a different view of the relevant statute. This risks undermining the integrity of administrative proceedings whenever there is a statutory right of appeal, rendering them little more than rehearsals for a judicial appeal — the inverse of the legislative intent to establish a specialized regime and entrust certain legal and policy questions to non-judicial actors.

Perhaps in an effort to address these concerns, the majority observed, at para 54, that while a court reviewing an administrative decision on a correctness standard could choose either to uphold it or to substitute its own view and was "ultimately empowered to come to its own conclusions on the question", it "should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it."

### ***Bell Canada – an illustration of correctness review***

The first decision to illustrate the application by the Supreme Court of the correctness standard of review is *Vavilov*'s companion case, *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. In reading the excerpt below, note the different starting points of the majority's

exposition of the proper interpretation of s. 9(1)(h) of the *Broadcasting Act*, SC 1991, c 11 and the dissent's review of the reasonableness of the Canadian Radio-television and Telecommunications Commission's (CRTC) interpretation.

***Bell Canada v Canada (Attorney General), 2019 SCC 66***

**Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ. —**

[1] For more than 40 years, the Super Bowl game, which is played in the United States, had been broadcast in Canada in accordance with the "simultaneous substitution" regime, which was set out in various regulations made under the *Broadcasting Act*, S.C. 1991, c. 11. As a result, Canadians were prevented from viewing high-profile commercials that were aired in the U.S. broadcast of the Super Bowl.

[2] After a lengthy consultation process, the Canadian Radio-television and Telecommunications Commission ("CRTC") decided that the broadcast of the Super Bowl should be exempt from the simultaneous substitution regime as of January 1, 2017 ("Final Decision"), which meant that Canadians would be free to view the U.S. broadcast that features American commercials — which the CRTC described as being "an integral element of the event". The CRTC implemented that decision by way of an order ("Final Order") issued under s. 9(1)(h) of the *Broadcasting Act*, which provides that the CRTC can require that television service providers "carry, on such terms and conditions as the [CRTC] deems appropriate, programming services specified by the [CRTC]".

[3] The main question in these statutory appeals is whether the CRTC had the authority under s. 9(1)(h) of the *Broadcasting Act* to issue the Final Order. The Federal Court of Appeal answered this question in the affirmative. Applying the standard of reasonableness, it held — on the basis of "the deference owed to the CRTC in its interpretation of its home statutes and the broad discretion conferred on the CRTC by paragraph 9(1)(h)" — that "the CRTC's explanation of its jurisdiction to make the Final Order is justifiable, transparent, and intelligible and falls within the range of reasonable outcomes defensible in respect of the facts and the law" (2017 FCA 249, [2018] 4 F.C.R. 300, at para. 28).

[4] We arrive at a different conclusion. The applicable standard must be determined in accordance with the framework set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, a case this Court heard together with these statutory appeals in order to "consider the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir* and subsequent cases" (*Vavilov*, at para. 6). Given that the appellants have challenged the CRTC's Final Decision and Final Order by way of the statutory appeal mechanism provided for in s. 31(2) of the *Broadcasting Act*, the appellate standards of review apply here (*Vavilov*, at paras. 36-52). And because the issues in these appeals raise legal questions that go directly to the limits of the CRTC's statutory grant of power, and therefore plainly fall within the scope of the statutory appeal mechanism referred to above, the applicable standard is correctness.

[5] Applying this standard, we are of the view that the Final Order was issued on the basis of an incorrect interpretation of the scope of the authority conferred on the CRTC under s. 9(1)(h). Properly interpreted, s. 9(1)(h) only authorizes the issuance of mandatory

carriage orders — orders that require television service providers to carry specific channels as part of their cable or satellite offerings — that include specified terms and conditions. It does not empower the CRTC to impose terms and conditions on the distribution of programming services *generally*. Accordingly, because the Final Order does not actually mandate that television service providers distribute a channel that broadcasts the Super Bowl, but instead simply imposes a condition on those that already do, its issuance was not authorized by s. 9(1)(h) of the *Broadcasting Act*.

[6] We would allow the appeals and quash the Final Order and the Final Decision accordingly.

I. Background

A. *Overview of Simultaneous Substitution in Canada*

[7] The CRTC is an independent public authority that oversees broadcasting and telecommunications in Canada. Section 5(1) of the *Broadcasting Act* requires that the CRTC “regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)” of that Act.

[8] In regulating the Canadian broadcasting industry, the CRTC is required, for the most part, to ensure that all “programming undertakings” and “distribution undertakings” are licensed and that they comply with all conditions applicable to such licences (*Broadcasting Act*, ss. 32 and 33).

[9] Programming undertakings are broadcasters, or television stations, that “acquire, create and produce television programming, and are licensed by the CRTC to serve a certain geographic area within the reach of their signal transmitters” (*Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489 (“Cogeco”), at para. 4). Although the signals of local television stations can be received for free by anyone with the proper equipment, most Canadians receive them from “distribution undertakings” — which are essentially television service providers like Bell — as part of their cable, satellite or Internet TV subscriptions (*Broadcasting Regulatory Policy CRTC 2015-24*, January 29, 2015 (online), at para. 3). These distribution undertakings receive signals from television stations, and retransmit them to their subscribers for a fee (*Cogeco*, at para. 4).

[10] Given the technical nature of these terms, we will refer in these reasons to distribution undertakings as “television service providers”, and programming undertakings as “television stations”. Some of the authorities also refer to programming undertakings as “broadcasters”.

[11] Section 7 of the *Broadcasting Distribution Regulations*, SOR/97-555 (“*Distribution Regulations*”), provides that, as a general rule, television service providers cannot alter or delete the signals of television stations while retransmitting them. Section 7(a) of the *Distribution Regulations* provides for an exception to this rule that applies where simultaneous substitution of the signal is either required or authorized under the *Simultaneous Programming Service Deletion and Substitution Regulations*, SOR/2015-240 (“*Simultaneous Substitution Regulations*”). The *Simultaneous Substitution Regulations* were made by the CRTC in November 2015 pursuant to its powers under s. 10(1) of the *Broadcasting Act*.

[12] Simultaneous substitution is a process by which a television service provider temporarily deletes and replaces the *entire* signal of a distant (usually national or international) television

station with the signal of another (usually local) television station that is airing the same program at the same time. Requests for simultaneous substitution are most often made by Canadian television stations that hold exclusive broadcasting rights to a particular American program so as to require that television service providers in Canada replace the signal of an American station airing the same program with the Canadian station's signal. For example, if the Canadian Broadcasting Corporation ("CBC") owns the exclusive broadcasting rights for a specific event (e.g. the Academy Awards), it can request that the signal of an American station airing that event (e.g. a station of the American Broadcasting Company) be replaced with a CBC station's signal. The result is that local viewers will see the CBC's broadcast of that event — with the same content as the U.S. broadcast *but with different commercials* — when tuning in to either station.

[13] An important reason why simultaneous substitution is permitted by the CRTC as an exception to the general rule in s. 7 of the *Distribution Regulations* is to allow Canadian broadcasters to realize greater advertising revenues:

*The record of this proceeding indicates that simultaneous substitution is still of significant benefit to Canadian broadcasters since it allows them to fully exploit and monetize the programming rights they have acquired, to the benefit of their overall investment in the production of Canadian programming. While the Commission recognizes the challenges of quantifying the actual financial benefits of simultaneous substitution for broadcasters, it generally agrees that the estimated value of advertising revenue attributable to substitution in the 2012-2013 broadcast year was approximately \$250 million.*

(*Broadcasting Regulatory Policy CRTC 2015-25, January 29, 2015 (online), at para. 14.*)

Put simply, because simultaneous substitution allows local television stations to maximize their audiences for specific programs, those stations will be able to charge advertisers more for in-program commercials.

[14] Section 3 of the *Simultaneous Substitution Regulations* authorizes an operator of a Canadian television station to ask a television service provider "to delete the programming service of another Canadian television station or a non-Canadian television station and substitute for it the programming service of a local television station or regional television station". Section 4(1)(b) requires that the television service provider carry out the requested action if, among other things, "the programming service to be deleted and the programming service to be substituted are comparable and are to be broadcast simultaneously". Pursuant to s. 4(3), however, a television service provider "must not delete a programming service and substitute another programming service for it if the [CRTC] decides under subsection 18(3) of the *Broadcasting Act* that the deletion and substitution are not in the public interest". Section 18(3) of the *Broadcasting Act* reads as follows:

The [CRTC] may hold a public hearing, make a report, issue any decision and give any approval in connection with any complaint or representation made to the [CRTC] or in connection with any other matter within its jurisdiction under this Act if it is satisfied that it would be in the public interest to do so.

(...)

B. *Simultaneous Substitution and the Super Bowl*

(...)

[21] On January 29, 2015, [Following an extensive public consultation about the future of television] the CRTC released Broadcasting Regulatory Policy CRTC 2015-25, in which it announced its intention to continue to allow the practice of simultaneous substitution generally, but to disallow it for (among other things) broadcasts of the Super Bowl beginning in 2017. The CRTC based this decision on “the comments received from Canadians and the fact that the non-Canadian advertising produced for the Super Bowl is an integral part of this special event programming” (para. 22).

[22] On November 19, 2015, the CRTC announced the enactment of the *Simultaneous Substitution Regulations*, which would replace the previous regime set out in the *Distribution Regulations*. In the accompanying Broadcasting Regulatory Policy CRTC 2015-513, November 19, 2015 (online), the CRTC indicated that it intended to prohibit simultaneous substitution for the Super Bowl by way of an order issued under s. 9(1)(h) of the *Broadcasting Act*.

[23] The Federal Court of Appeal unanimously dismissed statutory appeals brought by Bell and the NFL against the CRTC’s broadcasting regulatory policies of January and November 2015 and the promulgation of the *Simultaneous Substitution Regulations* (*Bell Canada v. Canada (Attorney General)*, 2016 FCA 217, 402 D.L.R. (4th) 551). Writing for the court, de Montigny J.A. held that it was premature to assess the validity of a *proposed* distribution order or regulation prohibiting simultaneous substitution for the Super Bowl, as no such order or regulation had actually been made as of the time of the hearing (para. 34). He also held that “the remedial regime set out in the [*Simultaneous Substitution Regulations*] ha[d] been validly adopted” (para. 54).

[24] On February 3, 2016, the CRTC invited comments on its proposed order under s. 9(1)(h) to prohibit simultaneous substitution for the Super Bowl (Broadcasting Notice of Consultation CRTC 2016-37, February 3, 2016 (online)). It received submissions from a number of interested parties, including Bell and the NFL.

[Bell, a Canadian broadcaster, had acquired from the National Football League the exclusive right to broadcast the Super Bowl in Canada from 2013 to the 2018-19 season.]

## II. Procedural History

### A. *Decisions of the CRTC: Broadcasting Regulatory Policy CRTC 2016-334 and Broadcasting Order CRTC 2016-335, August 19, 2016 (online)*

[25] On August 19, 2016, pursuant to s. 9(1)(h) of the *Broadcasting Act*, the CRTC issued Broadcasting Order 2016-335 (“Final Order”), which prohibited simultaneous substitution for the Super Bowl as of January 1, 2017. The salient portion of the Final Order reads as follows:

A distribution undertaking subject to this order may only distribute the programming service of a Canadian television station that broadcasts the Super Bowl if that distribution undertaking does not carry out a request made by that Canadian television station pursuant to section 3 of the *Simultaneous Programming Service Deletion and Substitution Regulations* to delete the programming service of another Canadian television station or a non-Canadian television station and substitute for it the programming service of a local television station or regional television station during any period in which the Super Bowl is being broadcast on the requesting Canadian television station. [para. 3]

[26] The CRTC's reasons for issuing the Final Order are set out in Broadcasting Regulatory Policy CRTC 2016-334 ("Final Decision"). In those reasons, the CRTC expressed the view that the decision to no longer authorize simultaneous substitution for the Super Bowl reflected a reasonable balance of the many policy objectives of the *Broadcasting Act*. The CRTC also held that its authority to implement that policy decision was rooted in s. 9(1)(h) of that Act, and that the Final Order issued pursuant to that authority satisfied the requirement of s. 4(3) of the *Simultaneous Substitution Regulations*. As we noted above, s. 4(3) prohibits television service providers from carrying out simultaneous substitution where the CRTC has decided, under s. 18(3) of the *Broadcasting Act*, that doing so is not in the public interest.

[27] Among the legal submissions advanced during the consultation process, Bell and the NFL argued that the CRTC lacked jurisdiction to issue the Final Order under s. 9(1)(h) of the *Broadcasting Act*. They took the position that orders issued under s. 9(1)(h) "can only affect a programming service (that is, the entire output of a service), and not an individual program such as the Super Bowl" (Final Decision, at para. 52). The CRTC rejected this argument, finding that the provision in question confers on it the "broad power to regulate the cable industry and impose any conditions necessary to do so" (para. 21). It explained the relationship between s. 9(1)(h) and the Final Order specifically as follows:

The proposed distribution order relates to the distribution of a "Canadian television station that broadcasts the Super Bowl", . . . and then imposes a condition on that distribution, specifically, that the simultaneous substitution shall not be performed during the Super Bowl. Further, the wording of the proposed order adequately responds to the contention that s. 9(1)(h) can only operate with respect to a programming service, as opposed to a particular program (such as the Super Bowl).

Moreover, the distribution order reflects the way simultaneous substitution is actually performed. The entire output of a programming service is, for a particular program, deleted and the entire output of another programming service is substituted, until that program ends. The distribution order reflects the notion that the entire output of the programming service of a television station will not be deleted and substituted for the Super Bowl, a particular program. [paras. 54-55]

[28] The Final Decision also addressed a submission from SaskTel that the wording of the Final Order could be interpreted as requiring a television service provider to distribute a Canadian television station that broadcasts the Super Bowl, even if it does not otherwise distribute that station (para. 62). The CRTC clarified its position: the Final Order was not intended to mandate the distribution of a station that broadcasts the Super Bowl, "but simply to add a condition that must be fulfilled should a [television service provider] carry the station (whether it is being carried because it is mandated to be carried by regulation as a local television station, or whether it is simply authorized to be carried as a distant signal)" (para. 63 (emphasis added)).

B. *Decision of the Federal Court of Appeal: 2017 FCA 249, [2018] 4 F.C.R. 300*

[29] Bell and the NFL were granted leave to appeal the Final Decision and the Final Order to the Federal Court of Appeal pursuant to s. 31(2) of the *Broadcasting Act*. Their appeals were unanimously dismissed.

[30] Near J.A., writing for the court, began his analysis by considering the issue of whether the CRTC had jurisdiction to issue the Final Order pursuant to s. 9(1)(h) of the *Broadcasting Act*. After identifying reasonableness as the applicable standard of review, he found that it

was reasonable for the CRTC to have interpreted that the term “programming services”, as it is used in s. 9(1)(h), includes an individual program like the Super Bowl. He also found that the CRTC’s policy determination that simultaneous substitution for the Super Bowl was not in the public interest was entitled to deference on appeal (para. 24), and that once it had made this determination under s. 18(3) of the *Broadcasting Act*, “it was entitled to exempt the Super Bowl from the simultaneous substitution regime under [s.] 4(3) of the [*Simultaneous Substitution Regulations*]” (para. 25).

(...)

### III. Analysis

[32] Before this Court, the appellants, Bell and the NFL, submit that the Final Order and the Final Decision should be set aside on the basis that the CRTC lacked the statutory authority, pursuant to s. 9(1)(h) of the *Broadcasting Act*, to prohibit simultaneous substitution for the Super Bowl. They also submit that the Final Decision and the Final Order are invalid because they conflict with the operation and the purpose of s. 31(2) of the *Copyright Act*.

[33] ... The two issues that we will address in these reasons are therefore the following:

1. What standard should this Court apply in reviewing the CRTC’s decision regarding the scope of its authority under s. 9(1)(h) of the *Broadcasting Act*?
2. Was the CRTC correct in deciding that it had the power under s. 9(1)(h) of the *Broadcasting Act* to implement its Final Decision to issue the Final Order prohibiting simultaneous substitution for the Super Bowl?

#### A. *Correctness as the Applicable Standard of Review*

[34] Bell and the NFL challenge the Final Decision and the Final Order by means of the statutory appeal mechanism provided for in s. 31(2) of the *Broadcasting Act*, which allows for an appeal to be brought to the Federal Court of Appeal, with leave, “on a question of law or a question of jurisdiction”. The appellate standards of review therefore apply (see *Vavilov*, at paras. 36-52).

[35] Bell and the NFL do not dispute that the CRTC is the administrative body that is statutorily mandated with overseeing broadcasting and telecommunications in Canada in accordance with the policy objectives set out in the *Broadcasting Act* and the *Telecommunications Act*, S.C. 1993, c. 38. Instead, the primary ground of appeal they advance in this case is that the CRTC lacked the authority to issue a specific order prohibiting simultaneous substitution for the Super Bowl under s. 9(1)(h) of the *Broadcasting Act*. This raises a question that goes directly to the limits of the CRTC’s statutory grant of power, and therefore plainly falls within the scope of the statutory appeal mechanism of s. 31(2); the Attorney General of Canada conceded as much in oral argument (transcript, day 1, at p. 80).<sup>111</sup> The applicable standard is therefore correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8).

#### B. *CRTC’s Authority Under Section 9(1)(h) of the Broadcasting Act*

[36] The main issue on the merits of the appeals is therefore whether the CRTC was correct in determining that it had the authority, pursuant to s. 9(1)(h) of the *Broadcasting Act*, to implement its Final Decision to issue the Final Order prohibiting simultaneous substitution for the Super Bowl. Before determining the scope of the CRTC’s power under that provision, we will begin with an analysis of the nature and effect of the Final Order.

(1) Nature and Effect of the Final Order

[37] The Final Order permits television service providers to distribute “**the programming service** of a Canadian television station that broadcasts the Super Bowl” (Final Decision, at para. 53), *on the condition that* they refrain from carrying out a request for simultaneous substitution from that station for the duration of the event. Its effect is therefore that a television service provider that distributes both American and Canadian television stations airing the Super Bowl must do so without altering their respective signals.

[38] It is important to recognize, however, that the Final Order does not require that television service providers distribute any programming services to their customers; this was made clear in the CRTC’s Final Decision. Responding to SaskTel’s concern that the wording of the Final Order “could be interpreted as requiring a [television service provider] to distribute a . . . station that broadcasts the Super Bowl, even if it does not already distribute that station” (para. 62), the CRTC gave the following explanation:

It was not the [CRTC’s] intent to mandate [television service providers] to distribute a station that broadcasts the Super Bowl, but simply to add a condition that must be fulfilled should a [television service provider] carry the station (whether it is being carried because it is mandated to be carried by regulation as a local television station, or whether it is simply authorized to be carried as a distant signal). Accordingly, SaskTel is correct as to the intent of the distribution order and how the [CRTC] will interpret it in the future. [para. 63]

[39] The result is therefore that the condition of carriage set out in the Final Order — prohibiting simultaneous substitution for the Super Bowl — applies only to those service providers that already distribute the programming services of a Canadian television station airing the Super Bowl, either because they are required to do so in accordance with some other order or have chosen to do so on a discretionary basis. The Final Order does not *mandate* the distribution of any such station.

(2) Scope of the CRTC’s Power Under Section 9(1)(h) of the *Broadcasting Act*

[40] The main thrust of the position advanced by Bell and the NFL is that the Final Order exceeds the authority delegated to the CRTC under s. 9(1)(h) of the *Broadcasting Act*. That provision reads as follows:

**9 (1)** Subject to this Part, the [CRTC] may, in furtherance of its objects,

. . .

**(h)** require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the [CRTC] deems appropriate, programming services specified by the [CRTC].

[41] The scope of the CRTC’s authority under s. 9(1)(h) is to be determined by interpreting that provision in accordance with the modern approach to statutory interpretation. As this Court has reiterated on numerous occasions, this approach requires that the words of the statute be read “in their entire context and in their grammatical and ordinary sense harmonious with the scheme of the Act, the object of the Act, and the intention of Parliament” (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, as quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, and most recently in *R. v. Barton*, 2019 SCC 33, at para. 71).

[42] Bell and the NFL submit that s. 9(1)(h) “does not allow the CRTC to require that [television service providers] carry a specific program, or set terms and conditions for the carriage of a single program like the Super Bowl” (A.F. (NFL), at para. 35). Rather, they say, the term “programming services” as used in that provision refers to the *entire aggregation of programs* broadcast by a television station. On this basis, they submit that the CRTC cannot issue a s. 9(1)(h) order that targets *individual programs*, like the Super Bowl.

[43] To begin, we observe that the Final Order appears to impose a condition on the distribution of a Canadian television station’s signal; the order effectively says that a service provider can distribute such a signal during its broadcast of the Super Bowl *as long as* it does not carry out a request for simultaneous substitution for an American television station that also broadcasts the Super Bowl for the duration of the event (Final Decision, at para. 54). This, according to the CRTC, “reflects the way [in which] simultaneous substitution is actually performed”: the television service provider deletes and replaces the signal of the *television station*, and not of a specific *television program* (*ibid.*, at para. 55). Put simply, the Final Order imposes a requirement upon the carriage of a given “programming service” — in the sense of the affected television stations’ broadcast to the public — albeit only for the duration of a specific program.

[44] We need not decide, for the purpose of these appeals, whether the “terms and conditions” that can be imposed under s. 9(1)(h) of the *Broadcasting Act* can relate directly to a specific program or must instead relate to a television station’s slate of programming in its entirety. This is because we are of the view that the CRTC did not have the statutory authority to issue the Final Order pursuant to that provision in the first place. Specifically, the CRTC’s authority under s. 9(1)(h) — interpreted in accordance with the provision’s text, context and purpose — is limited to issuing orders that require television service providers to carry specific channels as part of their service offerings, and attaching terms and conditions to such mandatory carriage orders (A.F. (NFL), at paras. 3, 8, 12, 29, 35, 61-62 and 77-79; transcript, day 1, at pp. 5 and 17-21; transcript, day 3, at pp. 180-83). Section 9(1)(h) does not, as the Attorney General of Canada suggests (R.F., at paras. 65, 66, 71 and 76-78; transcript, day 1, at pp. 80 and 90-92), give the CRTC a broad power to impose conditions outside the context of a mandatory carriage order.

[45] We will begin this interpretive exercise with the statutory text of s. 9(1)(h) of the *Broadcasting Act*, the bilingual version of which we reproduce below for ease of reference:

<b>9 (1)</b> Subject to this Part, the Commission may, in furtherance of its objects,	<b>9 (1)</b> Sous réserve des autres dispositions de la présente partie, le Conseil peut, dans l'exécution de sa mission :
---	--

(h) require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.

h) obliger ces titulaires à offrir certains services de programmation selon les modalités qu'il précise.

It is highly relevant that, in the English version of the Act, the phrase “on such terms and conditions as the [CRTC] deems appropriate” is couched in between commas, next to the words “carry” and “programming services”. This, in our view, indicates that the *primary* power delegated to the CRTC is to mandate that television service providers carry specific programming services as part of their cable or satellite offerings, and that the *secondary* power relates to the imposition of terms and conditions on such mandatory carriage orders.

[46] Support for this interpretation can also be found in the text of the French version. The language used there contemplates a direct link between “les modalités” (the terms and conditions) and the “*oblig[ation] . . . à offrir [les] services de programmation*” (obligation to carry programming services) — and therefore further weighs against interpreting this provision as conferring on the CRTC a general power to impose conditions on carriage. Indeed, there is no discordance between the English and French versions of s. 9(1)(h); both indicate that it is limited to authorizing the issuance of mandatory carriage orders on specified terms and conditions.

[47] The Federal Court of Appeal reached the same conclusion as to the plain meaning of this statutory text in *Bell Canada v. 7262591 Canada Ltd.*, 2018 FCA 174, 428 D.L.R. (4th) 311. At issue in that case was whether the CRTC had jurisdiction under s. 9(1)(h) of the *Broadcasting Act* to order that television service providers adhere to the “Wholesale Code”, a broadcasting regulatory policy that governed “affiliation agreements” between television stations and service providers. Answering this question in the negative, Woods J.A. explained her conclusion as follows:

By its terms, paragraph 9(1)(h) provides the CRTC with the power to require a licensee to carry specified programming services, and if so required, it provides an additional power to mandate such terms and conditions of carriage of those services as the Commission deems appropriate . . . .

The ordinary meaning of this provision does not encompass a general power to regulate the terms and conditions of carriage. Such regulation must relate to terms and conditions of programming services that the CRTC specifies and requires to be provided by a licensee. [paras. 168-169]

[48] The context surrounding s. 9(1)(h) also supports our view as to its scope. It is important to recognize that this provision sets out but one power among many that the CRTC has in relation to the issuance of licenses to broadcasting undertakings pursuant to s. 9 of the *Broadcasting Act*. Of particular note are the powers under s. 9(1)(b), which allows the CRTC to subject such licenses to conditions it deems appropriate for the implementation of Canadian broadcasting policy, and under s. 9(1)(g), which allows the CRTC to “require any licensee who is authorized to carry on a distribution undertaking to give priority to the carriage of broadcasting”. The existence of these *specific* powers weighs against reading s. 9(1)(h) as conferring a *general* power to impose terms and conditions on any carriage of programming services.

[49] Moreover, s. 10 of the *Broadcasting Act* confers on the CRTC the power to make regulations in respect of various aspects of the broadcasting system, including “standards of programs and the allocation of broadcasting time for the purpose of giving effect to the broadcasting policy set out in subsection 3(1)” (s. 10(1)(c)); “the carriage of any foreign or other programming services by distribution undertakings” (s. 10(1)(g)); and “such other

matters as it deems necessary for the furtherance of its objects" (s. 10(1)(k)). Again, the extent of the CRTC's powers under this section of the *Broadcasting Act* means that a narrow reading of s. 9(1)(h) will not hamper its efforts to regulate the broadcasting industry in accordance with the statutory objectives listed in s. 3(1).

[50] Further, the *Distribution Regulations* refer in various provisions to "the programming services of a programming undertaking that the [CRTC] has required, under paragraph 9(1)(h) of the Act, to be distributed as part of [a television service provider's] basic service" (ss. 17(1)(g), 41(1)(b), and 46(3)(b); see also ss. 18(3)(a), 19(2)(d), 47(2)(a.1) and 49(2)(a)(i)). These regulatory provisions offer yet another contextual indication that the power under s. 9(1)(h) extends only to the issuance of mandatory carriage orders on specified terms and conditions.

[51] Finally, this interpretation is confirmed by the purpose for which s. 9(1)(h) of the *Broadcasting Act* was enacted. As was explained in a report entitled *Review of the Regulatory Framework for Broadcasting Services in Canada*:

Section 9(1)(h) provides an important means for the Commission to ensure carriage of important Canadian services which market forces might not otherwise dictate be carried in different regions of Canada. This power is also an important one in ensuring that the Canadian broadcasting system strengthens and enriches the cultural, political, social and economic fabric of Canada.

(L. J. E. Dunbar and C. Leblanc, *Review of the Regulatory Framework for Broadcasting in Canada — Final Report* (2007), at p. 195.)

[52] The power to mandate the carriage of specific programming services is thus a useful tool — albeit one among many — that the CRTC can use to achieve the various policy objectives listed in s. 3 of the *Broadcasting Act* (*ibid.*, at p. 75). The CRTC has in fact exercised this power on several occasions to mandate the distribution of an existing or proposed service that

- makes an exceptional contribution to Canadian expression and reflects Canadian attitudes, opinions, ideas, values and artistic creativity;
- contributes in an exceptional manner to achieving the overall objectives for the digital basic service and one or more objectives of the Act, such as:
  - Canadian identity and cultural sovereignty;
  - ethno-cultural diversity, including the special place of Aboriginal peoples in Canadian society;
  - service to and reflection and portrayal of persons with disabilities; or
  - linguistic duality, including improved service to official language minority communities (OLMCs); and
- makes exceptional commitments to original, first-run Canadian programming in terms of exhibition and expenditures.

(Broadcasting Regulatory Policy CRTC 2013-372, August 8, 2013 (online), at para. 7)

For example, the CRTC recently granted a mandatory carriage order to the Aboriginal Peoples Television Network, requiring that that network be distributed as part of the basic service of Canadian cable and satellite providers at a specified monthly rate of \$0.35 per subscriber

(Broadcasting Order CRTC 2018-341, August 31, 2018 (online)). Other programming services that enjoy s. 9(1)(h) status include the Cable Public Affairs Channel (CPAC), Nouveau TV-5, and The Weather Network.

[53] More significantly, it appears that the CRTC has only ever validly exercised its power under s. 9(1)(h) for the issuance of mandatory carriage orders. As we noted above, its attempt to use that power to make the Wholesale Code binding upon television service providers (Broadcasting Order CRTC 2015-439, September 24, 2015 (online)) was rejected by the Federal Court of Appeal. Likewise, this Court held in *Cogeco*, in the context of a reference question, that the CRTC lacked jurisdiction under s. 9(1)(h) to implement a proposed “value for signal regime”. Apart from those cases, we have not been directed to, nor have we found, any orders under s. 9(1)(h) other than ones that mandate the distribution of particular programming services on specified terms and conditions.

[54] Furthermore, this use of s. 9(1)(h) is consistent with the way in which this provision was understood in various reports and publications that were prepared in advance of the enactment of the *Broadcasting Act* in 1991. In a clause-by-clause analysis of the bill that became the *Broadcasting Act*, the Department of Communications explained that s. 9(1)(h) addressed what was described as the “cable-as-gatekeeper” problem in that it would “ensur[e] that the cable industry cannot frustrate the licensing of new satellite to cable services simply by refusing to carry them”. The analysis also included the following comments:

This clause provides a clear statutory basis for the [CRTC]’s priority carriage regulations (already enacted in the Cable Regulations). The 1968 Act was silent on such a power. It would also allow the CRTC to require carriage of a particular service such as, for example, TV-5, a second CBC service, or the alternative programmer. [Emphasis added.]

(Canada, Department of Communications, *The Broadcasting Act 1988: A Clause-by-Clause Analysis of Bill C-136* (1988), at s. 9(1)(h))

[55] The *Government Response to the Fifteenth report of the Standing Committee on Communications and Culture: A Broadcasting Policy for Canada* (1988) also refers, at various places, to the fact that, “[u]nder clause 9.(1)(h), the CRTC can require carriage of specified services” (see pp. 27, 56 and 90) — it appeared in particular in a response to a recommendation that the *Broadcasting Act* “be drafted so as to define the essential role of distribution undertakings as that of distributing Canadian radio and television services in French and English, both public and private, with first priority given to public-sector Canadian services” (p. 90). And after the Standing Committee on Communications and Culture expressed the view that the statute “should be drafted so as to provide authorization for the [CRTC] to establish any conditions respecting the carriage of programming services that are necessary to further the objectives of the Act” (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Communications and Culture*, No. 36, 2nd Sess., 33th Parl., May 4, 1987, at p. 78), the government showed it was satisfied that this concern was adequately addressed by the narrowly drafted s. 9(1)(h) (*Government Response*, at p. 89).

[56] While certainly not determinative, this legislative history nevertheless provides a further indication as to the interpretation of s. 9(1)(h) that is borne out by its text and its context: that this provision *only* confers on the CRTC the authority to issue mandatory carriage orders

on specified terms and conditions, and does not establish a “broad power to regulate the cable industry and impose any conditions necessary to do so” (Final Decision, at para. 21 (emphasis added)).

[57] Because the CRTC did not, in the Final Order, purport to mandate the carriage of any particular programming services, but instead sought to “add a condition that must be fulfilled should a [television service provider] carry [a Canadian] station” that broadcasts the Super Bowl (Final Decision, at para. 63 (emphasis added)), the issuance of that order was not within the scope of its delegated power under s. 9(1)(h) of the *Broadcasting Act*. We would therefore quash the Final Order, as well as the Final Decision.

[58] We would note that these appeals turn strictly on the scope of the CRTC’s authority under s. 9(1)(h) of the *Broadcasting Act*, and that neither Bell nor the NFL disputes the Federal Court of Appeal’s holding that it was reasonable for the CRTC to have determined that the public interest would be served by exempting the Super Bowl from the simultaneous substitution regime (paras. 23-24). Therefore, and although we maintain that s. 9(1)(h) did not give the CRTC the authority to implement that policy determination, we express no view as to whether the CRTC could do so pursuant to some other statutory power.

#### IV. Conclusion

[59] For the foregoing reasons, we would allow these appeals with costs throughout, set aside the decision of the Federal Court of Appeal, and quash the decisions of the CRTC (CRTC 2016-334 and CRTC 2016-335).

#### The following are the reasons delivered by

##### **Abella and Karakatsanis JJ. —**

[60] These cases concern the Canadian Radio-television and Telecommunications Commission’s 2016 decision to prohibit broadcasters from substituting Canadian advertisements for U.S. advertisements during the Super Bowl broadcast. The outcome of the appeals turns on whether the CRTC’s interpretation of “programming services” in its home statute is reasonable. In our view, that interpretation was reasonable and the decision should be upheld.

[61] As set out in our concurring reasons in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, as a general rule, administrative decisions are to be reviewed for reasonableness. None of the correctness exceptions apply to the CRTC’s decision and reasonableness review is consistent with the highly specialized expertise of the CRTC. When conducting reasonableness review, a court assesses whether the decision as a whole is reasonable, viewed in light of the reasons given and the decision-making context. Reviewing courts should pay particular attention to the administrative context and the consequences, operational implications and challenges identified by the decision-maker. To succeed, the party challenging the decision must satisfy the reviewing court that the decision is unreasonable.

(...)

[64] The Canadian Radio-television and Telecommunications Commission is a regulatory body established in 1976. It has been called the “archetype” of an expert administrative tribunal: B. Kain, “Developments in Communications Law: The 2012-2013 Term —

The *Broadcasting Reference*, the Supreme Court and the Limits of the CRTC” (2014), 64 S.C.L.R. (2d) 63, at p. 63. Parliament gave the CRTC an extensive mandate to implement measures that further Canadian broadcasting policy: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 (CanLII), [2012] 3 S.C.R. 489, at para. 2, per Rothstein J. Broadcasting policy in Canada seeks to maintain a distinctive Canadian culture while fostering a competitive environment for the development of a strong domestic telecommunications industry: *Broadcasting Act*, S.C. 1991, c. 11, s. 3.

[65] The powers and purposes of the CRTC in relation to broadcasting are set out in Part II of the *Broadcasting Act* (see also *Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22, s. 12(1)). The CRTC licenses television stations and cable providers and can subject those licenses to terms and conditions that it deems appropriate. It can also make regulations about program standards, the character of advertising, and the proportion of time that may be allotted to Canadian and foreign content.

[66] Among the regulatory tools available to the CRTC is a technique called simultaneous substitution. First proposed by the CRTC’s institutional predecessor in 1971, simultaneous substitution is a process by which the signal of a “distant” station (usually in the United States) is replaced by the signal of a “local” station: R. Armstrong, *Broadcasting Policy in Canada* (2nd ed. 2016), at p. 45. When a Canadian station, or broadcaster, broadcasts a U.S. program at the same time as a U.S. station, the Canadian station can request a Canadian distribution undertaking — the cable or television service provider — to replace the U.S. signal with its signal, which usually includes Canadian advertising: *Simultaneous Programming Service Deletion and Substitution Regulations*, SOR/2015-240, s. 3 (*Simultaneous Substitution Regulations*). As long as a request respects certain guidelines, the distribution undertaking receiving the request must comply: s. 4.

[67] Canadian broadcasters frequently make simultaneous substitution requests as a means of protecting their distribution rights in Canada: Armstrong, at p. 116. Simultaneous substitution also allows Canadian companies to consolidate audiences for a given program and, as a result, permits broadcasters to charge higher rates for advertising during that time slot: Armstrong, at pp. 54-55. The CRTC reported that in 2012-13, simultaneous substitution created revenue of approximately \$250 million: *Broadcasting Regulatory Policy CRTC 2015-25*, January 29, 2015 (online).

[A lengthy description of the consultations and proceedings leading to the CRTC’s impugned decision and order is omitted, as well as a description of the judgment below.]

(...)

[77] Before this Court, Bell focuses its submissions on the standard of review, arguing that the applicable standard of review is correctness. Bell argues first that s. 9(1)(h) is a jurisdiction-conferring provision, framing the issue as a true question of jurisdiction in “the narrow sense of [the CRTC’s] authority to enter upon an inquiry”: A.F. (Bell), at para. 52. It also argues that concerns regarding freedom of expression, the presence of a statutory appeal and the absence of policy considerations also militate in favour of correctness. Finally, Bell asserts that the question of whether the Super Bowl Order conflicts with the *Copyright Act* must be reviewed for correctness, because these questions extend beyond the CRTC’s home statute. In the alternative, Bell argues that the CRTC’s interpretation of s. 9(1)(h) is unreasonable because the statute permits only one reasonable interpretation.

[78] The NFL adopts Bell's arguments regarding the standard of review and makes additional arguments regarding the merits of the CRTC's decision. The NFL characterizes the CRTC's interpretation of s. 9(1)(h) as the arrogation of an "Orwellian power to reach down into the specific shows that broadcasters create and decide which ones are worthy of distribution to the public": A.F. (NFL), at para. 4. Drawing on dictionaries, previous CRTC decisions and other provisions of the *Broadcasting Act*, the NFL asserts that "programming services" can *only* mean an entire channel. It relies heavily on the legislative history of the provision to argue that s. 9(1)(h) was not intended to permit orders regarding individual programs. The NFL further asserts that the "contrived interpretation of the CRT[C] . . . was clearly designed to justify its end goal of banning Sim Sub for only a single program": para. 96. Finally, the NFL argues that the CRTC's interpretation creates an operational conflict with and frustrates the purposes of the *Copyright Act*.

[79] The Attorney General of Canada submits that the applicable standard of review is reasonableness and that a deferential analysis should begin with respectful attention to the CRTC's reasons. In its view, an administrative body may choose *any* reasonable interpretation of a statute — not only the *most* reasonable interpretation. Moreover, the Attorney General of Canada submits that Bell and the NFL have failed to demonstrate how the CRTC's interpretation was unreasonable, particularly in light of the CRTC's specialized, technical knowledge of its operational context and duty to balance the 40-odd objectives of the *Broadcasting Act*. The CRTC, it says, reasonably rejected the appellants' arguments regarding the *Copyright Act* and international treaties.

#### I. Analysis

[80] We are of the view that the applicable standard of review is reasonableness and that the CRTC's decision was reasonable. As we point out in our concurring reasons in *Vavilov*, the majority's framework disregards the significance of specialized expertise and results in broad application of the standard of correctness. It does so based solely on the premise that appeal clauses reflect the legislature's intention that all questions of law be reviewed by a court on the basis of correctness. Since there is an appeal clause in the *Broadcasting Act*, the majority says the Court is entitled to substitute its opinion for that of the CRTC. This case demonstrates the fundamental flaws of such an approach.

[81] Under reasonableness review, Bell and the NFL bear the onus of demonstrating that the CRTC's decision, as a whole, is unreasonable. In our view, the Federal Court of Appeal approached the decision with appropriate deference, providing an effective foil to the appellants' correctness-based arguments. We agree that the appellants have not met their burden.

[82] Reasonableness review begins with seeking to understand the decision and the reasons for that decision in light of the administrative context and the grounds on which it is challenged. Here, Bell and the NFL argue that the CRTC's interpretation of "programming services" was not available because, in their view, the term refers to an entire channel, whereas they characterize the Super Bowl Order as targeting a specific program. As a result, they argue, there was no legal basis for the Super Bowl Order.

[83] As an archetype of an expert administrative body, the CRTC's specialized expertise is well-settled. Extensive statutory powers have been granted to this regulatory body, and an exceptionally specialized mandate requires the CRTC to consider and balance complex public interest considerations in regulating an entire industry. The need for an expert body to

balance sensitive public interest issues in a highly technical context is particularly evident in this case, with the record containing a series of public notices, consultations and policies spanning almost three years and leading to the decision at issue.

[84] In our view, the reasons provided by the CRTC in the Order and accompanying regulatory policy set out a rational and persuasive line of reasoning which clearly outlines the consequences, operational implications and challenges that motivated its decision. The challenges raised by Bell and the NFL fail to satisfy us that the CRTC was unreasonable in concluding that s. 9(1)(h) provided a legal basis to prohibit simultaneous substitution during the Super Bowl.

[85] In its decision, the CRTC highlighted that simultaneous substitution is not a right, but an exception to the general requirement that distribution undertakings may not alter the programs they transmit. The CRTC emphasized that the decision was part of “much broader policy determinations” in light of its duty to regulate and supervise the broadcasting system as a whole. Given the cultural significance of the Super Bowl, the decision was an attempt to balance support for Canadian programming with a response to the frustrations of viewers and other objectives of the *Broadcasting Act*, such as allowing subscribers to view complete programming. The CRTC noted that s. 4(3) of the *Simultaneous Substitution Regulations* prohibits simultaneous substitution where the CRTC has decided that the practice is not in the public interest.

[86] Given its decision that authorizing simultaneous substitution during the Super Bowl was not in the public interest, the CRTC determined it could use its power under s. 9(1)(h) of the *Broadcasting Act* to implement that decision.

[87] Section 9(1)(h) of the *Broadcasting Act* provides:

**Licences, etc.**

**9 (1)** Subject to this Part, the Commission may, in furtherance of its objects,

...

**(h)** require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.

[88] In the CRTC’s view, s. 9(1)(h) of the *Broadcasting Act* was enacted “to clarify the Commission’s broad power to regulate the cable industry and impose any conditions necessary to do so.” The opening clause of s. 9(1) couches the CRTC’s authority to make orders “in furtherance of its objects”, and thus, in the purposes of the Act. In support of this, the CRTC cited a previous notice in which it had concluded that the broad wording of s. 9(1)(h) was part and parcel of the flexible mandate that allows it to use a combination of regulations, conditions and orders to achieve the objects of the *Broadcasting Act*. The Order was therefore found by the CRTC to be within its jurisdiction.

[89] The CRTC also responded to the NFL’s argument that s. 9(1)(h) could only be used to make orders concerning the entire output of a programming service rather than an individual program. In the CRTC’s view, the wording of the Order — directed at a programming service — was sufficient to indicate that this was in fact what was being done. The CRTC explained that, on a technical level, *any* simultaneous substitution order involves replacing the entire output of a programming service. As the CRTC wrote in its decision:

Moreover, the distribution order reflects the way simultaneous substitution is actually performed. The entire output of a programming service is, for a particular program, deleted and the entire output of another programming service is substituted, until that program ends. The distribution order reflects the notion that the entire output of the programming service of a television station will not be deleted and substituted for the Super Bowl, a particular program.

(Super Bowl Order, at para. 55)

(...)

[91] Because judicial substitution is incompatible with reasonableness review, we do not begin our analysis by asking how we would have decided the issue before us. Rather, it is in light of the above reasons, as well as the broader administrative context and record, that we must consider whether Bell and the NFL have raised any arguments that, if accepted, would render the CRTC's decision unreasonable. The CRTC here holds the "interpretative upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, even if other reasonable interpretations may exist": *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895, at para. 40 (emphasis in original).

[92] Bell and the NFL concentrated their textual analysis of s. 9(1)(h) on the term "programming services". They submit that this term cannot support the issuance of an order with terms and conditions that relate to a single program. The NFL further argued that the use of the terms "programming services" and "programs" elsewhere in the *Broadcasting Act* indicates that the two terms serve different purposes in the Act.

[93] We agree with Near J.A. that neither Bell and the NFL's submissions, nor the legislative history of s. 9(1)(h), exclude the possibility that "programming services" could relate to a single program in this context. Showing appropriate deference and attention to the administrative context, Near J.A. looked to a previous decision of the CRTC for guidance with respect to the interpretation of this term, which confirmed that the CRTC had previously relied on s. 33(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, to support its conclusion that the term "programming services" may be singular or plural *depending on the context in which it is used*: Broadcasting Decision CRTC 2005-195, May 12, 2005 (online), at paras. 27-28. As the intervener the "Wholesale Code Applicants" pointed out, Bell itself has advanced contradictory interpretations of s. 9(1)(h) in different proceedings: I.F. (Wholesale Code Applicants), at paras. 11-13. In addition, the fact that Parliament granted to the Governor in Council the right to make an order for the urgent broadcast of a specific "program" under s. 26(2) of the *Broadcasting Act* sheds little light on the interpretation of "programming services" in s. 9(1)(h), which operates in a completely different context and allows the CRTC to impose terms and conditions on the distribution of programming services.

[94] In any event, the Super Bowl Order attached a condition to the carriage of Canadian television stations and was, by its own terms, structured to apply to programming services — a reflection of how simultaneous substitution is actually performed. As the CRTC observed, when simultaneous substitution is performed, it is not simply the advertisements that are replaced, but the entire feed of the program. If a station were to make a simultaneous substitution request for the Super Bowl, for example, both the game *and* the advertisements would be re-broadcasted by distribution undertakings complying with the request. In other words, the resulting broadcast would not be an American signal of the Super Bowl game

intermittently interrupted by a signal carrying Canadian commercials. It would be a continuous Canadian re-transmission of the entire Super Bowl broadcast, including Canadian commercials. We agree with the Attorney General of Canada's submission that the CRTC's reasoning here engaged its specialized and technical knowledge, leading to an interpretation that was reasonable in this operational context.

[95] In addition, the CRTC evidently considered s. 9(1)(h) in its context, including not only the objectives of the *Broadcasting Act* but also its broader statutory framework. In response to the jurisdictional arguments brought by Bell and the NFL, the CRTC relied on s. 4(1) and (3) of the *Simultaneous Substitution Regulations* which prohibit licensees from engaging in simultaneous substitution where the CRTC has determined that the practice is "not in the public interest". We agree with the Federal Court of Appeal's assessment that "[i]t is not for the Court to engage in weighing these competing policy objectives and substituting its own view in deciding which policy objectives should be pursued" in the public interest: para. 24. The Super Bowl Order was one piece in a mosaic of decisions arising from nearly three years of consultation and was reasonably determined to further the policy objectives of the *Broadcasting Act*. Section 9(1)(h) contains no statutory limits on the types of terms or conditions that the CRTC may deem appropriate towards programming services, and the provision must be read in light of Parliament's broad grant of discretion to the CRTC. Throughout the process, the CRTC made clear that its decision was weighed — and ultimately justified — in light of "much broader policy determinations" and the CRTC's duty to regulate the "system as a whole".

[A discussion of arguments related to the existence of a conflict between the CRTC's interpretation of s. 9(1)(h) and the *Copyright Act* is omitted.]

(...)

[97] Bell and the NFL's burden was not only to show that their competing interpretation of s. 9(1)(h) was reasonable, but also that the CRTC's interpretation was unreasonable (*McLean*, at para. 41). That they have not done. Deferential review of the decision and administrative context satisfy us that the CRTC reasonably interpreted s. 9(1)(h) of the *Broadcasting Act* and that its Super Bowl Order was reasonable and defensible in light of the facts and law. We would dismiss the appeals.

*Appeals allowed.*

### Notes and questions

In determining that s. 9(1)(h) of the *Broadcasting Act* did not confer on the CRTC the authority to issue an order providing that Bell could only distribute the programming service of a Canadian television station that broadcasts the Super Bowl if it refrained from carrying out a request for simultaneous substitution from that station, the majority did not simply adopt the statutory interpretation arguments advanced by parties. The appellants had argued that the term "programming services" in s. 9(1)(h) referred to the "entire aggregation" of a television station's programs, and did not authorize the CRTC to issue an order targeting the Super Bowl – a specific program. The majority focused instead on the text of s. 9(1)(h), finding that the language of "requiring" a licensee to carry programming services meant that the provision was intended to give the CRTC authority to issue mandatory carriage orders on specified terms and conditions –

an interpretation supported by the relevant statutory context and legislative history. Significantly, the reasons issued by the CRTC in its [Broadcasting Regulatory Policy CRTC 2016-334](#) and [Broadcasting Order CRTC 2016-335](#) did not engage in an analysis of the text or statutory context of s. 9(1)(h) or examine pertinent elements of the legislative history, such as the clause-by-clause analysis of the Bill by the Department of Communications. The majority's approach illustrates that on a correctness review, the court is free to undertake its own analysis of the scope of authority granted to the CRTC by s. 9(1)(h). While the majority noted in *Vavilov* that reviewing courts should take an administrative decision-maker's reasoning into account, in this case, the CRTC's reasons, while addressing the appellant's arguments on the meaning of "programming services", did not speak to the significant elements of text, context and purpose raised by the majority.

In contrast to the majority's judgement, the dissent emphasized the CRTC's qualities as "an archetype of an expert administrative body" and focused on whether the appellants had satisfied their burden of showing that the CRTC's interpretation was unreasonable. In the dissent's view, they had not. On the question of "programming service", the dissent accepted that the CRTC's view that simultaneous substitution *did* involve replacing the entire output of a programming service fully answered the appellants' textual arguments. Accordingly, the appellants had failed to demonstrate that the CRTC's decision was unreasonable.

After reading this excerpt, do you think that the CRTC demonstrated, through its reasons, that its interpretation of the authority conferred by s. 9(1)(h) of the *Broadcasting Act* was, as the dissent claimed, informed by its specialized mandate and expertise in balancing sensitive public-interest issues in a highly technical context? Or, was the CRTC, in seeking to achieve a desirable outcome consistent with the objects of the *Broadcasting Act*, overreaching by issuing an order under a provision that, based on its text, context and legislative purpose, was meant to serve other specific ends?

### "Attentive" correctness review

In *Bell Canada*, the majority of the Supreme Court resolved for itself the question of statutory interpretation raised on the appeal of the CRTC's decision. Because arguments before the CRTC had focused on the meaning of "programming service", the Court did not have the benefit of the CRTC's views on whether, properly interpreted, its power under s. 9(1)(h) was restricted to issuing mandatory carriage orders. In that sense, the outcome in *Bell Canada* supports the dissent's concern that correctness review on a statutory appeal of an expert administrative decision maker's interpretation of its enabling statute allows generalist courts to "freely revisit" legal questions that fall squarely in the decision maker's expertise. Such an outcome is not foreordained. To the extent that an expert decision maker engages, in its reasons, with the key elements of text, context and purpose essential to the interpretation of the statutory

provision, the majority in *Vavilov* encourages appellate courts to take this reasoning into account in correctness review. If an administrative decision maker fails to engage in this way, an appellate court can give it “a second kick at the can” by allowing the appeal but, rather than answering the statutory interpretation question on its own without the benefit of the expert decision maker’s insights, remit the matter back with a direction that the decision maker rehear the matter and interpret the relevant statutory provision in a manner attentive to its text, context and purpose. For example, under s. 52(a)(ii) of the *Federal Courts Act*, RC 1985, c F-7, the Federal Court of Appeal hearing an appeal from an administrative decision maker may, “in its discretion, refer the matter back for determination in accordance with such directions as it considers to be appropriate.” In *Canadian National Railway Company v Richardson International Limited*, 2020 FCA 20, the Federal Court of Appeal exercised this power in order to allow the Canadian Transportation Agency, a specialized decision maker, to provide its view of the meaning of very technical provisions of the *Canada Transportation Act*, SC 1996, c 10 governing the Agency’s power to order one railway to “interswitch” rail traffic (rail cars) between its network and another railway’s network.

***Canadian National Railway Company v Richardson International Limited***

**2020 FCA 20**

**M. Nadon J.A.:**

[Richardson, which operates grain elevators in Western Canada, sends most of its grain by rail to end-use producers or port terminals. CN and CP have railyards at Scotford, northeast of Edmonton, Alberta, within 30 km of one of Richardson’s main grain elevators at Lamont, Alberta. While CN’s main line is not connected to CP’s main line at Scotford, interconnected spur lines there allow CN and CP to interswitch as many as 150 cars a day. Richardson sought an order from the Canadian Transportation Agency determining that there was an “interchange” between CN and CP’s railway lines at Scotford and requiring CN to transfer traffic offered by Richardson by interswitching between the Lamont elevator and Scotford. The Agency granted the order. CN appealed the decision under s. 41(1) of the *Canada Transportation Act*, which provided for an appeal, with leave, on a question of law or of jurisdiction.]

(...)

**III. The Agency’s decision**

10 After posing the question that had to be answered, *i.e.* whether there existed an interchange at Scotford, the Agency summarized the parties’ respective positions. It then began its analysis by setting out the requirements for an interchange, as per section 111 of the Act, namely:

- 1) A place where the line of one railway connects with the line of another railway company; and

2) A place where loaded or empty cars may be stored until delivered or received by the other railway company.

11 In response to CN's argument that although it did interchange traffic with CP at Scotford, its main railway line did not connect with CP's main railway line, the Agency indicated that section 111 did not make any distinction between the type of railway line required to connect with that of another railway. The Agency made the point that while subsection 140(1) of the Act defined "railway line" as excluding a yard track, siding or spur, or other track auxiliary to a railway line, that definition applied only for the purpose of Division V of the Act. Consequently, in the Agency's view, the subsection 140(1) exclusions did not apply to a determination under section 111 because "had it been Parliament's intent to similarly limit the concept of railway line for the purposes of determining whether a location is an interchange, it would have included a comparable exclusion in section 111 of the [Act]." (Reasons at paragraph 50).

12 Thus, by reason of the concession made by CN that it and CP interchanged traffic at Scotford and because of its determination that there was a connection between their respective railway lines thereat, the Agency concluded the first requirement of section 111 was met.

13 The Agency then turned to the second requirement. After reviewing the evidence before it, the Agency concluded Scotford was a location where loaded or empty cars could be stored, notwithstanding that it might be necessary to break up trains for storage.

14 In making its determination with respect to the second requirement, the Agency made a number of factual findings. First, it found that although the storage location at Scotford was not located at the connection point, it was sufficiently close so as not to constitute a barrier to a determination that Scotford was an interchange. Second, it found, on the basis of what it referred to as evidence adduced by Richardson, that each of CN's yard tracks was approximately 3000 feet in length and thus could store up to 50 cars. The Agency indicated CN had not provided any evidence to refute Richardson's evidence. Hence, the Agency accepted that up to 50 cars could be stored on each of CN's tracks at Scotford.

15 Third, in response to CN's argument that it did not have the capacity to store a unit train without dismantling it into smaller strings of cars on at least three or four separate yard tracks and that, in any event, there was insufficient space to store 100 cars even if dismantled, the Agency held CN had not provided evidence with regard to operational constraints at its yard that might impede the storage of cars once a unit train was broken up.

16 The Agency then turned to the question of whether it should order CN to interswitch Richardson's traffic from the Lamont elevator at the Scotford interchange and whether CN should be ordered to provide reasonable facilities for the interswitch.

17 The Agency answered the first question in the affirmative and ordered CN, pursuant to subsection 127(2) of the Act, to interswitch Richardson's traffic from its Lamont elevator

at the Scotford interchange (the Interswitching Order or Order). However, the Agency declined to order CN to provide reasonable facilities for the convenient interswitching of traffic at Scotford because there was no evidence before it to show CN's facilities would not be made available.

[Statutory provisions omitted].

## VI. Analysis

(...)

### ***B. Did the Agency err in its interpretation of sections 111 and 127 of the Act?***

39 CN says the Agency made a reviewable error in interpreting the words of the definition of "interchange" found at section 111 of the Act. More particularly, CN says the words "the line of one railway company connects with the line of another railway company" were given too broad of an interpretation by the Agency and the Agency failed to consider the purpose of the interswitching provisions of the Act and the legislative scheme as a whole.

40 In making this argument, CN says the standard of review applicable to this question of interpretation is that of reasonableness since the Agency was interpreting its home statute. Richardson is also of the view that reasonableness is the standard that applies to this issue.

41 Prior to the Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 CSC 65 (S.C.C.) [Vavilov], I would have agreed with the parties that the standard of reasonableness was the applicable standard regarding the issue of interpretation (see *Canadian National Railway v. Canadian Transportation Agency*, 2010 FCA 65, [2011] 3 F.C.R. 264 (F.C.A.), at paragraphs 27-29; *Canadian National Railway v. Richardson International Ltd.*, 2015 FCA 180, 476 N.R. 83 (F.C.A.), at paragraphs 17, 18 and 30; *Canadian National Railway Company v. BNSF Railway Company*, 2018 FCA 135, [2018] F.C.J. No. 750 (F.C.A.), at paragraph 8; *Canadian National Railway v. Emerson Milling Inc.*, 2017 FCA 86, [2017] F.C.J. No. 415 (F.C.A.), at paragraph 33). However, there can now be no doubt that the applicable standard in the present matter is that of correctness.

42 The appeal before us is one taken pursuant to subsection 41(1) of the Act on a question of law upon leave being granted by this Court. It is a statutory appeal of an administrative decision in respect of which the Supreme Court in *Vavilov* held appellate review now applies (*Vavilov* at paragraphs 36-52). More particularly, at paragraph 36 of its reasons in *Vavilov*, the Supreme Court made the following statement:

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

[My emphasis].

43 At paragraph 37 of its reasons in *Vavilov*, the Supreme Court explained that what it meant by “appellate basis” was the standards of review enunciated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) [*Housen*]. Thus, the standard of correctness will apply to questions of law and to questions of mixed fact and law where there is an extricable principle of law.

44 Since the issue pertaining to the interpretation of sections 111 and 127 of the Act is, without doubt, a question of law, it is subject to the standard of correctness.

45 As I indicated earlier, the Agency dealt with the question of interpretation in a summary manner, at paragraphs 47 to 50 of its reasons, where it concluded that because section 111, contrary to subsection 140(1), did not exclude spur lines and other auxiliary lines from the words “railway line”, such lines were therefore included in the words “railway line” found in the section 111 definition of “interchange” .

46 Under the previous standard of reasonableness, I would have had no hesitation concluding the Agency’s interpretation was unreasonable because it failed to consider both context and the legislative scheme as a whole. As the Supreme Court has made abundantly clear in a number of decisions, the words of a statute must “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.” (*Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at paragraph 26, quoting from Elmer Driedger, *Construction of Statutes*, 2nd ed. 1983 at p. 87).

47 In *Vavilov*, the Supreme Court affirmed that the principles of statutory interpretation are one of the elements relevant to evaluating the reasonableness of an administrative decision (*Vavilov* at paragraph 106). After restating the “modern principle” of statutory interpretation, according to which the “language chosen by the legislature [can only be understood] in light of the purpose of the provision and the entire relevant context”, the Supreme Court stated the following:

“[a]n approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.” (*Vavilov* at paragraph 118).

48 The Agency failed to observe the fundamental principles of statutory interpretation referred to by the Supreme Court. Notably, the same “implied exclusion rule” adopted here by the Agency was rejected by the Supreme Court in *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360 (S.C.C.) [*Green*]. The Supreme Court indicated such an interpretation is “inconsistent with this Court’s purposive approach to statutory interpretation”, and reaffirmed that “[t]he words of the statute must be considered in conjunction with its purpose and its scheme.” (*Green* at paragraphs 35-37).

49 Thus, even under the more deferential reasonableness standard, the Agency’s failure to properly inquire into the legislative intent behind the provision in question would have been fatal to its decision. However, reasonableness is no longer the applicable standard and

thus it is now open to us, on the basis of the standard of correctness, to determine what in our view is the correct interpretation of sections 111 and 127 of the Act (*Vavilov* at paragraph 54).

50 Having given the matter serious consideration, I am of the opinion that we should allow the appeal and return the matter to the Agency for reconsideration in the light of these reasons. In other words, we should not determine what the correct interpretation is. I so conclude for the following reasons.

51 First, I am satisfied that we have not had the benefit of legal arguments from the parties consistent with the standard of correctness, as the appeal was argued on the basis that the Agency's interpretation was reasonable (on the part of Richardson) or unreasonable (on the part of CN). Neither party argued the point on the basis that the Court could substitute its own view of the meaning of the relevant words found in sections 111 and 127 of the Act.

52 For example, Richardson argued, at paragraphs 99-103 of its memorandum of fact and law, that since the Agency's decision was consistent with its prior decision in Order No. 1992-R207 wherein the Agency adopted a generous interpretation of the words "railway line", the prior decision provided a reasonable basis for the Agency's decision in the present matter which, in effect, rejected a more restrictive interpretation of the words at issue. Another example is paragraph 82 of CN's memorandum of fact and law where CN simply asserts that it was an error on the part of the Agency to fail "to undertake or articulate an analysis of whether an interchange should be limited to connections of railway main lines."

53 A second reason, in my view, for returning the matter to the Agency is that the Court would benefit greatly from a fuller analysis by the Agency as to why it believes one interpretation is better than the other. In other words, we will benefit from the Agency's rationale considering that it has considerable expertise not only with regard to its home statute but also in relation to all matters pertaining to railways, including the interswitching of traffic.

54 In making these comments, I do not rule out the possibility that the Agency might come to an interpretation that differs from the one it arrived at in the present matter. However, whatever interpretation the Agency arrives at will necessarily be the result of a more fulsome analysis, which can only benefit the parties and this Court should the matter return to us.

In your view, what are the benefits of the Federal Court of Appeal's approach to appellate review in this case? What might be some of the disadvantages?

*Planet Energy (Ontario) Corp v Ontario Energy Board*, [2020 ONSC 598](#) at para 31 is another example of a Court declining to exercise its discretion to deal with an issue of statutory interpretation raised by the appellant on its appeal from a board's decision because it was not argued before the board, depriving the Court of the expert board's views.

## REVIEW FOR PALPABLE AND OVERRIDING ERROR

Administrative decisions subject to statutory appeals are reviewed on appellate standards. These were described in the leading case of *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. For a pure question of law, the standard of review is correctness. As the Court noted, at para 8, “the basic rule with respect to the review of a trial judge’s findings is that an appellate court is free to replace the opinion of the trial judge with its own.” In contrast, findings of fact cannot be reversed unless it is established that the trial judge made a palpable and overriding error, a standard that also applies to the appellate review of the factual inferences made by the trial judge. As stated by the Court at para 23:

... [I]t is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. [emphasis in the original]

Similarly, questions of mixed fact and law, which involve the application of a legal standard to a set of facts – for example, whether the facts establish that the defendant failed to exercise the legal standard of reasonable care and was negligent as a result – are also reviewed on the stringent standard of palpable and overriding error. However, as the Court noted at para 36, if the erroneous finding of the trial judge “can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test or similar error in principle,” the error can be characterized as an error of law, subject to correctness review.

### What is palpable and overriding error?

The “palpable and overriding error” standard is clearly a deferential standard. Its meaning was explored in some depth by the Federal Court of Appeal in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157. Mahjoub, a foreign national, had been detained under a security certificate signed by the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration stating that they were of the opinion that he was inadmissible to Canada on security grounds. As required by the *Immigration and Refugee Protection Act*, SC 2001, c 27, a certificate was referred to the Federal Court which, after lengthy and complex proceedings, found that the security certificate was reasonable. There were reasonable grounds to believe that Mahjoub was inadmissible as a danger to the security of Canada because he was a member of an organization that there were reasonable grounds to believe engages, has engaged or will engage in espionage, subversion by force of a government or terrorism. Mahjoub appealed the Federal Court’s decision that the certificate was reasonable

as well as its refusal to exercise its discretion to stay the proceedings on account of an alleged abuse of process. While it ultimately found no grounds to interfere with the Federal Court's decision, the Federal Court of Appeal's detailed explanation of how the *Housen* appellate standards applied to its review of the Federal Court's decisions, including its exercises of discretion, is well worth reproducing in full.

***Mahjoub v Canada (Citizenship and Immigration), 2017 FCA 157***

David Stratas, Richard Boivin, Judith Woods JJ.A.

**David Stratas J.A.:**

(...)

**D. Analysis**

***(1) The standard of review***

56 The Supreme Court has confirmed that the standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) apply when this Court reviews the Federal Court's finding that a security certificate is reasonable: *Harkat, Re*, 2014 SCC 37, [2014] 2 S.C.R. 33 (S.C.C.) at paras. 107-109.

57 Therefore, for questions of law, questions of legal principle and questions of mixed fact and law where there are extricable questions of law or legal principle, the Federal Court shall be reviewed for correctness. On all other questions, particularly questions of fact, the Federal Court shall be reviewed for palpable and overriding error.

58 Everyone knows what correctness review is: if there is error, this Court can substitute its opinion for that of the Federal Court. But not everyone knows what palpable and overriding error is.

59 On occasion during argument, it became apparent that Mr. Mahjoub's view of what constitutes palpable and overriding error diverges from our own. As well, as will be seen, the high threshold for finding palpable and overriding error plays a significant role in this matter. Thus, at the outset of my analysis, I wish to say a few words about palpable and overriding error.

60 In this case, many of Mr. Mahjoub's submissions focus on the Federal Court's fact-finding and its factually suffused application of legal standards to the facts, particularly on the issue of the reasonableness of the security certificate. These matters can only be reviewed for palpable and overriding error.

61 Palpable and overriding error is a highly deferential standard of review: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 (S.C.C.) at para. 38; *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.). When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire

tree must fall. See *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 431 N.R. 286 (F.C.A.) at para. 46, cited with approval by the Supreme Court in *St-Germain*, above.

62 “Palpable” means an error that is obvious. Many things can qualify as “palpable.” Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.

63 But even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding.

64 “Overriding” means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not “overriding.” The judgment of the first-instance court remains in place.

65 There may also be situations where a palpable error by itself is not overriding but when seen together with other palpable errors, the outcome of the case can no longer be left to stand. So to speak, the tree is felled not by one decisive chop but by several telling ones.

66 Often those alleging palpable and overriding error submit that a first-instance court forgot, ignored, misconceived or gave insufficient weight to evidence because it did not mention the evidence in its reasons. Before us, Mr. Mahjoub frequently makes that submission. But a non-mention in reasons does not necessarily lead to a finding of palpable and overriding error.

67 For one thing, first-instance courts benefit from a rebuttable presumption that they considered and assessed all of the material placed before them: *Housen* at para. 46.

68 Further, when an appellate court considers a submission of palpable and overriding error, often it focuses on the reasons of the first-instance court. But its reasons are to be viewed in context and construed in light of both the evidentiary record before it and the submissions made to it: *R. v. M. (R.E.)*, 2008 SCC 51, [2008] 3 S.C.R. 3 (S.C.C.) at paras. 35 and 55. Although the reasons may not mention a particular matter or a particular body of evidence, the evidentiary record and the context may shed light on why the first-instance court did what it did. They may also confirm that although a matter is not mentioned in the reasons, it was nevertheless within the court’s contemplation and considered by it.

69 Sometimes counsel submit that gaps in the reasons of the first-instance court show palpable and overriding error. In considering this sort of submission, appellate courts must remember certain realities about the craft of writing reasons. It is an imprecise art suffused by difficult judgment calls that cannot be easily second-guessed. This Court has described the task of a first-instance court drafting reasons in the following way:

Immersed from day-to-day and week-to-week in a long and complex trial such as this, trial judges occupy a privileged and unique position. Armed with the tools of logic and reason, they study and observe all of the witnesses and the exhibits. Over time, factual assessments develop, evolve, and ultimately solidify into a factual narrative, full of complex interconnections, nuances and flavour.

When it comes time to draft reasons in a complex case, trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.

Sometimes appellants attack as palpable and overriding error the non-mention or scanty mention of matters they consider to be important. In assessing this, care must be taken to distinguish true palpable and overriding error on the one hand, from the legitimate by-product of distillation and synthesis or innocent inadequacies of expression on the other.

(*South Yukon*, above at paras. 49-51.) These observations are particularly true in a case like this with a voluminous, complex and sprawling record scattered among numerous motions and proceedings.

70 Palpable and overriding error is often best defined by describing what it is not. If an appellate court had a free hand, it might weigh the evidence differently and come to a different result. It might be inclined to draw different inferences or see different factual implications from the evidence. But these things, without more, do not rise to the level of palpable and overriding error.

71 Another point of confusion among counsel in this area is the standard of review for exercises of discretion by the first-instance court.

72 An exercise of discretion involves applying legal standards to the facts as found. For the purposes of the *Housen* framework that governs the appellate standards of review, exercises of discretion are questions of mixed fact and law: *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.L.R. (4th) 497 (F.C.A.) at paras. 28 and 71-72; *Imperial Manufacturing Group Inc. v. Decor Grates Inc.*, 2015 FCA 100, [2016] 1 F.C.R. 246 (F.C.A.) at para. 18.

73 Sometimes people are confused because not all questions of mixed fact and law are alike. Some questions of mixed fact and law are binary in nature. For example, the question whether on the facts a professional has fallen below the legal standard of care is a question of mixed fact and law that admits of only a yes or no answer. Other questions of mixed fact and law allow for a whole range of possible answers. For example, consider the question of remedy for an abuse of process, a question very much before us. Governed by the legal standards set out in the case law, a court has a range of remedial options available to it. In cases where questions of mixed fact and law give rise to that range, we tend to speak of the

court as having discretion. But it is still a question of mixed fact and law for the purposes of the *Housen* framework that governs the appellate standards of review.

74 Under the *Housen* framework, questions of mixed fact and law, including exercises of discretion, can be set aside only on the basis of palpable and overriding error — the high standard described above — unless an error on an extricable question of law or legal principle is present. So, for example, if an appellate court can discern some error in law or principle underlying the first-instance court's exercise of discretion, it can reverse the exercise of discretion on account of that error. Another way of putting this is whether the discretion was “infected or tainted” by some misunderstanding of the law or legal principle: *Housen* at para. 35.

### **Application of appellate standards**

The decision of the Alberta Court of Appeal in *Al-Ghamdi v College of Physicians and Surgeons of Alberta*, 2020 ABCA 71 illustrates the application of appellate standards in the area of professional discipline. The powers of professional bodies to set professional standards and to enforce these through professional discipline proceedings are key elements of the privilege of self-regulation. Given the significant impact of such proceedings on the livelihood and reputation of the professionals subject to discipline, the decisions of disciplinary bodies are frequently subject to statutory appeals to the courts. In the excerpt that follows, note how the Court breaks down the various grounds of appeal into questions of law, reviewable on a correctness standard, and mixed questions of fact and law and questions of fact, reviewable for palpable and overriding error. As noted in the previous chapter, these different standards will likely encourage segmentation by presenting parties and their counsel with a strong incentive to distinguish between various aspects of a decision to separate questions of law from other types of questions even if all are integral to the overall decision.

#### ***Al-Ghamdi v College of Physicians and Surgeons of Alberta, 2020 ABCA 71***

[Al-Ghamdi, an orthopedic surgeon practising at the Queen Elizabeth II Hospital in Grande Prairie, was charged by the College of Physicians and Surgeons of Alberta with unprofessional conduct arising from “a pattern of disruptive conduct” carried out over eleven years of practice. The College identified over a dozen categories of conduct, including: failing to cooperate with medical colleagues and nursing staff to ensure surgical cases were performed on the basis of medical need for urgent care; cultivating a culture of fear and distrust through making complaints to the Alberta Human Rights Commission and professional bodies as well as threatening to start or starting legal action; failing to follow dispute resolution processes applicable to medical staff; and having nursing staff open sterilized packs of surgical instruments which were not reasonably required, making them unavailable for other surgeons. According to the College, this behaviour was contrary to Al-Ghamdi’s obligation under the Canadian Medical Association Code of Ethics and Standards of Practice established under Alberta’s *Health Professions Act*, RSA 2000, c H-7 (the Act) and

therefore constituted unprofessional conduct. After a 47 day hearing, the Hearing Tribunal of the College, in a 118 page decision, found Al-Ghamdi guilty of “demonstrating a pattern of disruptive behaviour with a number of his medical and nursing colleagues” and held that this behaviour was contrary to the behaviour expected of physicians as established in the CMA Code of Ethics, the CPSA Standards of Practice and the Act and that it amounted to unprofessional conduct. After an unsuccessful appeal to the Council Review Panel of the College, Al-Ghamdi appealed to the Alberta Court of Appeal under s. 90 of the Act.]

Frans Slatter, Myra Bielby, Brian O’Ferrall JJ.A.

***Per curiam:***

(...)

**Issues and Standard of Review**

- 8 On appeal the appellant alleges that the Review Panel erred in the following ways:
- (a) affirming that “disruptive behavior” constitutes “unprofessional conduct” under the *Health Professions Act*;
  - (b) affirming that outcomes, rather than behaviour, may yield a finding of “unprofessional conduct” under the *Health Professions Act*;
  - (c) finding that the Tribunal reasonably re-considered complaints that had been previously dismissed;
  - (d) affirming that Dr. Al-Ghamdi’s conduct before the Tribunal as a self-represented advocate was material in determining his credibility;
  - (e) finding that the Tribunal made reasonable determinations with respect to particulars a, b, f, g, i, j, and m;
  - (f) affirming an unreasonable sanction against Dr. Al-Ghamdi; and
  - (g) affirming an unreasonable cost award against Dr. Al-Ghamdi.

- 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 (S.C.C.) 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 (S.C.C.) at para. 8, [2002] 2 S.C.R. 235 (S.C.C.). 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; *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25 (S.C.C.) at para. 74, [2005] 1 S.C.R. 401 (S.C.C.).
- (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.

10 The members of the College of Physicians and Surgeons of Alberta, like most professions in Alberta, are afforded the privilege and responsibility of self-regulation. The ultimate objective of professional regulation is protection of the public. The presumption behind self-regulation is that no one has a greater stake in the integrity of the profession than the members of the profession, and the profession is well-positioned to judge when conduct is so unacceptable as to amount to professional misconduct that is contrary to the public interest. On the other hand, professionals subjected to discipline are entitled to have disciplinary decisions reviewed externally on appeal to this Court.

11 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 subjected to discipline has met that standard.

#### **Can “Disruptive Behaviour” Constitute “Unprofessional Conduct”?**

12 While the complaint against the appellant listed 13 particulars, the allegation was not that each of those particulars constituted unprofessional conduct. The allegation was that the particulars were evidence of a long-term pattern of “disruptive behaviour” that constituted unprofessional conduct. The appellant argues that the term “unprofessional conduct” in the *Health Professions Act* does not permit that interpretation. This is a question of statutory interpretation reviewed for correctness. On the other hand, whether the specific conduct that is the subject of the proceedings constitutes unprofessional conduct involves an assessment of the facts against that legal standard, and is a mixed question of fact and law.

13 The *Health Professions Act* defines “unprofessional conduct”. The relevant portions of the definitions include:

1(1) In this Act, . . .

(j) “conduct” includes an act or omission; . . .

(oo) “standards of practice” means standards of practice adopted by a council under Part 8; . . .

(pp) “unprofessional conduct” means one or more of the following, whether or not it is disgraceful or dishonourable:

- (i) displaying a lack of knowledge of or lack of skill or judgment in the provision of professional services;
- (ii) contravention of this Act, a code of ethics or standards of practice;
- (iii) contravention of another enactment that applies to the profession; . . .
- (xii) conduct that harms the integrity of the regulated profession;

The appellant argues that the use of the word “means” in s. 1(1)(pp) signals that this is a “closed” definition. The practical impact of that restriction on the definition is weakened by the breadth of s. 1(1)(pp)(xii) relating to harm to the integrity of the profession.

14 Part 8 of the *Health Professions Act* governs the adoption of a code of ethics and standards of practice (statutory provisions omitted)... The Notice of Hearing expressly alleges that the appellant’s conduct was contrary to his obligations under the *Canadian Medical Association Code of Ethics*, including in particular section 52, and Standards of Practice No. 3 and No. 28.

15 The professional standards referred to are as follows. Section 52 of the *CMA Code of Ethics* sets out a duty to:

52. Collaborate with other physicians and health professionals in the care of patients and the functioning and improvement of health services. Treat your colleagues with dignity and as persons worthy of respect.

Standard of Practice No. 3 “Collaboration In Patient Care” provides:

1. When multiple healthcare providers are caring for a patient or group of patients, a physician must collaborate with other physicians, regulated healthcare providers, and other members of the care team in the care of those patients.
2. A physician must treat other healthcare providers with dignity and respect.
3. A physician must communicate effectively with other members of the healthcare team.
4. When working in a team setting, a physician must document clearly his or her contribution to the patient’s care.
5. When collaborating in the care of a patient, a physician must explain the physician’s role and responsibilities to the patient.

The appellant argues that the allegation against him does not constitute an offence because “disruptive behaviour” is not a term that appears in the *CMA Code of Ethics* or the standards of practice.

16 The term “disruptive behaviour” is used in a “Guidance Document” prepared by the College entitled “Managing Disruptive Behaviour in the Healthcare Workplace”. This document was prepared in 2010, during the period covered by the allegations (2003 to 2014). That document cautions that behaviour must be measured in context, and states: “Disruptive behaviour is an enduring pattern of conduct that disturbs the work environment”. The term is also used in a “Provincial Framework” document prepared by the Health Quality Council of Alberta in 2013, also entitled “Managing Disruptive Behaviour in the Healthcare Workplace”. It uses a similar definition, and includes as examples:

- Using intimidation tactics to gain compliance from others.
- Threatening others with retribution, litigation or violence.
- Intimidating, threatening or coercive actions such as threatening or implying unwarranted discipline or job loss.
- Excessive and unreasonable monitoring of someone’s work.
- Intentional noncompliance with clinical and administrative policies or processes, such as refusing to complete forms, manage records, sign orders, return calls in a timely manner.
- Intentional noncompliance with work schedules or assignments; chronic lateness.
- Refusal to work collaboratively e.g. not sharing information, not consulting when appropriate, not offering assistance when it is requested.

As the Hearing Tribunal noted at para. 352, neither of these documents qualifies as a “standard of practice” within s. 1(1)(pp)(ii), and the Hearing Tribunal did not use them as such. Further, it noted both documents were prepared after the bulk of the conduct engaged by the Notice of Hearing had occurred.

17 The appellant is correct in arguing that “unprofessional conduct” must be situated within the definition in the *Health Professions Act*. That definition, however, is cast at a conceptual level; it does not purport to list in detail all acts or omissions that would constitute unprofessional conduct. For example, no attempt is made to define the limits of “lack of care and skill” in s. 1(1)(pp)(i), and indeed any precise definition would be impossible. Until 2019, there was no specific mention of sexual misconduct with a patient, although that would clearly be unprofessional conduct. Likewise, the reference to harm to the integrity of the profession is intended to be very wide-ranging. Further, s. 52 of the *CMA Code of Ethics* and Standard of Practice No. 3 are also very general in scope. They mandate collaboration to advance the functioning and improvement of health services. There is nothing preventing the College from reducing those general principles into specific allegations of misconduct.

18 Not every workplace misstep or disagreement should be characterized as “professional misconduct”. Workplace issues generally call for workplace remedies. However, workplace conduct that has a serious detrimental effect on the provision of patient care, and the efficient and sustainable operation of a healthcare facility (like the

Queen Elizabeth II Hospital) can fall within the definition of professional misconduct if it is sufficiently egregious to be what could reasonably be called “misconduct”. Many of the particulars provided in the Notice of Hearing could fit within the parameters of those more general provisions. As a matter of law, the charge filed against the appellant falls within the definition of “professional misconduct”.

19 The Hearing Tribunal did not treat “disruptive behaviour” as a discrete category of professional misconduct. None of the 13 particulars expressly used that phrase. The Hearing Tribunal regarded that term as a suitable description of the pattern of misconduct of which the appellant was accused. This term, which was later adopted in the guidance documents, is essentially a synonym for the kind of conduct discussed in the *Code of Ethics* and Standard of Practice No. 3.

20 The Hearing Tribunal held at paras. 345, 351 that the two documents entitled “Managing Disruptive Behaviour in the Healthcare Workplace” were “helpful as an articulation of the types of behaviour that would harm the integrity of the profession”. Deciding whether a particular act meets the expected standard of professional conduct engages the expertise of the Hearing Tribunal and Review Panel. It is properly characterized as a mixed question of fact and law, a type of decision which is reviewed for palpable and overriding error. The finding that the conduct described in the particulars of the Notice of Hearing could constitute unprofessional conduct does not disclose any reviewable error.

[The appeal was dismissed]

With respect to Al-Ghamdi’s claim that several of the Hearing Tribunal’s findings, including that he was responsible for a culture of fear and distrust and that reporting “legitimate” complaints against co-workers was improper or unreasonable, the Court of Appeal noted, at para 32, that this ground of appeal came down to “a disagreement with the Hearing Tribunal’s findings of fact and credibility” which were “only disturbed on appeal where palpable and overriding error is shown.” After reviewing Al-Ghamdi’s submissions, it held, at para 40, that “there was evidence on the record to support the findings of the Hearing Tribunal with respect to each of the particulars it found were established” and that the appellant had shown no reviewable error.

As noted in *Mahjoub*, exercises of discretion are considered to involve questions of mixed fact and law and reviewed for palpable and overriding error unless an extricable question of law or legal principle, reviewable for correctness, is present. Questions relating to the scope of a discretionary power, including what considerations may be relevant to its exercise, have been held to be questions of law and reviewed on a correctness standard. In the following case, the British Columbia Superintendent of Motor Vehicles issued a notice prohibiting the defendant from driving for four months when she received, and did not dispute, a ticket for using an electronic device while driving contrary to the *Motor Vehicle Act*, RSBC 1996, c 318 (MVA) on two occasions within a single month. The reasons accompanying the Notice of Prohibition stated:

Your driving record and letter, in response to the Notice of Intent, have been considered. Based on that consideration, we hereby notify you that you are prohibited from driving a motor vehicle under Section 93(1)(a)(ii) of the *Motor Vehicle Act* and continues for a term of 4 months.

This action is necessary because of your unsatisfactory driving record...

The Superintendent's authority to issue a Notice of Prohibition is set out in s. 93(1) of the *MVA*:

93 (1) Even though a person is or may be subject to another prohibition from driving, if the superintendent considers it to be in the public interest, the superintendent may, with or without a hearing, prohibit the person from driving a motor vehicle

(a) if the person

- (i) has failed to comply with this Act or the regulations, or
- (ii) has a driving record that in the opinion of the superintendent is unsatisfactory...
- (...)

(2) In forming an opinion as to whether a person's driving record is unsatisfactory the superintendent may consider all or any part of the person's driving record, including but not limited to any part of the driving record previously taken into account by a court or by the superintendent in making any order prohibiting the person from driving a motor vehicle.

(3) If under this section the superintendent prohibits a person from driving a motor vehicle on the grounds of an unsatisfactory driving record, a prohibition so made must not be held invalid on the grounds that the superintendent did not examine or consider other information or evidence.

The language of s. 93 ("if the Superintendent considers it to be in the public interest, the Superintendent may... prohibit...") clearly confers on the Superintendent a discretionary power to issue a Notice of Prohibition. The defendant appealed the Notice to the British Columbia Supreme Court under s. 94 of the *MVA*, which empowers the Court to either dismiss the appeal or allow the appeal and order the Superintendent to terminate the prohibition. She claimed that the Superintendent erred in failing to provide sufficient reasons; in failing to consider the circumstances surrounding the offences on her driving record (on the first occasion, she had picked up the phone to tell her employer, who had initiated the call, that she was coming, and on the second occasion, she picked up the phone to decline the call); and in failing to adequately consider the hardship she would face as a result of the prohibition, being a single mother responsible for driving her children to medical appointments and living twenty minutes away from her work, the grocery store and pharmacy.

***Mayer v The Superintendent of Motor Vehicles, 2020 BCSC 474***

Forth J.

(...)

**Issue 1: The Standard of Review**

[After setting out an overview of the Vavilov framework for selecting the standard of review, the court set out the parties' respective positions.]

***Positions of the Parties******Ms. Mayer's Position***

26 Ms. Mayer submits that the standard of correctness applies.

27 She argues that the statutory right of appeal in s. 94 of the MVA indicates that the legislature intended a more involved role for the courts. This is further evinced by the fact that, under s. 94(3), a reviewing court has only two options: dismiss the appeal, or order the Superintendent to terminate the prohibition imposed. The court does not have the option to send the decision back for reconsideration. Ms. Mayer submits that this demonstrates the legislature's intent to have the court intervene by substituting its own view of the appropriate outcome, which is consistent with a correctness standard.

***The Superintendent's Position***

28 The Superintendent submits that the standard of review to be applied in this case is palpable and overriding error.

29 She points to the wording of s. 93 to demonstrate the legislative intent to give the Superintendent a wide discretion with respect to this decision making power. Under s. 93(1)(a)(ii), the test for imposing a prohibition is whether the Superintendent considers it to be "in the public interest" to do so based on a driving record that "in the opinion of the superintendent is unsatisfactory". Subsection 93(2) provides that the Superintendent "may consider all or any part of the person's driving record" in forming an opinion as to whether it is unsatisfactory. Finally, under s. 93(3), the legislature directs that where the prohibition is based on an unsatisfactory driving record, it "must not be held invalid on the grounds that the superintendent did not examine or consider other information or evidence." All of these subsections point to a legislative intention to give the Superintendent a wide discretion to act based on its opinion and assessment of the public interest.

***Analysis***

30 It is clear, and the parties agree, that appeals under s. 94(1) of the MVA are now conducted on appellate standards of review, and that the presumption of reasonableness does not apply.

31 I find that, applying appellate standards, the Superintendent's decision to issue a driving prohibition to Ms. Mayer is a question of mixed fact and law, and is reviewable on a standard of palpable and overriding error absent an extricable legal question. I agree with

the Superintendent's characterization of the relevant questions and standards of review, which are:

- a) the question of what is entered on the appellant's driving record is a question of fact;
- b) the question of whether the appellant's driving record, in the opinion of the Superintendent, is unsatisfactory, involves the application of a legal standard to a set of facts and is therefore a question of mixed fact and law; and
- c) the question of whether the Superintendent considers it to be in the public interest to impose a driving prohibition involves the application of a legal standard to a set of facts and is a question of mixed fact and law.

32 I disagree with Ms. Mayer's submission that the fact that the reviewing court's only options are to dismiss the appeal or terminate the prohibition is consistent with a legislative intention to review the prohibition on a correctness standard. In my view, it is consistent with a deferential standard of review. Under a correctness standard, the court would usually be entitled to substitute its view of the correct result in place of that of the first instance decision maker, which, in the circumstances of a review of a driving prohibition, could mean tinkering with the terms of the prohibition by, for example, imposing a prohibition for a different period of time than that ordered by the decision maker. The fact that the court must either uphold the prohibition imposed by the Superintendent or find it to be so unsupportable that it must be terminated is consistent with a deferential approach to reviewing the Superintendent's decision.

33 With that being said, Ms. Mayer does raise some extricable legal questions that should be determined on a correctness standard. As the Superintendent agrees, if the reasons are insufficient to allow for appellate review, this amounts to an error of law. I will consider this in greater detail in Issue 2.

34 I also accept that the questions of whether or not the Superintendent was required to consider the circumstances surrounding the tickets and the hardship that Ms. Mayer outlines in her letter are questions about the proper legal test to be applied, and are therefore questions of law. However, the application of that test to the facts before the decision maker is a question of mixed fact and law, and is owed deference absent palpable and overriding error.

#### **Issue 2: Did the Superintendent err in failing to provide sufficient reasons?**

[Mayer argued that the Superintendent's reasons did not refer to the letter she had submitted relating the circumstances surrounding her offences and the impacts of the prohibition and "showed no logic or reasons behind the decision and the factors that led to it." The Superintendent submitted that the reasons, considered in the context of the record, which included a copy of the Guidelines relied on by the Superintendent in exercising its discretion and Mayer's driving record and submissions, disclosed all that was required to permit appellate review.]

### ***Analysis***

44 In my view, the reasons provided by the Superintendent were sufficient “to demonstrate that review was adequately considered”, to borrow the language in Ms. Mayer’s submissions.

45 It is not in dispute that the Superintendent issued reasons for the decision. The dispute is about whether the reasons were sufficient. The issue is therefore not one of procedural fairness, but a consideration on substantive review: *Newfoundland Nurses* at paras. 20-22. Although *Newfoundland Nurses* was decided before *Vavilov*, in my view, *Vavilov* did not change the law on this point.

46 The parties both rely on jurisprudence considering the sufficiency of reasons in the appellate context. I agree that it is consistent with the reasoning in *Vavilov* that, in the context of a statutory appeal of an administrative decision, appellate jurisprudence on the framework for analyzing the adequacy of reasons should govern. Consideration of the nature and context in which the administrative decision was made fits well within this framework, and, in my view, may inform the question of whether the reasons, viewed in the context of the record, are sufficient to allow the court to exercise its appellate function in reviewing the administrative decision.

47 Appellate jurisprudence is clear that the sufficiency of reasons is not a stand-alone basis for interfering with a decision on appeal: *Ecobase Enterprises Inc.* at paras. 7-8. This principle is consistent with the administrative law jurisprudence (albeit pre-*Vavilov*): *Newfoundland Nurses* at paras. 14-15.

48 The appropriate approach is to ask: are the reasons, viewed in the context of the record, sufficient to allow the reviewing court to exercise its appellate function? In my view, the reasons of the Superintendent, considered in the context of the record and the statutory scheme, were sufficient to explain the reason for the decision.

49 The reasons in the Notice of Prohibition clearly disclose that Ms. Mayer’s letter was considered, but the decision to issue the prohibition was “necessary because of [her] unsatisfactory driving record.” The reasons make clear that the decision to prohibit was because, in the Superintendent’s opinion, Ms. Mayer’s driving record was unsatisfactory. Where the driving record is the reason for issuing the prohibition, the Superintendent is not required to examine or consider other information or evidence: s. 93(3).

50 In my view, the fact that there is a statutory right of appeal does not necessarily mean that the legislature intended an exacting review of the administrative decision such that the absence of lengthy reasons frustrates the purpose of the legislation. Instead, it may be that the legislature wished to prescribe the parameters of review, to circumscribe the role of the reviewing court and to ensure that the decision is not unduly interfered with. The parameters set in s. 93(3) (that a prohibition on the basis of an unsatisfactory driving record must not be invalidated on the grounds that other information or evidence was not considered), and 94(3) (as discussed above at para. [32]) are demonstrative of this intention with respect to the statutory appeal in s. 94.

51 The issues before the decision maker were: is Ms. Mayer’s driving record unsatisfactory, and if so, is it in the public interest to issue a driving prohibition? I agree with the Superintendent’s submission that this is a highly discretionary decision that did not require the decision maker to resolve complex legal or factual questions, and the reason for the decision is evident even with minimal reasons.

52 The basis of the decision is even clearer when considered in the context of the record. Ms. Mayer’s driving record disclosed a record of two offences for using an electronic device while driving within one month. The Guidelines — a publicly available document that adjudicators are required to consider in exercising their discretion as to whether or not it is in the public interest or order a prohibition — are clear that use of an electronic device while driving is considered a “high risk driving offence”. Experienced drivers who commit two or more high risk offences within a one-year period are subject to potential driver improvement action. The Guidelines recommend that an experienced driver who has a record of any combination of two or more high-risk driving offences within a year receive a prohibition with a minimum of three months and a maximum of 12 months: Guidelines at 4.2: Experienced Drivers — High-Risk Driving Offences (pp. 12-13). The four month prohibition that Ms. Mayer received was clearly within the range suggested by the Guidelines for a driver with her record, and on the low end of it.

53 I find that the reasons for the prohibition, both in the Notice of Prohibition itself, and when considered in the context of the record, including Ms. Mayer’s driving record, her application for review, and the Guidelines, are sufficient to disclose the reason for the prohibition and to permit appellate review of the decision.

**Issue 3: Did the Superintendent err in failing to consider the circumstances surrounding the offences on Ms. Mayer’s driving record?**

[Mayer claimed that the Superintendent had erred by failing to consider the circumstances surrounding the violations, including the fact that she had been licensed since 1990 with no violations, which indicated she was not a threat to public safety. The Superintendent argued that it was required only to look at “all or part” of Mayer’s driving record, and that by pleading guilty, Mayer admitted the requisite elements of the offence: operating the device while driving a motor vehicle. In any event, the reasons indicated that it had considered Mayer’s letter.]

***Analysis***

59 I find that the Superintendent did not err in failing to consider the circumstances of the offences.

60 The interpretation of s. 93(1)(a)(ii) in *Winthrope* relied on by the appellant was rejected by the Court of Appeal in *McEachern*, at para. 25. In *McEachern*, the Court of Appeal held that it was an error to require the adjudicator to find that the driver “was a dangerous driver who might put the safety of the public at risk” in order to find that a driving prohibition was in the public interest: paras. 26-30. As the Court of Appeal affirmed in *McEachern* at para. 27, the consideration of whether it is in the public interest to issue a

prohibition on the basis of an unsatisfactory driving record is not only about prohibiting potentially dangerous drivers, but also by deterring poor driving behaviour. The appellant's submission that, had the adjudicator considered the circumstances of the offences, the public safety concerns would have been mitigated, implicitly invites the same reasoning that was rejected in *McEachern*.

61 I agree with the Superintendent that it was entitled to rely on the driving record itself to determine whether or not it was unsatisfactory such that a prohibition was required in the public interest. This is consistent with the statutory language and with the Court of Appeal's decision in *McEachern*.

62 Even if I am wrong about this, the Notice of Prohibition explains that Ms. Mayer's letter — which explained the circumstances of the offences — was considered. It is not open to a reviewing court on appeal to reweigh the evidence that was before the first-instance decision maker, and I would decline to do so.

**Issue 4: Did the decision maker err in failing to adequately consider the hardship Ms. Mayer would face as a result of the driving prohibition?**

[Mayer argued that even though the Guidelines allowed a consideration of hardship, the Superintendent had given no weight to her personal circumstances and, if it did, its reasons presented no explanation of its consideration of hardship. The Superintendent replied that it was not required to consider hardship, that it had focused on the protection of the public and that in light of Mayer's driving record, it did not make a palpable and overriding error in finding a four month prohibition to be in the public interest.]

***Analysis***

68 In my view, this ground of appeal cannot succeed based on the language of s. 93(3), which prohibits the court from invalidating a prohibition on the grounds that the Superintendent did not consider evidence other than the driving record where the record being unsatisfactory is the reason for the prohibition. The hardship faced by Ms. Mayer is evidence or information other than the driving record.

69 Although s. 5.1 of the Guidelines provides that the adjudicator *may* consider personal or financial hardship, it is up to their discretion whether or not to consider this information and if so, how much weight to give to it.

70 As with the explanation of the circumstances of the offences, the information about hardship was included in Ms. Mayer's letter, which the adjudicator expressly considered. The prohibition given to Ms. Mayer was at the low end of the range for an experienced driver with her record outlined in the Guidelines. In my view, there was no error in the decision to issue a four month driving prohibition in all of the circumstances.

71 *Vavilov* is clear that legislative intent is key for courts to consider when acting in review of an administrative decision. In my view, the relevant provisions of the MVA demonstrate an intent for courts to be deferential to the discretion of the Superintendent in issuing driving prohibitions in exercising its statutory mandate to ensure the safety of the

road-using public. The legislature has made it clear that courts must not interfere lightly with a decision to issue a prohibition on the basis of an unsatisfactory driving record, and I see no reason to do so in this case.

### **Conclusion**

72 The reasons provided in the Notice of Prohibition, both on their own and in the context of the material before the adjudicator, were sufficient to explain the reason for issuing the driving prohibition. The adjudicator was not required to consider the circumstances of the offences or the hardship Ms. Mayer would face as a result of the prohibition in deciding that her record was unsatisfactory and that it was in the public interest to issue a prohibition. In this case, the adjudicator exercised their discretion to consider them anyway, as they were entitled to do. However, these considerations were insufficient to overcome the public interest in issuing a driving prohibition on the basis of the unsatisfactory record before the adjudicator, which included two high-risk offences within a one month period. The four month prohibition was well within, and at the low end of, the range of suggested prohibitions for experienced drivers for offences of this nature. I see no error in the reasons or in the decision itself.

73 For these reasons, the appeal is dismissed, with no costs being awarded...

### **Note**

In *Strom v Saskatchewan Registered Nurses' Association*, [2020 SKCA 112](#) at paras 73-76, the Saskatchewan Court of Appeal decided to review a determination of professional misconduct on a standard other than palpable and overriding error because the question straddled the line between “deciding a question of mixed fact and law or making a discretionary decision.”

### **Palpable and overriding error and reasonableness compared**

The appellate standard of review for palpable and overriding error is clearly a deferential standard. Some observers have suggested that it may be more deferential than the robust reasonableness review described by the majority in *Vavilov*. As Professor Paul Daly observed:

Although the appellate standard of review framework set out in *Housen v. Nikolaisen* calls for correctness on questions of law, it calls for the deferential standard of palpable and overriding error on everything else, including mixed questions of law and fact. Where there is a statutory appeal, any issue of fact, discretion or mixed law and fact will be subject to the palpable and overriding error standard. On judicial review, by contrast, “robust” reasonableness review will be applied to any such issue... and will, in some respects, go further than palpable and overriding error. Furthermore, whereas the animating principle of *Vavilovian* reasonableness review is responsive justification, the animating principle of the *Housen v. Nikolaisen* framework is judicial economy, designed to minimize appellate

oversight. More deference would be due, in other words, in situations where an appeal has been provided for.

Paul Daly, “The Vavilov Framework and the Future of Canadian Administrative Law” (2020), 33 Can. J. Admin. L. & Prac. 111 at 119-120

Professor David Mullan has opined that

... it may well be the case that, despite the different terminology, there will be little or no difference in a practical sense between unreasonableness and palpable and overriding error when applied in an appellate context” and that “it is even possible that the palpable and overriding error category posits a higher onus on appellants challenging findings of fact and of mixed law and fact than straight unreasonableness in a judicial review context.”

David Mullan, *Judicial Scrutiny*, *supra* at 430.

In *Houghton v Association of Land Surveyors*, 2020 ONSC 863 at para 15, the Divisional Court of Ontario rejected the argument that reviewing courts applying appellate standards of review in statutory appeals from administrative decision makers should develop a less deferential approach to the “palpable and overriding error” standard to ensure that it remained distinct and less deferential than the “robust” reasonableness standard espoused in *Vavilov*:

In *Vavilov*... the Supreme Court of Canada expressly directed that in the absence of a specific alternative provided by the Legislature, the *Housen v. Nikolaisen* standard of review applies to statutory appeals. The standard of review applies in accordance with its terms. It does not draw meaning or strength from a comparison to the reasonableness standard that may apply in other cases.

## REASONABleness REVIEW

In *Vavilov*, the Court set about to reconsider and clarify two aspects of substantive review. The first of these was the framework for selecting the standard of review. The majority’s new framework, based on a general presumption of reasonableness review of administrative decisions grounded in reviewing courts’ respect for the legislature’s institutional design choice to delegate certain matters to administrative decision makers through statute, proved to be the most controversial aspect of *Vavilov*. While concurring in the result, Justices Abella and Karakatsanis strongly disagreed with two aspects of this new framework: the majority’s repudiation of administrative decision makers’ relative expertise as a factor relevant to the determination of the standard of review and its decision to treat the inclusion of a statutory appeal as determinative of the legislature’s intent that an administrative decision be reviewed on an appellate standard. The second aspect of substantive review to be clarified in *Vavilov*, and the topic of this section, was the nature and conduct of reasonableness review. The majority emphasized the central role of reasons in reasonableness review in an effort to “develop and strengthen a culture of justification in administrative decision making” and provided guidance to

reviewing courts by setting out a non-exhaustive list of legal and factual constraints that are generally relevant in evaluating whether a decision is reasonable. On this second aspect of substantive review, unlike the first, there was no fundamental disagreement between the majority and the concurring judges.

We begin this section with an excerpt from *Vavilov* setting out the approaches to reasonableness review adopted by the majority and the concurring judges. It is followed by an examination of post-*Vavilov* decisions applying the different aspects of the majority's approach and a discussion of lingering questions about the conduct of reasonableness review.

***Canada (Minister of Citizenship and Immigration) v Vavilov***

**2019 SCC 65**

The following is the judgment delivered by

**Wagner C.J.C., Moldaver, Gascon, Côté, Brown, Rowe, Martin JJ.:**

[The majority's description of the new framework for selecting the standard of review is set out in the previous chapter – "Selecting the Standard of Review".]

(...)

**III. Performing Reasonableness Review**

73 This Court's administrative law jurisprudence has historically focused on the analytical framework used to determine the applicable standard of review, while providing relatively little guidance on how to conduct reasonableness review in practice.

74 In this section of our reasons, we endeavour to provide that guidance. The approach we set out is one that focuses on justification, offers methodological consistency and reinforces the principle "that reasoned decision-making is the lynchpin of institutional legitimacy": *amici curiae* factum, at para. 12.

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.

**A. Procedural Fairness and Substantive Review**

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.

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 (S.C.C.), at p. 682; *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), 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 c. Lafontaine (Municipalité)*, 2004 SCC 48, [2004] 2 S.C.R. 650 (S.C.C.), 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.

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.

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 (S.C.C.), 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.

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.

81 Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision: *Baker*, at para. 39. In *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), 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 & Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (S.C.C.), 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.

#### ***B. Reasonableness Review Is Concerned With the Decision-making Process and Its Outcomes***

82 Reasonableness review aims to give effect to the legislature’s intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir*, at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.), at para. 10; *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.), at para. 10.

83 It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the “range” of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the “correct” solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.), that, “as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did”: at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

84 As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with “respectful attention” and seeking to

understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

85 Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

86 Attention to the decision maker’s reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with “the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes”: para. 47. Reasonableness, according to *Dunsmuir*, “is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process”, as well as “with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *ibid*. In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

87 This Court’s jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6 (S.C.C.), at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

#### **C. Reasonableness Is a Single Standard That Accounts for Context**

88 In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in

complexity and importance, ranging from the routine to the life-altering. These include matters of “high policy” on the one hand and “pure law” on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.

89 Despite this diversity, reasonableness remains a single standard, and elements of a decision’s context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that “[r]easonableness is a single standard that takes its colour from the context”: *Khosa*, at para. 59; *Catalyst*, at para. 18; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 (S.C.C.), at para. 44; *Wilson*, at para. 22, per Abella J.; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80 (S.C.C.), at para. 57, per Côté J., dissenting but not on this point; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293 (S.C.C.), at para. 53.

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

#### **D. Formal Reasons for a Decision Should Be Read in Light of the Record and With Due Sensitivity to the Administrative Setting in Which They Were Given**

91 A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do “not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred” is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

92 Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker’s strength within its particular and specialized domain. “Administrative justice” will not always look like “judicial justice”, and reviewing courts must remain acutely aware of that fact.

93 An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

94 The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

95 That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

96 Where, 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. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

97 Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267 (F.C.), at para. 11:

*Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn ....

98 As for *Alberta Teachers*, it concerned a very specific and exceptional circumstance in which the reviewing court had exercised its discretion to consider a question of statutory interpretation on judicial review, even though that question had not been raised before the administrative decision maker and, as a result, no reasons had been given on that issue: paras. 22-26. Furthermore, it was agreed that the ultimate decision maker — the Information and Privacy Commissioner's delegate — had applied a well-established interpretation of the statutory provision in question and that, had she been asked for reasons to justify her interpretation, she would have adopted reasons the Commissioner had given in past decisions. In other words, the reasons of the Commissioner that this Court relied on to find that the administrative decision was reasonable were not merely reasons that *could* have been offered, in an abstract sense, but reasons that *would* have been offered had the issue been raised before the decision maker. Far from suggesting in *Alberta Teachers* that reasonableness review is concerned primarily with outcome, as opposed to rationale, this Court rejected the position that a reviewing court is entitled 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": para. 54, quoting *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135 (B.C. C.A.), at paras. 53 and 56. In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

**E. A Reasonable Decision Is One That Is Both Based on an Internally Coherent Reasoning and Justified in Light of the Legal and Factual Constraints That Bear on the Decision**

99 A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.

100 The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

101 What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

#### *(1) A Reasonable Decision Is Based on an Internally Coherent Reasoning*

102 To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 139; see also *Mora Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151 (F.C.), at paras. 57-59.

103 While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of

analysis: see *Wright v. Nova Scotia (Human Rights Commission)*, 2017 NSSC 11, 23 Admin. L.R. (6th) 110 (N.S. S.C.); *Southam*, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 17 (F.C.), at para. 21) or if the reasons read in conjunction with the record do not make it possible to understand the decision maker’s reasoning on a critical point (see *Gomez Blas v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 629, 26 Imm. L.R. (4th) 92 (F.C.), at paras. 54-66; *Reid v. Ontario (Criminal Injuries Compensation Board)*, 2015 ONSC 6578 (Ont. Div. Ct.) ; *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051 (F.C.A.) ; *Taman v. Canada (Attorney General)*, 2017 FCA 1, [2017] 3 F.C.R. 520 (F.C.A.), at para. 47).

104 Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker’s reasoning “adds up”.

**(2) A Reasonable Decision Is Justified in Light of the Legal and Factual Constraints That Bear on the Decision**

105 In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

106 It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

107 A reviewing court may find that a decision is unreasonable when examined against these contextual considerations. These elements necessarily interact with one another: for example, a reasonable penalty for professional misconduct in a given case must be justified *both* with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

**(a) Governing Statutory Scheme**

108 Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply “with the rationale and purview of the statutory scheme under which it is adopted”: *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at p. 140, “there is no such thing as absolute and untrammeled ‘discretion’”, and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (Ville) c. Administration portuaire de Montréal*, 2010 SCC 14, [2010] 1 S.C.R. 427 (S.C.C.), at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Ltd.*, 2010 FCA 193, [2011] 4 F.C.R. 203 (F.C.A.), at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.

109 As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of “truly” jurisdictional questions that are subject to correctness review. Although a decision maker’s interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues’ concern (at para. 285), this does not reintroduce the concept of “jurisdictional error” into judicial review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision makers.

110 Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker’s authority. If a legislature wishes to precisely circumscribe an administrative decision maker’s power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker’s ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, “in the public interest” — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker’s authority may support more

than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

### **(b) Other Statutory or Common Law**

111 It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 (S.C.C.), at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a “fictitious” system it has arbitrarily created: *Montréal (City)*, at para. 40. Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties’ rights within that relationship: *Dunsmuir*, at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard: see, e.g., the discussion of “reasonable grounds to suspect” in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006 (F.C.A.), at paras. 93-98.

112 Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body’s decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court’s interpretation does not work in the administrative context: M. Biddulph, “Rethinking the Ramification of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law” (2018), 56 *Alta. L.R.* 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant’s act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 35-37), it would clearly not be

reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.

113 That being said, administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable. For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context: see *Nor-Man Regional Health Authority*, at paras. 5-6, 44-45, 52, 54 and 60. Conversely, a decision maker that rigidly applies a common law doctrine without adapting it to the relevant administrative context may be acting unreasonably: see *Delta Air Lines*, at paras. 16-17 and 30. In short, whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

114 We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with ... the values and principles of customary and conventional international law": *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 (S.C.C.), at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754 (S.C.C.), at para. 40. Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power: *Baker*, at paras. 69-71.

### **(c) Principles of Statutory Interpretation**

115 Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. This is because reviewing courts are accustomed to resolving questions of statutory interpretation in a context in which the issue is before them at first instance or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.

116 Reasonableness review functions differently. Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.

117 A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must 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": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21, and *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC

42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

118 This Court has adopted the “modern principle” as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

119 Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

120 But whatever form the interpretive exercise takes, the merits of an administrative decision maker’s interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are “precise and unequivocal”, their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.), at para. 10. Where 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.

121 The administrative decision maker’s task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker’s responsibility is to discern meaning and legislative intent, not to “reverse-engineer” a desired outcome.

122 It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required “to explicitly address all possible shades of meaning” of a given provision: *Construction Labour*

*Relations Assn. (Alberta) v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405 (S.C.C.), at para.

3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision’s text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.

123 There may be other cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable.

124 Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the “correct” interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52 (F.C.A.), in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61), held that the decision maker’s interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

#### **(d) Evidence Before the Decision Maker**

125 It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from “reweighing and reassessing the evidence considered by the decision maker”: *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court’s deferring to a lower court’s factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

126 That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in

light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would also have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

#### **(e) Submissions of the Parties**

127 The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

128 Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

#### **(f) Past Practices and Past Decisions**

129 Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

130 Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as

administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal's members can be an effective tool to "foster coherence" and "avoid ... conflicting results": *I.W.A., Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 (S.C.C.), at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies to address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making.

131 Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

132 As discussed above, it has been argued that correctness review would be required where there is "persistent discord" on questions of law in an administrative body's decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body's decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

#### **(g) Impact of the Decision on the Affected Individual**

133 It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that

individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

134 Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 (S.C.C.).

135 Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

#### **F. Review in the Absence of Reasons**

136 Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g., *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all: *Baker*, at para. 43.

137 Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst ; Green ; Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, “[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw”: para. 29. In that case, not only were “the reasons [in the sense of rationale] for the bylaw … clear to everyone”, they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.

138 There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

#### **G. A Note on Remedial Discretion**

139 Where a court reviews an administrative decision, the question of the appropriate remedy is multi-faceted. It engages considerations that include the reviewing court's common law or statutory jurisdiction and the great diversity of elements that may influence a court's decision to exercise its discretion in respect of available remedies. While we do not aim to comprehensively address here the issue of remedies on judicial review, we do wish to briefly address the question of whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons.

140 Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see *Delta Air Lines*, at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.

141 Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.

142 However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 (F.C.A.), at paras. 18-19. An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland (Offshore Petroleum Board)*, [1994] 1 S.C.R. 202 (S.C.C.), at pp. 228-30; *Renaud c. Québec (Commission des affaires*

*sociales*), [1999] 3 S.C.R. 855 (S.C.C.) ; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772 (S.C.C.), at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1 (F.C.A.), at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175 (F.C.A.), at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319 (Ont. C.A.), at paras. 54 and 88. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court’s discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 (S.C.C.), at paras. 45-51; *Alberta Teachers*, at para. 55.

#### **IV. Role of Prior Jurisprudence**

143 Given that this appeal and its companion cases involve a recalibration of the governing approach to the choice of standard of review analysis and a clarification of the proper application of the reasonableness standard, it will be necessary to briefly address how the existing administrative law jurisprudence should be treated going forward. These reasons set out a holistic revision of the framework for determining the applicable standard of review. A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance. Indeed, much of the Court’s jurisprudence, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between two or more administrative bodies, will continue to apply essentially without modification. On other issues, certain cases — including those on the effect of statutory appeal mechanisms, “true” questions of jurisdiction or the former contextual analysis — will necessarily have less precedential force. As for cases that dictated how to conduct reasonableness review, they will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons.

144 This approach strives for future doctrinal stability under the new framework while clarifying the continued relevance of the existing jurisprudence. Where a reviewing court is not certain how these reasons relate to the case before it, it may find it prudent to request submissions from the parties on both the appropriate standard and the application of that standard.

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.

#### **V. Mr. Vavilov's Application for Judicial Review**

146 The case at bar involves an application for judicial review of a decision made by the Canadian Registrar of Citizenship on August 15, 2014. The Registrar's decision concerned Mr. Vavilov, who was born in Canada and whose parents were later revealed to be undercover Russian spies. The Registrar determined that Mr. Vavilov was not a Canadian citizen on the basis of an interpretation of s. 3(2)(a) of the *Citizenship Act* and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*. We conclude that the standard of review applicable to the Registrar's decision is reasonableness, and that the Registrar's decision was unreasonable. We would uphold the decision of the Federal Court of Appeal to quash the Registrar's decision and would not remit the matter to the Registrar for redetermination.

##### **A. Facts**

147 Mr. Vavilov was born in Toronto as Alexander Foley on [date omitted]. At the time of his birth, his parents were posing as Canadians under the assumed names of Tracey Lee Ann Foley and Donald Howard Heathfield. In reality, they were Elena Vavilova and Andrey Bezrukov, two foreign nationals working on a long-term assignment for the Russian foreign intelligence service, the SVR. Their false Canadian identities had been assumed prior to the birth of Mr. Vavilov and of his older brother, Timothy, for purposes of a "deep cover" espionage network under the direction of the SVR. The United States Department of Justice refers to it as the "illegals" program.

148 Ms. Vavilova and Mr. Bezrukov were deployed to Canada to establish false personal histories as Western citizens. They worked, ran a business, pursued higher education and, as noted, had two children here. After their second son was born, the family moved to France, and later to the United States. In the United States, Mr. Bezrukov obtained a Masters of Public Administration at Harvard University and worked as a consultant, all while working to collect information on a variety of sensitive national security issues for the SVR. The nature of the undercover work of Ms. Vavilova and Mr. Bezrukov meant that there was no point at which either of them had any publicly acknowledged affiliation with the Russian state, held any official diplomatic or consular status, or had been granted any diplomatic privilege or immunity.

149 Until he was about 16 years old, Mr. Vavilov did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, lived and identified as a Canadian, held a Canadian passport, learned both official languages and was proud of his heritage. His parents' true identities became known to him on June 27, 2010, when they were arrested in the United States and charged (along with several other individuals) with conspiracy to act as unregistered agents of a foreign government. On July 8, 2010, they pled guilty, admitted their status as Russian citizens acting on behalf of the Russian state, and were returned to Russia in a "spy swap" the following day. Mr. Vavilov has

described the revelation as a traumatic event characterized by disbelief and a crisis of identity.

150 Just prior to his parents' deportation, Mr. Vavilov left the United States with his brother on a trip that had been planned before their parents' arrest, going first to Paris, and then to Russia on a tourist visa. In October 2010, Mr. Vavilov unsuccessfully attempted to renew his Canadian passport through the Canadian Embassy in Moscow. Although he submitted to DNA testing and changed his surname from Foley to Vavilov at the behest of passport authorities, his second attempt to obtain a Canadian passport in December 2011 was also unsuccessful. He was then informed that despite his Canadian birth certificate, he would also need to obtain and provide a certificate of Canadian citizenship before he would be issued a passport. Mr. Vavilov applied for that certificate in October 2012, and it was issued to him on January 15, 2013. At that point, he made another passport application through the Canadian Embassy in Buenos Aires, Argentina, and, after a delay, applied for mandamus, a process that was settled out of court in June 2013. The Minister of Citizenship and Immigration undertook to issue a new travel document to Mr. Vavilov by July 19, 2013.

151 However, Mr. Vavilov never received a passport. Instead, he received a "procedural fairness letter" from the Canadian Registrar of Citizenship dated July 18, 2013 in which the Registrar stated that Mr. Vavilov had not been entitled to a certificate of citizenship, that his certificate of citizenship had been issued in error and that, pursuant to s. 3(2)(a) of the *Citizenship Act*, he was not a citizen of Canada. Mr. Vavilov was invited to make submissions in response, and he did so. On August 15, 2014, the Registrar formally cancelled Mr. Vavilov's Canadian citizenship certificate pursuant to s. 26(3) of the *Citizenship Regulations*.

### ***B. Procedural History***

#### ***(1) Registrar's Decision***

152 In a brief letter sent to Mr. Vavilov on August 15, 2014, the Registrar informed him that she was cancelling his certificate of citizenship pursuant to s. 26(3) of the *Citizenship Regulations* on the basis that he was not entitled to it. The Registrar summarized her position as follows:

- a) Although Mr. Vavilov was born in Toronto, neither of his parents was a citizen of Canada, and neither of them had been lawfully admitted to Canada for permanent residence at the time of his birth.
- b) In 2010, Mr. Vavilov's parents were convicted of "conspiracy to act in the United States as a foreign agent of a foreign government", and recognized as unofficial agents working as "illegals" for the SVR.
- c) As a result, the Registrar believed that, at the time of Mr. Vavilov's birth, his parents were "employees or representatives of a foreign government".
- d) Accordingly, pursuant to s. 3(2)(a) of the *Citizenship Act*, Mr. Vavilov had never been a Canadian citizen and had not been entitled to receive the certificate of Canadian citizenship that had been issued to him in 2013. Section 3(2)(a) provides that s. 3(1)(a)

of the *Citizenship Act* (which grants citizenship by birth to persons born in Canada after February 14, 1977) does not apply to an individual if, at the time of the individual's birth, neither of their parents was a citizen or lawfully admitted to Canada for permanent residence and either parent was "a diplomatic or consular officer or other representative or employee in Canada of a foreign government."

153 For these reasons, the Registrar cancelled the certificate and indicated that Mr. Vavilov would no longer be recognized as a Canadian citizen. The Registrar's letter did not offer any analysis or interpretation of s. 3(2)(a) of the *Citizenship Act*. However, it appears that in coming to her decision, the Registrar relied on a 12-page report prepared by a junior analyst, which included an interpretation of this key statutory provision.

154 In that report, the analyst provided a timeline of the procedural history of Mr. Vavilov's file, a summary of the investigation into and charges against his parents in the United States, and background information on the SVR's "illegals" program. The analyst also discussed several provisions of the *Citizenship Act*, including s. 3(2)(a), and it is this aspect of her report that is most relevant to Mr. Vavilov's application for judicial review. The analyst's ultimate conclusion was that the certificate of citizenship issued to Mr. Vavilov in January 2013 was issued in error, as his parents had been "working as employees or representatives of a foreign government (the Russian Federation) during the time they resided in Canada, including at the time of Mr. Vavilov's birth", and that "[a]s such, Mr. Vavilov was not entitled to receive a citizenship certificate pursuant to paragraph 3(2)(a) of the *Citizenship Act*": A.R., Vol. I, at p. 3. The report was dated June 24, 2014.

155 In discussing the relevant legislation, the analyst cited s. 3(1)(a) of the *Citizenship Act*, which establishes the general rule that persons born in Canada after February 14, 1977 are Canadian citizens. The analyst also referred to an exception to that general rule set out in s. 3(2) of the *Citizenship Act*, which reads as follows:

- (2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
  - (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
  - (b) an employee in the service of a person referred to in paragraph (a); or
  - (c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

156 The analyst noted that s. 3(2)(a) refers both to diplomatic and consular officers and to other representatives or employees of a foreign government. She acknowledged that the term "diplomatic or consular officer" is defined in s. 35(1) of the *Interpretation Act* and that the definition lists a large number of posts within a foreign mission or consulate. However,

the analyst observed that no statutory definition exists for the phrase “other representative or employee in Canada of a foreign government.”

157 The analyst compared the wording of s. 3(2)(a) with that of a similar provision in predecessor legislation. That provision, s. 5(3)(b) of the *Canadian Citizenship Act*, R.S.C. 1970, c. C-19, excluded from citizenship children whose “responsible parent” at the time of birth was:

- (i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,
- (ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
- (iii) an employee in the service of a person referred to in subparagraph (i).

158 The analyst reasoned that because s. 3(2)(a) “makes reference to ‘representatives or employees of a foreign government,’ but does not link the representatives or employees to ‘attached to or in the service of a foreign diplomatic mission or consulate in Canada’ (as did the earlier version of the provision), it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of ‘diplomatic and consular staff’: A.R., vol. I, at p. 7.

159 Although the analyst acknowledged that “Ms. Vavilova and Mr. Bezrukov, were employed in Canada by a foreign government without the benefits or protections (i.e.: immunity) that accompany diplomatic, consular, or official status positions”, she concluded that they were nonetheless “unofficial employees or representatives” of Russia at the time of Mr. Vavilov’s birth: A.R., vol. I, at p. 13. The exception in s. 3(2)(a) of the *Citizenship Act*, as she interpreted it, therefore applied to Mr. Vavilov. As a result, the analyst recommended that the Canadian Registrar of Citizenship “recall” Mr. Vavilov’s certificate on the basis that he was not, and had never been, entitled to citizenship.

*(2) Federal Court (Bell J.), 2015 FC 960, [2016] F.C.R. 39 (F.C.)*

160 Mr. Vavilov sought and was granted leave to bring an application for judicial review of the Registrar’s decision in the Federal Court pursuant to s. 22.1 of the *Citizenship Act*. His application was dismissed.

161 The Federal Court rejected Mr. Vavilov’s argument that the Registrar had breached her duty of procedural fairness by failing to disclose the documentation that had prompted the procedural fairness letter. In the Federal Court’s view, the Registrar had provided Mr. Vavilov sufficient information to allow him to meaningfully respond, and had thereby satisfied the requirements of procedural fairness in the circumstances.

162 The Federal Court also rejected Mr. Vavilov’s challenge to the Registrar’s interpretation of s. 3(2)(a) of the *Citizenship Act*. Applying the correctness standard, the Federal Court agreed with the Registrar that undercover foreign operatives living in Canada fall within the meaning of the phrase “diplomatic or consular officer or other representative or employee in Canada of a foreign government” in s. 3(2)(a). In the Federal Court’s view, to

interpret s. 3(2)(a) in any other way would render the phrase “other representative or employee in Canada of a foreign government” meaningless and would lead to the “absurd result” that “children of a foreign diplomat, registered at an embassy, who conducts spy operations, cannot claim Canadian citizenship by birth in Canada but children of those who enter unlawfully for the very same purpose, become Canadian citizens by birth”: para. 25.

163 Finally, the Federal Court was satisfied, given the evidence, that the Registrar’s conclusion that Mr. Vavilov’s parents had at the time of his birth been in Canada as part of an undercover operation for the Russian government was reasonable.

(3) *Federal Court of Appeal (Stratas J.A. with Webb J.A. Concurring; Gleason J.A. Dissenting), 2017 FCA 132, [2018] 3 F.C.R. 75 (F.C.A.)*

164 A majority of the Federal Court of Appeal allowed Mr. Vavilov’s appeal from the Federal Court’s judgment and quashed the Registrar’s decision.

165 The Court of Appeal unanimously rejected Mr. Vavilov’s argument that he had been denied procedural fairness by the Registrar. In the Court of Appeal’s view, the Registrar had provided Mr. Vavilov sufficient information in the procedural fairness letter to enable him to know the case to meet. Even if Mr. Vavilov had been entitled to more information at the time of that letter, the court indicated that his procedural fairness challenge would nevertheless have failed because he had subsequently obtained that additional information through his own efforts and was able to make meaningful submissions.

166 The Court of Appeal was also unanimously of the view that the appropriate standard of review for the Registrar’s interpretation and application of s. 3(2)(a) of the *Citizenship Act* was reasonableness. It split, however, on the application of that standard to the Registrar’s decision.

167 The majority of the Court of Appeal concluded that the analyst’s interpretation of s. 3(2)(a), which the Registrar had adopted, was unreasonable and that the Registrar’s decision should be quashed. The analysis relied on by the Registrar on the statutory interpretation issue was confined to a consideration of the text of s. 3(2)(a) and an abbreviated review of its legislative history, which totally disregarded its purpose or context. In the majority’s view, such a “cursory and incomplete approach to statutory interpretation” in a case such as this was indefensible: para. 44. Moreover, when the provision’s purpose and its context were taken into account, the only reasonable conclusion was that the phrase “employee in Canada of a foreign government” in s. 3(2)(a) was meant to apply only to individuals who have been granted diplomatic privileges and immunities under international law. Because it was common ground that neither of Mr. Vavilov’s parents had been granted such privileges or immunities, s. 3(2)(a) did not apply to him. The cancellation of his citizenship certificate on the basis of s. 3(2)(a) therefore could not stand, and Mr. Vavilov was entitled to Canadian citizenship under the *Citizenship Act*.

168 The dissenting judge disagreed, finding that the Registrar’s interpretation of s. 3(2)(a) was reasonable. According to the dissenting judge, the text of that provision admits of at

least two rational interpretations: one that includes all employees of a foreign government and one that is restricted to those who have been granted diplomatic privileges and immunities. In the dissenting judge’s view, the former interpretation is not foreclosed by the context or the purpose of the provision. It was thus open to the Registrar to conclude that Mr. Vavilov’s parents fell within the scope of s. 3(2)(a). The dissenting judge would have upheld the Registrar’s decision.

### **C. Analysis**

#### *(1) Standard of Review*

169 Applying the standard of review analysis set out above leads to the conclusion that the standard to be applied in reviewing the merits of the Registrar’s decision is reasonableness.

170 When a court reviews the merits of an administrative decision, reasonableness is presumed to be the applicable standard of review, and there is no basis for departing from that presumption in this case. The Registrar’s decision has come before the courts by way of judicial review, not by way of a statutory appeal. On this point, we note that ss. 22.1 through 22.4 of the *Citizenship Act* lay down rules that govern applications for judicial review of decisions made under that Act, one of which, in s. 22.1(1), is that such an application may be made only with leave of the Federal Court. However, none of these provisions allow for a party to bring an appeal from a decision under the *Citizenship Act*. Given this fact, and given that Parliament has not prescribed the standard to be applied on judicial review of the decision at issue, there is no indication that the legislature intended a standard of review other than reasonableness to apply. The Registrar’s decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between two or more administrative bodies. As a result, the standard to be applied in reviewing the decision is reasonableness.

#### *(2) Review for Reasonableness*

171 The principal issue before this Court is whether it was reasonable for the Registrar to find that Mr. Vavilov’s parents had been “other representative[s] or employee[s] in Canada of a foreign government” within the meaning of s. 3(2)(a) of the *Citizenship Act*.

172 In our view, it was not. The Registrar failed to justify her interpretation of s. 3(2)(a) of the *Citizenship Act* in light of the constraints imposed by the text of s. 3 of the *Citizenship Act* considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted

diplomatic privileges and immunities. Though Mr. Vavilov raised many of these considerations in his submissions in response to the procedural fairness letter (A.R., vol. IV, at pp. 448-52), the Registrar failed to address those submissions in her reasons and did not, to justify her interpretation of s. 3(2)(a), do more than conduct a cursory review of the legislative history and conclude that her interpretation was not explicitly precluded by the text of s. 3(2)(a).

173 Our review of the Registrar's decision leads us to conclude that it was unreasonable for her to find that the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" applies to individuals who have not been granted diplomatic privileges and immunities in Canada. It is undisputed that Mr. Vavilov's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar.

#### **(a) Section 3(2) of the Citizenship Act**

174 The analyst justified her conclusion that Mr. Vavilov is not a citizen of Canada by reasoning that his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*. Section 3(2)(a) provides that children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" are exempt from the general rule in s. 3(1)(a) that individuals born in Canada after February 14, 1977 acquire Canadian citizenship by birth. The analyst observed that although the term "diplomatic or consular officer" is defined in the *Interpretation Act* and does not apply to individuals like Mr. Vavilov's parents, the phrase "other representative or employee in Canada of a foreign government" is not so defined, and may apply to them.

175 The analyst's attempt to give the words "other representative or employee in Canada of a foreign government" a meaning distinct from that of "diplomatic or consular officer" is sensible. It is generally consistent with the principle of statutory interpretation that Parliament intends each word in a statute to have meaning: Sullivan, at p. 211. We accept that if the phrase "other representative or employee in Canada of a foreign government" were considered in isolation, it could apply to a spy working in the service of a foreign government in Canada. However, the analyst failed to address the immediate statutory context of s. 3(2)(a), including the closely related text in s. 3(2)(c):

(2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was

(a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;

(b) an employee in the service of a person referred to in paragraph (a); or

(c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and

immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

176 As the majority of the Court of Appeal noted (at paras. 61-62), the wording of s. 3(2)(c) provides clear support for the conclusion that *all* of the persons contemplated by s. 3(2)(a) — including those who are “employee[s] in Canada of a foreign government” — must have been granted diplomatic privileges and immunities in some form. If, as the Registrar concluded, s. 3(2)(a) includes persons who do not benefit from these privileges or immunities, it is difficult to understand how effect could be given to the explicit equivalency requirement articulated in s. 3(2)(c). However, the analyst did not account for this tension in the immediate statutory context of s. 3(2)(a).

### **(b) The Foreign Missions and International Organizations Act and the Treaties It Implements**

177 Before the Registrar, Mr. Vavilov argued that s. 3(2) of the *Citizenship Act* must be read in conjunction with both the *Foreign Missions and International Organizations Act, S.C. 1991, c. 41* (“*FMIOA*”), and the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29 (“*VCDR*”). The *VCDR* and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, are the two leading treaties that extend diplomatic and/or consular privileges and immunities to employees and representatives of foreign governments in diplomatic missions and consular posts. Parliament has implemented the relevant provisions of both conventions by means of s. 3(1) of the *FMIOA*.

178 To begin, we note that Canada affords citizenship in accordance both with the principle of *jus soli*, the acquisition of citizenship through birth regardless of the parents’ nationality, and with that of *jus sanguinis*, the acquisition of citizenship by descent, that is through a parent: *Citizenship Act*, s. 3(1)(a) and (b); see I. Brownlie, *Principles of Public International Law* (5th ed. 1998), at pp. 391-93. These two principles operate as a backdrop to s. 3 of the *Citizenship Act* as a whole. It is undisputed that s. 3(2)(a) operates as an exception to these general rules. However, Mr. Vavilov took a narrower view of that exception than did the Registrar. In his submissions to the Registrar, he argued that Parliament intended s. 3(2) of the *Citizenship Act* to simply mirror the *FMIOA* and the *VCDR*, as well as Article II of the *Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality*, 500 U.N.T.S. 223, which provides that “[m]embers of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State”. Mr. Vavilov made the following submission to the Registrar:

The purpose in excluding diplomats and their families, including newborn children, from acquiring citizenship in the receiving state relates to the immunities which extend to this group of people. Diplomats and their family members are immune from criminal prosecution and civil liability in the receiving state. As such, they cannot acquire citizenship in the receiving state and also benefit from these immunities. A citizen has duties and responsibilities to its country. Immunity is inconsistent with this principle and so does not apply to citizens. See Article 37 of the *Convention*.

Section 3(2) legislates into Canadian domestic law the above principles and should be narrowly interpreted with these purposes in mind. The term “employee in Canada of a foreign government” must be interpreted to mean an employee of a diplomatic mission, or connected to it, who benefits from the immunities of the *Convention*. Any other interpretation would lead to absurd results. There is no purpose served in excluding any child born of a person not having a connection to a diplomatic mission in Canada while sojourning here from the principle of *Jus soli*.

(A.R., vol. IV, at pp. 449-50)

179 In *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)*, 2007 FC 559, 64 Imm. L.R. (3d) 67 (F.C.), a case which was referred to in the analyst’s report and which we will discuss in greater detail below, the Federal Court, at para. 53, quoted a passage by Professor Brownlie on this point:

Of particular interest are the special rules relating to the *jus soli*, appearing as exceptions to that principle, the effect of the exceptions being to remove the cases where its application is clearly unjustifiable. A rule which has very considerable authority stipulated that children born to persons having diplomatic immunity shall not be nationals by birth of the state to which the diplomatic agent concerned is accredited. Thirteen governments stated the exception in the preliminaries of the Hague Codification Conference. In a comment on the relevant article of the Harvard draft on diplomatic privileges and immunities it is stated: ‘This article is believed to be declaratory of an established rule of international law’. The rule receives ample support from legislation of states and expert opinion. The Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 provides in Article 12: ‘Rules of law which confer nationality by reasons of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs.’

In 1961 the United Nations Conference on Diplomatic Intercourse and Immunities adopted an Optional Protocol concerning Acquisition of Nationality, which provided in Article II: ‘Members of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State’. Some states extend the rule to the children of consuls, and there is some support for this from expert opinion. [Emphasis deleted.]

(Brownlie, at pp. 392-93).

180 Mr. Vavilov included relevant excerpts from the parliamentary debate that had preceded the enactment of the *Citizenship Act* in support of his argument that the very purpose of s. 3(2) of the *Citizenship Act* was to align Canada’s citizenship rules with these principles of international law. These excerpts describe s. 3(2) as “conform[ing] to international custom” and as having been drafted with the intention of “exclud[ing] children born in Canada to diplomats from becoming Canadian citizens”: Hon. J. Hugh Faulkner, Secretary of State of Canada, House of Commons, *Minutes of Proceedings and Evidence of*

*the Standing Committee on Broadcasting, Films and Assistance to the Arts, respecting Bill C-20, An Act respecting citizenship*, No. 34, 1st Sess., 30th Parl., February 24, 1976, at 34:23. The record of that debate also reveals that Parliament took care to avoid the danger that because of how some provisions were written, “a number of other people would be affected such as those working for large foreign corporations”: *ibid.* Although the analyst discussed the textual difference between s. 3(2) and a similar provision in the former *Canadian Citizenship Act*, she did not grapple with these other elements of the legislative history, despite the fact that they cast considerable doubt on her conclusions, indicating that s. 3(2) was not intended to affect the status of individuals whose parents have not been granted diplomatic privileges and immunities.

181 In attempting to distinguish the meaning of the phrase “other representative or employee in Canada of a foreign government” from that of the term “diplomatic or consular officer”, the analyst also appeared to overlook the possibility that some individuals who fall into the former category might be granted privileges or immunities despite not being considered “diplomatic or consular officer[s]” under the *Interpretation Act*. Yet, as the majority of the Federal Court of Appeal pointed out, such individuals do in fact exist: paras. 53-55, citing *FMIOA*, at ss. 3 and 4 and Sched. II, Articles 1, 41, 43, 49, and 53. In light of Mr. Vavilov’s submissions regarding the purpose of s. 3(2), the failure to consider this possibility is a noticeable omission.

182 It is well established that domestic legislation is presumed to comply with Canada’s international obligations, and that it must be interpreted in a manner that reflects the principles of customary and conventional international law: *Appulonappa*, at para. 40; see also *Pushpanathan*, at para. 51; *Baker*, at para. 70; *Scierie Thomas-Louis Tremblay inc. c. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401 (S.C.C.), at para. 39; *Hape*, at paras. 53-54; *B010 v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704 (S.C.C.), at para. 48; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127 (S.C.C.), at para. 38; *Office of the Children’s Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398 (S.C.C.), at paras. 31-32. Yet the analyst did not refer to the relevant international law, did not inquire into Parliament’s purpose in enacting s. 3(2) and did not respond to Mr. Vavilov’s submissions on this issue. Nor did she advance any alternate explanation for why Parliament would craft such a provision in the first place. In the face of compelling submissions that the underlying rationale of s. 3(2) was to implement a narrow exception to a general rule in a manner that was consistent with established principles of international law, the analyst and the Registrar chose a different interpretation without offering any reasoned explanation for doing so.

### **(c) Jurisprudence Interpreting Section 3(2) of the Citizenship Act**

183 Although the analyst cited three Federal Court decisions on s. 3(2)(a) of the *Citizenship Act* in a footnote, she dismissed them as being irrelevant on the basis that they related only to “individuals whose parents maintained diplomatic status in Canada at the time of their birth”. But this distinction, while true, does not explain why the *reasoning* employed in those decisions, which directly concerned the scope, the meaning and the legislative purpose of s. 3(2)(a), was inapplicable in Mr. Vavilov’s case. Had the analyst considered just the three cases cited in her report — *Al-Ghamdi ; Lee v. Canada (Minister of Citizenship & Immigration)*, 2008

FC 614, [2009] 1 F.C.R. 204 (F.C.); and *Hitti c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2007 FC 294, 310 F.T.R. 168 (Eng.) (F.C.) — it would have been evident to her that she needed to grapple with and justify her interpretation in light of the persuasive and comprehensive legal reasoning that supports the position that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities.

184 In *Al-Ghamdi*, the Federal Court considered the constitutionality of paras. (a) and (c) of s. 3(2) of the *Citizenship Act* in reviewing a decision in which Passport Canada had refused to issue a passport to a child of a Saudi Arabian diplomat. In its reasons, the court came to a number of conclusions regarding the purpose and scope of s. 3(2), including, at para. 5, that:

The only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status. These are individuals who enter Canada under special circumstances and without undergoing any of the normal procedures. Most importantly, while in Canada, they are granted all of the immunities and privileges of diplomats ....

185 The court went on to extensively document the link between the exception to the rule of citizenship by birth set out in s. 3(2) of the *Citizenship Act* and the rules of international law, the *FMIOA* and the *VCDR*: *Al-Ghamdi*, at paras. 52 et. seq. It noted that there is an established rule of international law that children born to parents who enjoy diplomatic immunities are not entitled to automatic citizenship by birth, and that their status in this respect is an exception to the principle of *jus soli*: *Al-Ghamdi*, at para. 53, quoting Brownlie, at pp. 391-93. In finding that the exceptions under s. 3(2) to citizenship on the basis of *jus soli* do not infringe the rights of children of diplomats under s. 15 of the *Charter*, the court emphasized that *all* children to whom s. 3(2) applies are entitled to an “extraordinary array of privileges under the *Foreign Missions and International Organizations Act*”: *Al-Ghamdi*, at para. 62. Citing the *VCDR*, it added that “[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship”: para. 63. In its analysis under s. 1 of the *Charter*, the court found that the choice to deny citizenship to individuals provided for in s. 3(2) is “tightly connected” to a pressing government objective of ensuring “that no citizen is immune from the obligations of citizenship”, such as the obligations to pay taxes and comply with the criminal law: *Al-Ghamdi*, at paras. 74-75. In the case at bar, the analyst failed entirely to engage with the arguments endorsed by the Federal Court in *Al-Ghamdi* despite the court’s key finding that s. 3(2)(a) applies only to “children born of foreign diplomats or an equivalent”, a conclusion upon which the very constitutionality of the provision turned: *Al-Ghamdi*, at paras. 3, 9, 27, 28, 56 and 59.

186 In *Lee*, another case cited by the analyst, the Federal Court confirmed the finding in *Al-Ghamdi* that “[t]he only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status”: *Lee*, at para. 77. The court found in *Lee* that the “functional duties of the applicant’s father” were not relevant to whether or not the applicant was excluded from citizenship pursuant to s. 3(2)(a) of the *Citizenship Act*: para.

58. Rather, what mattered was only that at the time of the applicant's birth, his father had been a registered consular official and had held a diplomatic passport and the title of Vice-Consul: paras. 44, 58, 61 and 63.

187 *Hitti*, the third case cited in the analyst's report, concerned a decision to confiscate two citizenship certificates on the basis that, under s. 3(2) of the *Citizenship Act*, their holders had never been entitled to them. In that case, the applicants' father, a Lebanese citizen, had been employed as an information officer of the League of Arab States in Ottawa. Although the League did not have diplomatic standing at that time, Canada had agreed as a matter of courtesy to extend diplomatic status to officials of the League's information centre, treating them as "attachés" of their home countries' embassies: *Hitti*, at paras. 6 and 9; see also *Interpretation Act*, s. 35(1). Mr. Hitti argued he did not, in practice, fulfill diplomatic tasks or act as a representative of Lebanon, but there was nonetheless a record of his being an accredited diplomat, enjoying the benefits of that status and being covered by the *VCDR* when his children were born: paras. 5 and 8. The Federal Court rejected a submission that Mr. Hitti would have had to perform duties in the service of Lebanon in order for his children to fall within the meaning of s. 3(2)(a), and concluded that "what Mr. Hitti did when he was in the country is not relevant": para. 32.

188 What can be seen from both *Lee* and *Hitti* is that what matters, for the purposes of s. 3(2)(a), is not whether an individual carries out activities in the service of a foreign state while in Canada, but whether, at the relevant time, the individual has been granted diplomatic privileges and immunities. Thus, in addition to the Federal Court's decision in *Al-Ghamdi*, the analyst was faced with two cases in which the application of s. 3(2) had turned on the existence of diplomatic status rather than on the "functional duties" or activities of the child's parents. In these circumstances, it was a significant omission for her to ignore the Federal Court's reasoning when determining whether the espionage activities of Ms. Vavilova and Mr. Bezrukov were sufficient to ground the application of s. 3(2)(a).

#### **(d) Possible Consequences of the Registrar's Interpretation**

189 When asked why the children of individuals referred to in s. 3(2)(a) would be excluded from acquiring citizenship by birth, another analyst involved in Mr. Vavilov's file (who had also been involved in Mr. Vavilov's brother's file) responded as follows:

Well, usually the way we use section 3(2)(a) is for — you're right, for diplomats and that they don't — because they are not — they are not obliged ... to the law of Canada and everything, so that's why their children do not obtain citizenship if they were born in Canada while the person was in Canada under that status. But then there is also this other part of the Act that says other representatives or employees of a foreign government in Canada, that may open the door for other person than diplomats and that's how we interpreted in this specific case 3(2)(a) but there is no jurisprudence on that.

(R.R. transcript, at pp. 87-88)

190 In other words, the officials responsible for these files were aware that s. 3(2)(a) was informed by the principle that individuals subject to the exception are “not obliged ... to the law of Canada”. They were also aware that the interpretation they had adopted in the case of the Vavilov brothers was a novel one. Although the Registrar knew this, she failed to provide a rationale for this expanded interpretation.

191 Additionally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include individuals who have not been granted diplomatic privileges and immunities. Citizenship has been described as “the right to have rights”: U.S. Supreme Court Chief Justice Earl Warren, as quoted in A. Brouwer, *Statelessness in Canadian Context: A Discussion Paper* (July 2003) (online), at p. 2. The importance of citizenship was recognized in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 (S.C.C.), in which Iacobucci J., writing for this Court, stated: “I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship”: para. 68. This was reiterated in *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.), in which this Court unanimously held that “[f]or some, such as those who might become stateless if deprived of their citizenship, it may be valued as highly as liberty”: para. 108.

192 It perhaps goes without saying that rules concerning citizenship require a high degree of interpretive consistency in order to shield against a perception of arbitrariness and to ensure conformity with Canada’s international obligations. We can therefore only assume that the Registrar intended that this new interpretation of s. 3(2)(a) would apply to any other individual whose parent is employed by or represents a foreign government at the time of the individual’s birth in Canada but has not been granted diplomatic privileges and immunities. The Registrar’s interpretation would not, after all, limit the application of s. 3(2)(a) to the children of spies — its logic would be equally applicable to a number of other scenarios, including that of a child of a non-citizen worker employed by an embassy as a gardener or cook, or of a child of a business traveller who represents a foreign government-owned corporation. Mr. Vavilov had raised the fact that provisions such as s. 3(2)(a) must be given a narrow interpretation because they deny or potentially take away rights — that of citizenship under s. 3(1) in this case — which otherwise benefit from a liberal and broad interpretation: *Brossard (Ville) c. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279 (S.C.C.), at p. 307. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation for such a large class of individuals, which included Mr. Vavilov, or the question whether, in light of those possible consequences, Parliament would have intended s. 3(2)(a) to apply in this manner.

193 Moreover, we would note that despite following a different legal process, the Registrar’s decision in this case had the same effect as a revocation of citizenship — a process which has been described by scholars as “a kind of ‘political death’” — depriving Mr. Vavilov of his right to vote and the right to enter and remain in Canada: see A. Macklin, “Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien” (2014), 40 *Queen’s L.J.* 1, at pp. 7-8. While we question whether the Registrar was empowered to unilaterally alter Canada’s position with respect to Mr. Vavilov’s citizenship and recognize that the relationship between the cancellation of a citizenship certificate under s. 26 of the *Citizenship*

*Regulations* and the revocation of an individual's citizenship (as set out in s. 10 of the *Citizenship Act*) is not clear, we leave this issue for another day because it was neither raised nor argued by the parties.

#### **D. Conclusion**

194 Multiple legal and factual constraints may bear on a given administrative decision, and these constraints may interact with one another. In some cases, a failure to justify the decision against any one relevant constraint may be sufficient to cause the reviewing court to lose confidence in the reasonableness of the decision. Section 3 of the *Citizenship Act* considered as a whole, other legislation and international treaties that inform the purpose of s. 3, the jurisprudence cited in the analyst's report, and the potential consequences of the Registrar's decision point overwhelmingly to the conclusion that Parliament did not intend s. 3(2)(a) to apply to children of individuals who have not been granted diplomatic privileges and immunities. The Registrar's failure to justify her decision with respect to these constraints renders her interpretation unreasonable, and we would therefore uphold the Federal Court of Appeal's decision to quash the Registrar's decision.

195 As noted above, we would exercise our discretion not to remit the matter to the Registrar for redetermination. Crucial to our decision is the fact that Mr. Vavilov explicitly raised all of these issues before the Registrar and that the Registrar had an opportunity to consider them but failed to do so. She offered no justification for the interpretation she adopted except for a superficial reading of the provision in question and a comment on part of its legislative history. On the other hand, there is overwhelming support — including in the parliamentary debate, established principles of international law, an established line of jurisprudence and the text of the provision itself — for the conclusion that Parliament did not intend s. 3(2)(a) of the *Citizenship Act* to apply to children of individuals who have not been granted diplomatic privileges and immunities. That being said, we would stress that it is not our intention to offer a definitive interpretation of s. 3(2)(a) in all respects, nor to foreclose the possibility that multiple reasonable interpretations of other aspects might be available to administrative decision makers. In short, we do not suggest that there is necessarily "one reasonable interpretation" of the provision as a whole. But we agree with the majority of the Court of Appeal that it was *not* reasonable for the Registrar to interpret s. 3(2)(a) as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

196 Given that it is undisputed that Ms. Vavilova and Mr. Bezrukov, as undercover spies, were granted no such privileges, it would serve no purpose to remit the matter in this case to the Registrar. Given that Mr. Vavilov is a person who was born in Canada after February 14, 1977, his status is governed only by the general rule set out in s. 3(1)(a) of the *Citizenship Act*. He is a Canadian citizen.

#### **E. Disposition**

197 The appeal is dismissed with costs throughout to Mr. Vavilov.

**The following are the reasons delivered by****Abella, Karakatsanis JJ.:**

[The concurring judges' critical analysis of the majority's new framework for selecting the standard of review is reproduced in the preceding chapter – "Selecting the Standard of Review". This excerpt begins with their discussion of the how reasonableness review should be conducted. Footnotes have been omitted.]

(...)

284 We also acknowledge that this Court should offer additional direction on conducting reasonableness review. We fear, however, that the majority's multi-factored, open-ended list of "constraints" on administrative decision making will encourage reviewing courts to dissect administrative reasons in a "line-by-line treasure hunt for error" (*Irving Pulp & Paper Ltd. v. CEP, Local 30*, [2013] 2 S.C.R. 458 (S.C.C.), at para. 54). These "constraints" may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision — a checklist with unsettling similarities to the series of "jurisdictional errors" spelled out in *Anisminic* itself.

285 Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than that applied to trial judges. Such an approach undercuts deference and revives a long-abandoned posture of suspicion towards administrative decision making. We are also concerned by the majority's warning that administrative decision-makers cannot "arrogate powers to themselves that they were never intended to have", an unhelpful truism that risks reintroducing the tortured concept of "jurisdictional error" by another name.

286 We would advocate a continued approach to reasonableness review which focuses on the concept of *deference* and what it requires of reviewing courts. Curial deference, after all, is the hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under the correctness standard. The choice of a particular standard of review — whether described as "correctness", "reasonableness" or in other terms — is fundamentally about "whether or not a reviewing court should defer" to an administrative decision (see *Dunsmuir*, at para. 141, per Binnie J., concurring; Régimbald, at pp. 539-40). If courts, therefore, are to properly conduct "reasonableness" review, they must properly understand what deference means.

287 In our view, deference imposes three requirements on courts conducting reasonableness review. It informs the attitude a reviewing court must adopt towards an administrative decision-maker; it affects how a court frames the question it must answer on judicial review; and it affects how a reviewing court evaluates challenges to an administrative decision.

288 First and foremost, deference is an "attitude of the court" conducting reasonableness review (*Dunsmuir*, at para. 48). Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, and for the important role that administrative decision-makers play in upholding and

applying the rule of law (*Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 (S.C.C.), at para. 131, per LeBel J., concurring). Deference also requires respect for administrative decision-makers, their specialized expertise and the institutional setting in which they operate (*Dunsmuir*, at paras. 48-49). Reviewing courts must pay “respectful attention” to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction in light of the entire record (*Newfoundland Nurses*, at paras. 11-14 and 17).

289 Second, deference affects how a court frames the question it must answer when conducting judicial review. A reviewing court does not ask how it would have resolved an issue, but rather, whether the answer provided by the administrative decision-maker has been shown to be unreasonable (*Khosa*, at paras. 59 and 61-62; *Dunsmuir*, at para. 47). Framing the inquiry in this way ensures that the administrative decision under review is the focus of the analysis.

290 This Court has often endorsed this approach to conducting reasonableness review. In *Ryan*, for example, Iacobucci J. explained:

... When deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been .... The standard of reasonableness does not imply that a decision-maker is merely afforded a “margin of error” around what the court believes is the correct result.

... Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness .... Even if there could be, notionally, a single best answer, it is not the court’s role to seek this out when deciding if the decision was unreasonable. [paras. 50-51]

(See also *U.A.W., Local 720 v. Volvo Canada Ltd.* (1979), [1980] 1 S.C.R. 178 (S.C.C.), at p. 214; *Toronto (City)*, at paras. 94-95, per LeBel J., concurring; *VIA Rail*, at para. 101; *Mason v. Canada (Citizenship and Immigration)*, 2019 FC 1251 (F.C.), at para. 22, per Grammond J.; Régimbald, at p. 539; Sharpe, at pp. 204 and 208; Paul Daly, “The Signal and the Noise in Administrative Law” (2017), 68 *U.N.B.L.J.* 68, at p. 85; Evans, “Triumph of Reasonableness: But How Much Does It Really Matter?”, at p. 107.)

291 Third, deferential review impacts how a reviewing court evaluates challenges to an administrative decision. Deference requires the applicant seeking judicial review to bear the onus of showing that the decision was unreasonable (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] 1 S.C.R. 83 (S.C.C.), at para. 108; *Khela v. Mission Institution*, [2014] 1 S.C.R. 502 (S.C.C.), at para. 64; *May v. Ferndale Institution*, [2005] 3 S.C.R. 809 (S.C.C.), at para. 71; *Ryan*, at para. 48; *Southam*, at para. 61; *Northern Telecom Ltd. v. Communications Workers of Canada* (1979), [1980] 1 S.C.R. 115 (S.C.C.), at p. 130). Focusing on whether the applicant has demonstrated that the decision is unreasonable reinforces the central role that administrative decisions play in a properly deferential review process, and confirms that the decision-maker does not have to persuade the court that its decision is reasonable.

292 Assessing whether a decision is reasonable also requires a qualitative assessment. Reasonableness is a concept that pervades the law but is difficult to define with precision (*Dunsmuir*, at para. 46). It requires, by its very nature, a fact-specific inquiry that involves a certain understanding of common experience. Reasonableness cannot be reduced to a formula or a checklist of factors, many of which will not be relevant to a particular decision. Ultimately, whether an administrative decision is reasonable will depend on the context (*Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5 (S.C.C.), at para. 18). Administrative law covers an infinite variety of decisions and decision-making contexts, as LeBel J. colourfully explained in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (S.C.C.), at para. 158 (dissenting in part, but not on this point):

... not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate ....

293 Deference, in our view, requires approaching each administrative decision on its own terms and in its own context. But we emphasize that the inherently contextual nature of reasonableness review does not mean that the degree of scrutiny applied by a reviewing court varies (*Alberta Teachers' Association*, at para. 47; *Wilson*, at para. 18). It merely means that when assessing a challenge to an administrative decision, a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised by the applicant, among other factors (see, for example, *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3 (S.C.C.), at para. 40; *Newfoundland Nurses*, at para. 18; Van Harten et al., at p. 794). Without this context, it is impossible to determine what constitutes a sufficiently compelling justification to quash a decision under reasonableness review. Context may make a challenge to an administrative decision more or less persuasive — but it does not alter the deferential posture of the reviewing court (*Suresh*, at para. 40).

294 Deference, however, does not require reviewing courts to shirk their obligation to review the decision. So long as they maintain a respectful attitude, frame the judicial review inquiry properly and demand compelling justification for quashing a decision, reviewing courts are entitled to meaningfully probe an administrative decision. A thorough evaluation by a reviewing court is not “disguised correctness review”, as some have used the phrase. Deference, after all, stems from respect, not inattention to detail. [295] Bearing this in mind, we offer the following suggestions for conducting reasonableness review. We begin with situations where reasons are required.

296 The administrative decision is the focal point of the review exercise. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably (*Williams Lake*, at para. 36). By beginning with the reasons offered for the decision, read in light of the surrounding context and the grounds raised to

challenge the decision, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making.

297 Reviewing courts should approach the reasons with respect for the specialized decision-makers, the significant role they have been assigned and the institutional context chosen by the legislator. Reasons should be approached generously, on their own terms. Reviewing courts should be hesitant to second-guess operational implications, practical challenges and on-the-ground knowledge used to justify an administrative decision. Reviewing courts must also remain alert to specialized concepts or language used in an administrative decision that may be unfamiliar to a generalist judge (*Newfoundland Nurses*, at para. 13; *Igloo Vikski*, at paras. 17 and 30). When confronted with unfamiliar language or modes of reasoning, judges should acknowledge that such differences are an inevitable, intentional and invaluable by-product of the legislative choice to assign a matter to the administrative system. They may lend considerable force to an administrative decision and, by the same token, render an applicant's challenge to that decision less compelling. Reviewing courts scrutinizing an administrative body's decision under the reasonableness framework should therefore keep in mind that the administrative body holds the "interpretative upper hand" (*McLean*, at para. 40).

298 Throughout the review process, a court conducting deferential review must view claims of administrative error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised by an applicant to ensure they go to the *reasonableness* of the administrative decision.

299 Unsurprisingly, applicants rarely present challenges to an administrative decision as explicit invitations for courts to substitute their opinions for those of administrative actors. Courts, therefore, must carefully probe challenges to administrative decisions to assess whether they amount, in substance, to a mere difference of opinion with how the administrative decision-maker weighed or prioritized the various factors relevant to the decision-making process. Allegations of error may, on deeper examination, simply reflect a legitimate difference in approach by an administrative decision-maker. By rooting out and rejecting such challenges, courts respect the valuable and distinct perspective that administrative bodies bring to answering legal questions, flowing from the considerable expertise and field sensitivity they develop by administering their mandate and working within the intricacies of their statutory context on a daily basis. The understanding and insights of administrative actors enhance the decision-making process and may be more conducive to reaching a result "that promotes effective public policy and administration ... than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law" (*National Corn Growers*, at pp. 1336-37 (emphasis deleted), per Wilson J., concurring, citing J. M. Evans et al., *Administrative Law: Cases, Text, and Materials* (3rd ed. 1989), at p. 414).

300 When resolving challenges to an administrative decision, courts must also consider the *materiality* of any alleged errors in the decision-maker's reasoning. Under

reasonableness review, an error is not necessarily sufficient to justify quashing a decision. Inevitably, the weight of an error will depend on the extent to which it affects the decision. An error that is peripheral to the administrative decision-maker’s reasoning process, or overcome by more compelling points advanced in support of the result, does not provide fertile ground for judicial review. Ultimately, the role of the reviewing court is to examine the decision as a whole to determine whether it is reasonable (*Dunsmuir*, at para. 47; *Khosa*, at para. 59). Considering the materiality of any impugned errors is a natural part of this exercise, and of reading administrative reasons “together with the outcome” (*Newfoundland Nurses*, at para. 14).

301 Review of the decision as a whole is especially vital when an applicant alleges that an administrative decision contains material omissions. Significantly, and as this Court has frequently emphasized, administrative decision-makers are not required to consider and comment upon every issue raised by the parties in their reasons (*Construction Labour Relations Assn. (Alberta) v. Driver Iron Inc.*, [2012] 3 S.C.R. 405 (S.C.C.), at para. 3; *Newfoundland Nurses*, at para. 16, citing *S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.* (1973), [1975] 1 S.C.R. 382 (S.C.C.), at p. 391). Further, a reviewing court is not restricted to the four corners of the written reasons delivered by the decision-maker and should, if faced with a gap in the reasons, look to the record to see if it sheds light on the decision (*Williams Lake*, at para. 37; *Delta Air Lines Inc. v. Lukács*, [2018] 1 S.C.R. 6 (S.C.C.), at para. 23; *Newfoundland Nurses*, at para. 15; *Alberta Teachers’ Association*, at paras. 53 and 56).

302 The use of the record and other context to supplement a decision-maker’s reasons has been the subject of some academic discussion (see, for example, Mullan, at pp. 69-74). We support a flexible approach to supplementing reasons, which is consistent with the flexible approach used to determine whether administrative reasons must be provided to begin with and sensitive to the “day-to-day realities of administrative agencies” (*Baker*, at para. 44), which may not be conducive to the production of “archival” reasons associated with court judgments (para. 40, citing Roderick A. Macdonald and David Lametti, “Reasons for Decision in Administrative Law” (1990), 3 C.J.A.L.P. 123).

303 Some materials that may help bridge gaps in a reviewing court’s understanding of an administrative decision include: the record of any formal proceedings as well as the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review (see Matthew Lewans, “Renovating Judicial Review” (2017), 68 U.N.B.L.J. 109, at pp. 137-38). Reviewing these materials may assist a court in understanding, “by inference”, why an administrative decision-maker reached a particular outcome (*Baker*, at para. 44; see also *Williams Lake*, at para. 37; *Mills v. Ontario (Workplace Safety & Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71 (Ont. C.A.), at paras. 38-39). It may reveal further confirmatory context for a line of reasoning employed by the decision-maker — by showing, for example, that the decision-maker’s understanding of the purpose of its statutory mandate finds support in the provision’s legislative history (*Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3 (S.C.C.), at paras. 25-29). Reviewing the record can also yield responses to the specific challenges raised by an applicant on judicial review, responses that are “consistent

with the process of reasoning” applied by the administrative decision-maker (*Igloo Vikski*, at para. 45). In these ways, reviewing courts may legitimately supplement written reasons without “supplant[ing] the analysis of the administrative body” (*Lukács*, at para. 24).

304 The “adequacy” of reasons, in other words, is not “a stand-alone basis for quashing a decision” (*Newfoundland Nurses*, at para. 14). As this Court has repeatedly confirmed, reasons must instead “be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes” (*Newfoundland Nurses*, at para. 14; *Halifax (Regional Municipality) v. Canada (Public Works & Government Services)*, [2012] 2 S.C.R. 108 (S.C.C.), at para. 44; *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559 (S.C.C.), at para. 52; *Williams Lake*, at para. 141, per Rowe J., dissenting, but not on this point). This approach puts substance over form in situations where the basis for a decision by a specialized administrative actor is evident on the record, but not clearly expressed in written reasons. Quashing decisions in such circumstances defeats the purpose of deference and thwarts access to justice by wasting administrative and judicial resources.

305 In our view, therefore, if an applicant claims that an administrative decision-maker failed to address a relevant factor in reaching a decision, the reviewing court must consider the submissions and record before the decision-maker, and the materiality of any such omission to the decision rendered. An administrative decision-maker’s failure, for example, to refer to a particular statutory provision or the full factual record before it does not automatically entitle a reviewing court to conduct a *de novo* assessment of the decision under review. The inquiry must remain focussed on whether the applicant has satisfied the burden of showing that the omission renders the decision reached unreasonable.

306 We acknowledge that respecting the line between reasonableness and correctness review has posed a particular challenge for judges when reviewing interpretation by administrative decision-makers of their statutory mandates. Judges routinely interpret statutes and have developed a template for how to scrutinize words in that context. But the same deferential approach we have outlined above must apply with equal force to statutory interpretation cases. When reviewing an administrative decision involving statutory interpretation, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach “imperils deference” (Paul Daly, “Unreasonable Interpretations of Law” (2014), 66 *S.C.L.R.* (2d) 233, at p. 250).

307 We agree with Justice Evans that “once [a] court embarks on its own interpretation of the statute to determine the reasonableness of the tribunal’s decision, there seems often to be little room for deference” (Evans, “Triumph of Reasonableness: But How Much Does It Really Matter?”, at p. 109; see also *Mason*, at para. 34; Dyzenhaus, “Dignity in Administrative Law: Judicial Deference in a Culture of Justification”, at p. 108; Daly, “Unreasonable Interpretations of Law”, at pp. 254-55). We add that a *de novo* interpretation of a statute, conducted as a prelude to “deferential” review, necessarily omits a vital piece of the interpretive puzzle: the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question (Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, at p. 304; Paul Daly,

“Deference on Questions of Law” (2011), 74 *Mod. L. Rev.* 694). By placing that perspective at the heart of the judicial review inquiry, courts display respect for administrative specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies.

308 Conversely, by imposing their own interpretation of a statutory provision, courts *undermine* legislative intent to confide a mandate to the decision-maker. Applying a statute will almost always require some interpretation, making the interpretive mandate of administrative decision-makers inherent to their legislative mandate. The decision-maker who applies the statute has primary responsibility for interpreting the provisions in order to carry out their mandate effectively.

309 Administrative decision-makers performing statutory interpretation should therefore be permitted to be guided by their expertise and knowledge of the practical realities of their administrative regime. In many cases, the “ordinary meaning” of a word or term makes no sense in a specialized context. And in some settings, law and policy are so inextricably at play that they give the words of a statute a meaning unique to a particular specialized context (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc.*, at p. 800). Further, not only are statutory provisions sometimes capable of bearing more than one reasonable interpretation, they are sometimes drafted in general terms or with “purposeful ambiguity” in order to permit adaptation to future, unknown circumstances (see Felix Frankfurter, “Some Reflections on the Reading of Statutes” (1947), 47 *Colum. L. Rev.* 527, at p. 528). These considerations make it all the more compelling that reviewing courts avoid imposing judicial norms on administrative decision-makers or maintaining a dogmatic insistence on formalism. Where a decision-maker can explain its decision adequately, that decision should be upheld (Daly, “Unreasonable Interpretations of Law”, at pp. 233-34, 250 and 254-55).

310 Justice Brown’s reasons in *Igloo Vikski* provide a useful illustration of a properly deferential approach to statutory interpretation. That case involved an interpretation of the *Customs Tariff*, S.C. 1997, c. 36, as it applies to hockey goaltender gloves. The Canada Border Services Agency had classified the gloves as “[g]loves, mittens [or] mitts”. Igloo Vikski argued they should have been classified as sporting equipment. The Canadian International Trade Tribunal (“CITT”) confirmed the initial classification. The Federal Court of Appeal reversed the decision.

311 Acknowledging that the “specific expertise” of the CITT gave it the upper hand over a reviewing court with respect to certain questions of law, Justice Brown determined that the standard of review was reasonableness. Writing for seven other members of the Court, he carefully reviewed the reasons of the CITT and how it had engaged with Igloo Vikski’s arguments before turning to the errors alleged by Igloo Vikski and the Federal Court of Appeal. Conceding that the CITT reasons lacked “perfect clarity”, Justice Brown nevertheless concluded that the Tribunal’s interpretation was reasonable. While he agreed with Igloo Vikski that an alternate interpretation to that given by the CITT was available, the inclusive language of the applicable statute was broad enough to accommodate the CITT’s reasonable interpretation. By beginning with the reasons offered for the interpretation and

turning to the challenges mounted against it in light of the surrounding context, *Igloo Vikski* provides an excellent example of respectful and properly deferential judicial review.

312 We conclude our discussion of reasonableness review by addressing cases where reasons are neither required nor available for judicial review. In these circumstances, a reviewing court should remain focussed on whether the decision has been shown to be unreasonable. The reasonableness of the decision may be justified by past decisions of the administrative body (see *Edmonton East*, at paras. 38 and 44-46; *Alberta Teachers' Association*, at paras. 56-64). In other circumstances, reviewing courts may have to assess the reasonableness of the outcome in light of the procedural context surrounding the decision (see *Law Society of British Columbia v. Trinity Western University*, [2018] 2 S.C.R. 293 (S.C.C.), at paras. 51-56; *Edmonton East*, at paras. 48-60; *Catalyst Paper Corp.*, at paras. 32-36). In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable.

313 In sum, reasonableness review is based on deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Deference must inform the attitude of a reviewing court and the nature of its analysis: the court does not ask how it would have resolved the issue before the administrative decision-maker but instead evaluates whether the decision-maker acted reasonably. The reviewing court starts with the reasons offered for the administrative decision, read in light of the surrounding context and based on the grounds advanced to challenge the reasonableness of the decision. The reviewing court must remain focussed on the reasonableness of the decision viewed as a whole, in light of the record, and with attention to the materiality of any alleged errors to the decision-maker's reasoning process. By properly conducting reasonableness review, judges provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers.

### **Application to Mr. Vavilov**

[The concurring judges' description of the facts and judicial history are omitted.]

(...)

324 As a general rule, administrative decisions are to be judicially reviewed for reasonableness. None of the correctness exceptions apply to the Registrar's interpretation of the Act in this case. As such, the standard of review is reasonableness.

[Section 3(2), also reproduced at para 155 of the judgment, is omitted.]

(...)

326 The specific issue in this case is whether the Registrar's interpretation of the statutory exception to citizenship was reasonable. Reasonableness review entails deference to the decision-maker, and we begin our analysis by examining the reasons offered by the Registrar in light of the context and the grounds argued.

327 In this case, the Registrar’s letter to Mr. Vavilov summarized the key points underlying her decision. In concluding that Mr. Vavilov was not entitled to Canadian citizenship, the Registrar adopted the recommendations of an analyst employed by Citizenship and Immigration Canada. As such, the analyst’s report properly forms part of the reasons supporting the Registrar’s decision.

328 The analyst’s report sought to answer the question of whether Mr. Vavilov was erroneously issued a certificate of Canadian citizenship. The report identifies the key question in this case as being whether either of Mr. Vavilov’s parents was a “representative” or “employee” of a foreign government within the meaning of s. 3(2)(a). Much of the report relates to matters not disputed in this appeal, including the legal status of Mr. Vavilov’s parents in Canada and their employment as Russian intelligence agents.

329 The analyst began her analysis with the text of s. 3(2)(a). In concluding that the provision operates to deny Mr. Vavilov Canadian citizenship, she set out two textual arguments. First, she compared the current version of s. 3(2)(a) to an earlier iteration of the exception found in s. 5(3) of the *Canadian Citizenship Act*, R.S.C. 1970, c. C-19...

[This provision, also reproduced at para 157 of the judgment, is omitted.]

330 The analyst stated that the removal of references to official accreditation or a diplomatic mission indicate that the previous exception was narrower than s. 3(2)(a). She then pointed out that the definition of “diplomatic or consular officer” in s. 35(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21, clearly associates these individuals with diplomatic positions. Because the current version of s. 3(2)(a) does not link “other representative or employee in Canada of a foreign government” to a diplomatic mission, the analyst determined “it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of ‘diplomatic and consular staff.’” Finally, the analyst stated that the phrase “other representative or employee in Canada of a foreign government” has not been previously interpreted by a court.

331 Beyond the analyst’s report, there is little in the record to supplement the Registrar’s reasons. There is no evidence about whether the Registrar has previously applied this provision to individuals like Mr. Vavilov, whose parents did not enjoy diplomatic privileges and immunities. Neither does there appear to be any internal policy, guideline or legal opinion to guide the Registrar in making these types of decisions.

332 In challenging the Registrar’s decision, Mr. Vavilov bears the onus of demonstrating why it is not reasonable. Before this Court, Mr. Vavilov submitted that the analyst focussed solely on the text of the exception to citizenship. In his view, had the broader objectives of s. 3(2)(a) been considered, the analyst would have concluded that “other representative” or “employee” only applies to individuals who benefit from diplomatic privileges and immunities.

333 In his submissions before the Registrar, Mr. Vavilov offered three reasons why the text of s. 3(2) must be read against the backdrop of Canadian and international law relating to the roles and functions of diplomats.

334 First, Mr. Vavilov explained that s. 3(2)(a) should be read in conjunction with the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 ("FMIOA"). This statute incorporates into Canadian law aspects of the *Vienna Convention on Diplomatic Relations*, Can. T.S. (1983), 1966 No. 29 (Australia H.C.), Sched. I to the FMIOA, and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, Sched. II to the FMIOA, which deal with diplomatic privileges and immunities. He submitted that s. 3(2) denies citizenship to children of diplomats because diplomatic privileges and immunities, including immunity from criminal prosecution and civil liability, are inconsistent with the duties and responsibilities of a citizen. Because Mr. Vavilov's parents did not enjoy such privileges and immunities, there would be no purpose in excluding their children born in Canada from becoming Canadian citizens.

335 Second, Mr. Vavilov provided the Registrar with Hansard committee meeting minutes such as the comments of the Honourable J. Hugh Faulkner, Secretary of State, when introducing the amendments to s. 3(2), who explained that the provision had been redrafted to narrow the exception to citizenship.

336 Third, Mr. Vavilov cited case law, arguing that: (i) the exception to citizenship should be narrowly construed because it takes away substantive rights (*Brossard (Ville) c. Québec (Commission des droits de la personne)*), [1988] 2 S.C.R. 279 (S.C.C.), at p. 307); (ii) s. 3(2)(a) must be interpreted functionally and purposively (*Medovarski v. Canada (Minister of Citizenship & Immigration)*), [2005] 2 S.C.R. 539 (S.C.C.), at para. 8); and (iii) because Mr. Vavilov's parents were not immune from criminal or civil proceedings, they fall outside the scope of s. 3(2) (*Greco v. Holy See (State of the Vatican City)*), [1999] O.J. No. 2467 (Ont. S.C.J.) ; *R. v. Bonadie* (1996), 109 C.C.C. (3d) 356 (Ont. Prov. Div.) ; *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)* (2007), 64 Imm. L.R. (3d) 67 (F.C.)).

337 The Federal Court's decision in *Al-Ghamdi*, a case which challenged the constitutionality of s. 3(2)(a), was particularly relevant. In that case, Shore J. wrote that s. 3(2)(a) only applies to the "children of individuals with diplomatic status" (paras. 5 and 65). Justice Shore also stated that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship" (para. 63).

338 The Registrar's reasons failed to respond to Mr. Vavilov's extensive and compelling submissions about the objectives of s. 3(2)(a). It appears that the analyst misunderstood Mr. Vavilov's arguments on this point. In discussing the scope of s. 3(2), she wrote, "[c]ounsel argues that CIC [Citizenship and Immigration Canada] cannot invoke subsection 3(2) because CIC has not requested or obtained verification with the Foreign Affairs Protocol to prove that [Mr. Vavilov's parents] held diplomatic or consular status with the Russian Federation while they resided in Canada." It thus appears that the analyst did not recognize that Mr. Vavilov's argument was more fundamental in nature — namely, that the objectives of s. 3(2) require the terms "other representative" and "employee" to be read narrowly. During discovery, in fact, the analyst acknowledged that her research did not reveal a policy purpose behind s. 3(2)(a) or why the phrase "other representative or

employee” was included in the Act. It also appears that the analyst did not understand the potential relevance of the *Al-Ghamdi* decision, since her report stated that “[t]he jurisprudence that does exist only relates to individuals whose parents maintained diplomatic status in Canada at the time of their birth.”

339 The Registrar, in the end, interpreted s. 3(2)(a) broadly, based on the analyst’s purely textual assessment of the provision, including a comparison with the text of the previous version. This reading of “other representative or employee” was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Rather, as Mr. Vavilov points out, the modifications made to s. 3(2) in 1976 appear to mirror those embodied in the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations*, which were incorporated into Canadian law in 1977. The judicial treatment of this provision, in particular the statements in *Al-Ghamdi* about the narrow scope of s. 3(2)(a) and the inconsistency between diplomatic privileges and immunities and citizenship, also points to the need for a narrow interpretation of the exception to citizenship.

340 In addition, as noted by the majority of the Federal Court of Appeal, the text of s. 3(2)(c) can be seen as undermining the Registrar’s interpretation. That provision denies citizenship to children born to individuals who enjoy “diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a)”. As Stratas J.A. noted, this language suggests that s. 3(2)(a) covers *only* those “employee[s] in Canada of a foreign government” who have diplomatic privileges and immunities.

341 By ignoring the objectives of the provision, the Registrar rendered an unreasonable decision. In particular, the arguments supporting a reading of s. 3(2) that is restricted to those who have diplomatic privileges and immunities, likely would have changed the outcome in this case.

342 Mr. Vavilov has satisfied us that the Registrar’s decision is unreasonable. As a result, the Court of Appeal properly quashed the Registrar’s decision to cancel Mr. Vavilov’s citizenship certificate, and he is thus entitled to a certificate of Canadian citizenship.

343 We would therefore dismiss the appeal with costs to Mr. Vavilov throughout.

*Appeal dismissed.*

A reasonable decision, according to the *Vavilov* majority, at para 85, is “one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker.” Accordingly, a court reviewing an administrative decision on a reasonableness standard focuses on the decision made by the decision maker, including the decision maker’s reasoning process and the outcome. By taking the administrative decision as the starting point of reasonableness review, the reviewing court respects the legislature’s intent to leave certain decisions with an administrative body; unlike correctness

review, where the court is expected to come to its own view of the question up for decision, the court's role is to *review* the administrative body's decision. Citing the Federal Court of Appeal's decision in *Delios v Canada (Attorney General)*, 2015 FCA 117, at para 28, the majority confirmed that "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did." This reminder was necessary in light of the contrary approach adopted by some appellate courts:

... [B]efore a reviewing court can determine the reasonableness of the tribunal's statutory interpretation, the court must conduct its own independent statutory interpretation. If the court concludes that the statutory term at issue is capable of more than one reasonable interpretation, the interpretation of the tribunal, if reasonable, will prevail. But if the court determines that there is only one reasonable interpretation and the tribunal failed to adopt it, the decision must be set aside.

*Simon Fraser University v British Columbia (Assessor of Area # 10 – Burnaby)*, 2019 BCCA 93 at para 55.

### The role of reasons in reasonableness review

Where a decision maker provides written reasons which communicate its rationale for a decision, a principled approach to reasonableness review puts those reasons first; through their attention to reasons, reviewing courts demonstrate respect for the decision making process. Reviewing courts must not assess an administrative decision maker's reasons against a standard of perfection but instead approach them against the background of the institutional context and the history of the proceedings within which they are drafted. The *Vavilov* majority observes, at para 92, that "'Administrative justice' will not always look like 'judicial justice'." Rather than including all the arguments, statutory provisions, jurisprudence or other details that reviewing judges may prefer, the majority allows at paras 92-93, administrative decision makers may prepare their reasons in a kind of shorthand, using concepts and language "highly specific to their fields of experience and expertise" and, relying on their expert understanding of the "consequences and operational impact of the decision," defend an outcome that, while appearing to a reviewing court to be "puzzling and counterintuitive" in fact "accords with the purposes and practical realities" of their administrative regime. Thus, the respectful attention to reasons required by reasonableness review will require that reviewing courts be "attentive to the application by decision makers of specialized knowledge as demonstrated by their reasons."

Reading a decision maker's reasons in light of the history of the proceedings in which they were rendered requires reviewing courts to have regard to several important elements in deciding whether an apparent shortcoming in the reasons may be explained as something other than a failure of justification, intelligibility or transparency: the evidence before the decision maker - in other words, the administrative record; the parties' submissions and, in particular, any concessions made to an issue that would explain the absence of analysis relating to that issue;

publicly available policies or guidelines that informed the decision making process; and past decisions of the administrative decision maker that were not challenged by the parties and that the decision maker may have relied on.

In an important clarification of previous jurisprudence, designed to strengthen a culture of justification in administrative decision making, the *Vavilov* majority confirmed, at para 96, that:

Where, 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. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome...

Before *Vavilov*, judges had on occasion adopted a more relaxed approach to the requirement of justification, reasoning that they could uphold as reasonable an administrative decision that fell within a range of possible, acceptable outcomes which the decision maker had failed to sufficiently justify in its reasons so long as the reviewing court could substitute its own justification for the outcome. The decision that – wrongly – had given rise to this relaxed approach was *Newfoundland and Labrador Nurses' Union v Newfoundland (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, where the Supreme Court had explained its requirement, in *Dunsmuir*, for reasons to demonstrate justification, transparency and intelligibility. At issue in *Newfoundland Nurses* was whether an arbitrator's twelve-page decision set out a line of analysis that reasonably supported his conclusion that, according to the language of the applicable collective agreement, casual employees were not entitled to accumulate time towards vacation entitlements. For the Court, Justice Abella emphasized *Dunsmuir*'s endorsement of Professor David Dyzenhaus' observation that deference to administrative tribunal decision-making required of courts "a respectful attention to the reasons offered or which could be offered in support of a decision" (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997) 279 at 304 [emphasis added]). She highlighted, at para 12, his admonition in the same article that "even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them." She observed, at para 13, that these words represented "a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counterintuitive for the generalist."

This issue came to a head before the Supreme Court in *Delta Air Lines Inc. v Lukács*, 2018 SCC 2. In detailed reasons, the Canadian Transportation Agency had very narrowly interpreted its statutory discretion to "inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act... administered... by the

Agency” to deny Lukács’ complaint against Delta regarding the airline’s practices in relation to the carriage of obese passengers. According to the Agency, public-interest standing could be granted only for complaints raising the constitutionality of legislation or administrative action. A majority of the Supreme Court decided that the Agency’s interpretation of its legislative scheme was unreasonable because it resulted in a test for public-interest standing that could never be met. The dissenting judges decided that while the Agency’s reasons were deficient, its denial of Lukács’ standing was a reasonable outcome because his complaint was purely theoretical and unsupported by evidence and because directly affected passengers could file a complaint. The majority cried foul, arguing that the dissent had supplanted rather than supplemented the Agency’s reasons. Under that approach, so long as a reviewing court believed that the outcome of the Agency’s decision was possible and acceptable, it could re-write the Agency’s justification and hand the agency a standing test not of its own making – the opposite of deferential review.

The *Vavilov* majority confirmed, at para 97, that while *Newfoundland Nurses* called for reviewing courts to pay “close attention... to a decision maker’s written reasons” and to read these reasons “holistically and contextually” in order to understand the basis on which the decision is being made, it did not hold that the decision maker’s rationale for its decision was irrelevant. It endorsed the following passage from Justice Donald Rennie’s decision in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, at para. 11:

*Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn...

The upshot of the Court’s discussion of the role of reasons in reasonableness review is that reviewing courts must focus on the reasons actually provided by the decision maker, not hypothetical reasons that it could have offered to justify the outcome. In the words of the *Vavilov* majority, at para 86: “it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies.” It further confirms, at para 98, that when a reviewing court, having read the decision maker’s reasons with sensitivity to the institutional setting and in light of the record, concludes that the “rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally not meet the requisite standard of justification, transparency and intelligibility.”

In *Vavilov*, the concurring judges who, incidentally, had supported the reasonableness of the Canadian Transportation Agency's standing rules and their application in *Lukács*, stated, at paras 302-303, their support for a “flexible approach to supplementing reasons.” In their view, a review of “the record of any formal proceedings, the materials before the decision maker, past decisions of the administrative body and policies or guidelines developed to guide the type of decision under review” may assist the court in understanding “by inference” why an administrative decision maker may have reached a particular outcome. This is entirely consistent with the majority’s description of reasonableness review as requiring reviewing courts to read a decision maker’s reasons with sensitivity to the institutional context and in light of the record; it is not clear to what extent the majority’s apparently more rigid position against supplementation actually differs from the concurring judges’ flexible position.

### ***The role of reasons in reasonableness review illustrated***

The following case excerpt illustrates several aspects of the role of reasons in reasonableness review post-*Vavilov*: attention to the institutional context in which the decision maker operates and the requirement that a decision be justified by the decision maker rather than that it simply be justifiable.

#### ***Patel v Canada (Citizenship and Immigration), 2020 FC 77***

[Patel, a twenty-three-year-old citizen of India who had acquired a business degree and briefly worked as an accountant, was accepted into a one-year business program at Vancouver Island University (VIU) conditional on his prior completion of an English as a Second Language (ESL) program. Although his first application for a study permit was refused in 2018, he submitted a second application in 2019 which contained an extensive “statement of purpose” submitted to VIU in support of his successful application to its business program which explored his reasons for undertaking the program, the opportunities he felt it would provide and the reasons why this education and experience would benefit him on his return to India at the completion of the program. Patel’s application was once again refused]

Diner J.:

(...)

5 The core of the reasons for refusal are contained in the Global Case Management System [GCMS] notes and read as follows:

PA failed to provide IELTS scores. Considering the availability of English courses locally at much less cost, I am not satisfied it is reasonable for Applicant to upgrade English skills in Canada at such expense. On balance, the Applicant has failed to satisfy me that the course of study is reasonable given the high cost of international study in Canada when weighed against the potential career/employment benefits, the local options available for similar studies, the applicant’s academic/work history and personal circumstances.

6 Based on these reasons, the Officer came to the conclusion that (i) Mr. Patel was neither a *bona fide* student in Canada, nor (ii) would leave Canada at the end of his stay as required under paragraph 216(1)(b) of the Regulations.

## II. Issues and Analysis

7 Mr. Patel challenges two aspects of the Decision, arguing that the Officer (i) breached his right to procedural fairness, and (ii) erred in finding that he did not satisfy the Regulations. (...)

[Justice Diner held that the first issue was reviewable on a correctness standard; he would decide whether, given the interests involved and the consequences of the decision, the visa officer had followed a fair and just process. The second issue – whether the officer erred in concluding that Mr. Patel would not comply with the Regulations by leaving Canada by the end of the period authorized for his stay – was subject to reasonableness review.]

9 When reviewing for reasonableness, the Court asks “whether the decision bears the hallmarks of reasonableness - justification, transparency and intelligibility - and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99). It must be internally coherent, and display a rational chain of analysis (*Vavilov* at para 85). As such, a decision will be unreasonable if the reasons read in conjunction with the record do not enable the Court to understand the decision maker’s reasoning on a critical point (*Vavilov* at para 103).

### A. *The Officer breached Mr. Patel's right to procedural fairness*

10 I agree with Mr. Patel that the Officer denied him his rights to procedural fairness by failing to conduct an interview or providing him with an opportunity to address the concerns about the genuineness of his application. While I acknowledge that the level of procedural fairness owed to visa and study permit applicants falls at the low end of the spectrum..., concerns with credibility should be raised with the applicant, at minimum in writing. At a practical level, this means that visa officers are not required to inform applicants of concerns regarding the sufficiency of supporting materials or evidence. However, that changes when the officer impugns the authenticity of the documents or the applicant’s credibility... Here, the Officer made a negative credibility finding against Mr. Patel - and in effect his supporting evidence such as his statement of purpose - in concluding that he would not be a *bona fide* student. Neither the record, nor the reasons themselves, justified this finding.

(...)

12 ...[T]he Officer’s conclusion that Mr. Patel would not be a *bona fide* student reflected a concern with the *genuineness* of his application. Thus, he owed Mr. Patel an opportunity to address these concerns, and the failure to do so breached his right to procedural fairness. Certainly, that opportunity did not have to be in the form of an oral interview, but there should have been - at minimum - an opportunity for Mr. Patel to address the Officer’s concerns in writing.

13 While this flaw in the Decision is sufficient to return the matter for redetermination, I also find the Officer's rationale for Mr. Patel's prospective non-compliance with the limits of his authorized stay in Canada problematic.

#### ***B. The Officer's Decision was unreasonable***

14 The Officer doubted that it was reasonable for Mr. Patel to enroll in the program at VIU, citing (i) the questionable employment benefits, (ii) the availability of lower-cost options for similar study in India, (iii) his academic and employment history, and (iv) his personal circumstances. From this, the Officer concluded that Mr. Patel would not be a *bona fide* student in Canada and would not leave Canada at the end of his study permit stay, in non-compliance with paragraph 216(1)(b) of the Regulations.

15 In my view, these four reasons, whether considered alone or together, do not provide a reasonable basis or justification for the Officer's conclusion. I appreciate that the context of a visa office, with immense pressures to produce a large volume of decisions every day, do not allow for extensive reasons. The brevity of the Decision, however, is not what makes this Decision unreasonable. Rather, it is its lack of *responsiveness* to the evidence. *Vavilov*, at paragraphs 127-128, describes the concept of responsiveness as follows:

The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

[Underlining added; italics in original.]

16 As can be seen above, the Supreme Court locates responsiveness of reasons somewhere in the land between procedural fairness and reasonableness. And that is natural because to be responsive, the decision-maker has to marry the concepts of fairness

- whether the party knew the case they had to meet, had an opportunity to respond... - with a coherent, justified decision made in relation to the relevant factual and legal constraints.

17 Again, while the reality of visa offices and the context in which its officers work include significant operational pressures and resource constraints created by huge volumes of applications, this cannot exempt their decisions from being responsive to the factual matrix put before them. Failing to ask for basic responsiveness to the evidence would deprive reasonableness review of the robust quality that *Vavilov* requires at paras 13, 67 and 72. “Reasonableness” is not synonymous with “voluminous reasons”: simple, concise justification will do.

18 Returning to the four reasons underlying the conclusion in this case (as listed in paragraph 14 above), first, there are clear potential employment benefits to international study, including in this case, the opportunity to improve English language skills.

19 As for the second reason cited by the Officer, lower-cost options for English programs in India does not make enrollment in a Canadian English program unreasonable. Foreign students worldwide often pay substantial fees for the experience of studying abroad, and all the salutary effects that it may have, including receiving advanced education, improving language skills, gaining international perspectives, being immersed in foreign cultures, and improving career prospects.

20 Regarding the third ground cited in the Decision, Mr. Patel’s academic and employment history is in the field of business. Therefore, I find nothing inherently unreasonable about pursuing further studies in his field.

21 Finally, on the fourth issue cited, the Officer did not expand whatsoever - or justify in any way - what the “personal circumstances” might be, or why those might render his attendance at the university “unreasonable.” The Officer did not explain, for instance, that it would be personally difficult for Mr. Patel to leave his friends and family in his home country, overly onerous on his finances, or simply difficult to adjust to a new environment or climate. The Officer might well have had a rationale for that conclusion in mind, but none is apparent in the reasons. *Vavilov*, at paragraph 96, teaches us that it is not for the Court to fill in the reasons for the officer... [Citation omitted]

22 Here, the Officer did not offer a rational line of analysis or explanation that could reasonably lead from the evidence to the conclusion that Mr. Patel would not be a *bona fide* student and would not leave Canada at the end of the study permit period (*Vavilov* at para 102). The Decision is thus not justified in relation to the relevant factual and legal constraints (*Vavilov* at para 99).

### **III. Conclusion**

23 The Officer breached Mr. Patel’s right to procedural fairness and rendered an unreasonable Decision. For both of these reasons, the application will be granted and the matter returned for redetermination.

### Note

Justice Diner notes at para 16 that responsiveness of reasons is “locate[d] somewhere in the land between procedural fairness and reasonableness.” *Romania v Boros*, [2020 ONCA 216](#) at paras 15-33 also illustrates that the sufficiency of reasons in reasonableness review has a procedural aspect. A decision-maker’s failure to secure and disclose evidence and to account for it in its reasons may raise procedural unfairness, as well as result in an unreasonable decision.

#### ***Reasonableness review in the absence of reasons***

As noted by the majority in *Vavilov*, a reviewing court assessing the reasonableness of an administrative decision focuses on the justification for the decision put forward by the administrative decision maker. In some circumstances, reasons may not be required by statute or by the common law duty of procedural fairness. For certain multi-member decision making bodies, including municipal councils or the Benchers of a law society, who enact bylaws or make decisions through votes, justification may not be found in a single set of reasons. In such circumstances, a reviewing court may find a rationale for the decision in the record of proceedings leading up to a decision. In the case of municipal decision-making, this record would include the debates, deliberations, statements of policy and planning documents produced by the municipality. However, as the *Vavilov* majority notes, at para 138, in circumstances where no reasons are provided and neither the record nor the context reveal the justification for the decision, “the analysis will then focus on the outcome rather than on the decision maker’s reasoning process.” *Minster Enterprises Ltd. v City of Richmond*, 2020 BCSC 455, an example of a post-*Vavilov* decision reviewing the decision of a municipality in the absence of reasons is discussed in the following section.

#### **What makes a decision reasonable**

The *Vavilov* majority’s insistence that, in order to be upheld as reasonable, decisions must be justified by the administrative decision makers to the affected parties is only the first of the judgement’s two key contributions to clarifying reasonableness review. Its second important contribution is the considerable guidance it provides to reviewing courts about what makes a decision reasonable or unreasonable and how to conduct reasonableness review in practice. A reviewing court should quash as unreasonable an administrative decision where the applicant for review has established that it contains flaws or shortcomings serious enough – sufficiently central or significant to the decision’s merits as opposed to merely superficial or peripheral – that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. The Court identifies two types of fundamental flaws that may show a decision to be unreasonable: flaws relating to a failure of internal rationality and flaws relating to the decision maker’s failure to justify a decision in light of the factual and legal constraints that bear on it.

### ***Flaws relating to a failure of internal rationality***

A decision can be unreasonable in a formal or “generic” sentence because it is not based on internally coherent reasoning. Such a decision presents a failure of internal rationality. As explained by the majority at para 102, a court conducting reasonableness review, while not engaging in a “line-by-line treasure hunt for error,” must be able to discern within the decision maker’s reasons “a line of analysis... that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.” A decision will be unreasonable if, read holistically and in conjunction with the record, the reasons:

- don’t reveal a rational chain of analysis underlying the decision;
- reveal that the decision is based on an irrational chain of analysis;
- don’t allow the court to understand the decision maker’s reasoning on a critical point; or
- exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise.

We have already encountered one example of a failure of internal rationality in *Patel, supra*, where Justice Diner found no rational line of analysis leading from the evidence before the visa officer to the officer’s conclusion that Patel’s personal circumstances made his proposed course of study unreasonable and indicated that he would not be a *bona fide* student. *Zhang v Canada (Citizenship and Immigration)*, 2020 FC 283 presents another example of a failure of internal rationality. In 2015, Zhang, who acquired Canadian citizenship in 2006, sought to sponsor her parents for permanent residence status. An immigration officer at Immigration, Refugees and Citizenship Canada (IRCC) gave her parents 30 days to complete an immigration medical examination (IME). When her father was hospitalized for a diagnostic check for diabetes, IRCC extended the deadline. When he was transferred to intensive care, Zhang received a further extension. Before this deadline expired, she advised IRCC that her father remained in intensive care and sought a six-month extension to complete the medical examinations. An immigration officer rejected Zhang’s application for sponsorship just under a week *before* the expiry of the deadline last imposed by IRCC, holding that it could not grant extensions indefinitely. Zhang appealed the officer’s decision to the Immigration Appeal Board (IAD) of the Immigration and Refugee Board, arguing that the officer had breached procedural fairness by rejecting her application before the deadline had passed and, in the alternative, that there were sufficient humanitarian and compassionate considerations for the IAD to exercise its discretion to grant special relief. The IAD denied her appeal. With regards to her procedural claim, it held that Zhang’s request for a third extension indicated that her parents would not meet the second deadline for the IME, and that even if procedural fairness had been breached, it would be inappropriate to quash the officer’s decision because the ultimate outcome of the application was “inevitable.” The IAD also rejected Zhang’s humanitarian and compassionate argument because, in its view, she had not demonstrated that she had exhausted other possible avenues of having her father examined or made every reasonable effort to ensure her father’s compliance

with the medical examination requirements. For example, the IAD found, IRCC could have directed the authorized physician to examine Zhang's father in his hospital bed or could have waived her father's medical examination requirement on humanitarian and compassionate grounds. The Federal Court held that the IAD's decision was unreasonable because it failed to reveal a rationally coherent analysis regarding the validity of the officer's decision to refuse the permanent residence application before the expiration of the second deadline for Zhang's parents to complete their medical examination. In particular, the Court highlighted that the IAD's finding that the outcome of her application was inevitable, for purposes of deciding against Zhang's procedural fairness claim, conflicted with its conclusion that humanitarian and compassionate relief could not be granted because Zhang had not exhausted all available avenues:

17 In my view, these inconsistencies in the IAD's conclusions undermine the internal coherence of the decision. On the one hand, the IAD concluded that the Officer did not breach procedural fairness by deciding the matter before the IME deadline without notice, particularly because it found that the outcome was "inevitable". On the other hand, the IAD faulted the Applicant's parents for not having exhausted all "other possible avenues", and it recognized that the Respondent could have done more, including by directing that the Applicant's father be examined in the hospital or by waiving the IME requirement.

18 To the extent that "other avenues" existed, as noted by the IAD, the Applicant may have availed herself of them before the deadline of June 20, 2018. On this basis, it was not reasonable for the IAD to conclude that the outcome was inevitable.

19 Moreover, the IAD's finding that the allegations of procedural fairness are moot is also unreasonable. The IAD considered the Applicant's procedural fairness claim as it pertains to the Officer's premature refusal, and it found this claim moot on the basis that the Applicant's father had not met the IME requirement by the June 20, 2018 deadline. However, by that date, the Officer had already refused the PR application. The IAD cannot reasonably use the Applicant's conduct following the refusal against her in this manner without further analysis.

20 To conclude, I find that the IAD's decision is unreasonable because it is not based on an internally coherent and rational chain of analysis (*Vavilov* at para 85).

#### Note

*Longue épée v University of Waterloo*, [2020 ONCA 830](#) at paras 72-87 provides another example of a failure of internal rationality. A student who unsuccessfully applied to transfer to the University of Waterloo from Dalhousie University, where his grades had suffered due to an unaccommodated disability, claimed that the rejection of his application was discriminatory. A human rights tribunal vice chair found that the university admissions committee had only considered Mr Longue épée's unaccommodated grades to be relevant to his ability to succeed in university and considered irrelevant other materials it had undertaken to review. However, she

also determined that the committee had reasonably accommodated Mr Longue épée in the admissions process.

***Flaws relating to a failure to justify a decision in light of the factual and legal constraints that bear on it***

To be reasonable, the *Vavilov* majority notes at para 105, a decision “must be justified in relation to the constellation of law and facts that are relevant to the decision” and that “operate as constraints on the decision maker in the exercise of its delegated powers.” While reinforcing that it was not cataloguing all of these legal and factual constraints, which could vary with each particular case, the majority offered a non-exhaustive list of legal and factual considerations that would generally be relevant in evaluating the reasonableness of the decision: the statutory scheme, other statutory, international and common law, the principles of statutory interpretation, the evidence before the decision maker, the submissions of the parties, a decision maker’s past practice and internal decisions and the impact of the decision on the affected individual. The majority warned, at para 106, that it was not setting out a checklist for reasonableness review and that these factors, whose significance could vary depending on the context, were “offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.”

It is noteworthy that while the majority eschews a contextual analysis in its framework for selecting the standard of review, built on a presumption of reasonableness based on legislatures’ institutional design choices, context comes back into the picture when the reviewing court applies the reasonableness standard. What is reasonable in a given situation, the majority observes at para 90, depends on “the constraints imposed by the legal and factual context of the particular decision under review” – contextual constraints that “dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt.” This aspect of the majority’s analysis links back to two features of pre-*Vavilov* reasonableness review. First, the Court had described reasonableness as “a single standard that takes its colour from the context”: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59. A reasonable decision must always be both internally coherent and rational and defensible in light of the relevant legal and factual constraints. However, which of these constraints are relevant and their relative significance (or, to continue the metaphor of colour, what colours are available on the reasonableness palette) depends to some extent on the circumstances of each particular decision. Second, a reasonable decision had been defined as exhibiting justification, transparency and intelligibility within the decision-making process *and* falling within a range of possible, acceptable outcomes defensible in respect of the facts and the law: *Dunsmuir, supra*, at para 47. Just as this range varied according to contextual factors such as the nature of the decision making process and the legislative scheme that empowered the decision maker (*Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at paras 25 and 29) so, post-*Vavilov*, will the “limits and contours” of the permissible space in which the decision maker may act. These links

to pre-*Vavilov* concepts of reasonableness demonstrate that the new framework does not supplant previous understandings of reasonableness review, which also required of decision makers the transparent and intelligible justification of outcomes that are defensible in respect of the facts and the law. Instead, it supplies to reviewing courts, parties and their counsel a long-awaited and detailed roadmap of how to assess the reasonableness of administrative decisions. We turn next to a description of the seven constraints identified by the majority and to examples of decisions in which these have played a significant role.

### *1. Governing statutory scheme*

The statutory language chosen to define a decision maker's authority affects the permissible space for reasonable decision making. For example, when a decision maker is given wide discretion, the majority notes at para 108, it "would be unreasonable for it to fetter that discretion". However, an exercise of discretion must comply with the underlying rationale and purview of the governing statutory scheme and with any specific constraints that the scheme imposes, including "statutory definitions, principles or formulas that prescribe the exercise of discretion". In sum, whether a decision maker's interpretation of a statutory provision is reasonable will be influenced by the statutory language: precise and narrow language will tightly constrain the decision maker's ability to interpret the provision while broad, open-ended or highly qualitative language will grant it greater interpretive flexibility. The importance of the language chosen by a legislator to describe the limits and contours of the decision maker's authority is illustrated in *Minster Enterprises Ltd v City of Richmond*, 2020 BCSC 455.

#### ***Minster Enterprises Ltd v City of Richmond, 2020 BCSC 455***

[Minster secured from the City of Richmond building permits authorizing the building of a one-family dwelling on a property located in an Agricultural Land Reserve. Permits are initially valid for a period of 180 days from the date of issuance and expire when "no construction, gas work or plumbing pursuant to the issued permit has begun within the period starting on the date of issuance and ending 180 days thereafter." The permits were issued to Minster on September 17, 2017 and set to expire, if no construction occurred, on March 18, 2018. As part of the Permit process, Minster submitted a geotechnical report which recommended that to prepare the site for building and to avoid the risk that the soil would sink under the weight of the new house, the topsoil beneath the house footprint should be excavated and replaced with permanent compacted structural fill. In a process called "preloading," five metres of sand would be deposited temporarily on the structural fill to densify and compress it. When the fill was sufficiently compressed, the sand would be removed, and concrete poured over the fill to form the foundation of the house. Due to wet weather, the site was excavated, and structural fill placed in the building footprint in February and March 2018. Minster requested and received an extension of the permits. The new expiration date was September 17, 2018 if there was no construction activity. In April, a

preload sand mound was placed on the site. In early September, Minster's geotechnical engineer recommended that the mound be left in place until November 2018 to allow for further settlement. Minster sought another extension of the Permits. The City refused, finding that there was no evidence of physical construction of the house on the site and that the permits had therefore expired on September 17. Significantly, a few months earlier, in May 2018, the City had issued a Bulletin titled "Permits-Expiry and Extension" which purported to interpret the section of the Building Regulation Bylaw that outlined the terms, conditions and requirements pertaining to building permits. It stated that "construction activity, as defined in the Bylaw, is not deemed to include site preparation works, mobilization of construction equipment and materials, or soil densification work (such as pre-loading)." Minster sought judicial review of the City's decision that the permits had expired by operation of the Building Regulation Bylaw, arguing that the broad definition of "construction" in the Bylaw encompassed the preparation and preloading work carried out on the site and that, since construction had already begun, the permits had not expired. The City argued that the Bylaw aimed to ensure that owners move their building projects forward, that it gave the City *discretion* to extend permits and that other sections of the Bylaw indicated that preloading did not fall within the definition of construction. The City had not provided reasons for its decision, and Minster agreed that reasons were not required by the duty of procedural fairness. Based on his reading of *Vavilov*, Justice Crerar set out, at para 61, the following principles to guide his review of an administrative decision in the absence of reasons: a) the judicial review focuses on the reasonableness of the outcome; b) the reasonableness of the decision must be considered in light of the relevant constraints on the decision maker... ; c) the record before the decision maker may illuminate the reason for the decision; d) the larger context of the decision may illuminate the reason for the decision; e) the record and larger context may reveal that a decision was made on the basis of an improper motive or for another impermissible decision; and f) notwithstanding the above, the impugned decision must still be reviewed on the deferential standard of reasonableness.]

**Crerar J.:**

(...)

**D. Decision and discussion: was the Decision — that the soil densification steps carried out on the building footprint did not constitute "construction" — reasonable?**

**1. Introduction**

93 Even based on the deferential standard, the Decision was unreasonable. Its interpretation that the actions of the petitioner did not fall within the broad definition of "construction" in the Building Bylaw was not consistent with the text, context, and purpose of the enactment. The excavation of the organic topsoil, the deposit of the permanent structural fill, and the placement of the preloading sand were all necessary steps in the construction process, and expressly and implicitly contemplated in the issuance of the building permit upon receipt of the geotechnical report.

94 The City did not provide any evidence as to the purpose and intent of the Building Bylaw when it was enacted in 2002, or whether the purpose and intent changed between

2002 and 2018. Nor did it provide evidence of how the Building Department had treated excavation, the placement of structural fill, and preloading between 2002 and 2018, and specifically whether it had considered such activities “construction” such as to keep a building permit alive. Such evidence would have presumably been readily available to the City. It would have provided guidance with respect to the *Vavilov* consideration of constraints on the decision maker’s decision. It would have also provided specific guidance as to statutory interpretation. It would also have provided guidance as to whether the City’s treatment of the petitioner or interpretation of the Bylaw was consistent with past practices and past decisions (*Vavilov* at paras. 129 — 132).

95 Given this paucity of evidence, and the absence of reasons by the Building Director and Inspections Manager, this Court’s decision will focus on the outcome of the decision, rather than the process, as anticipated by *Vavilov* at para. 138. It will start with the plain wording of the Building Bylaw definition of [“construction”] before addressing other arguments advanced by the City.

## 2. Text: plain wording of the Bylaw

96 The City drafters of the Building Bylaw elected to define “construction” in very broad terms, offering a wide range of activities that constitute construction:

CONSTRUCT/CONSTRUCTION means to build, erect, install, repair, alter, add, enlarge, move, locate, relocate, reconstruct, demolish, remove, excavate or shore.

97 The soil densification process engaged the following verbs in the definition: install, alter, add, enlarge, move, locate, relocate, demolish, remove, excavate, and shore.

98 The City was free to have used a more restrictive definition of “construction.” Many other enactments do so. For example, the *Community Charter*, SBC 2003, c. 26, the subject of *Campagna*, defines “construction” narrowly for the purpose of requiring a geotechnical report:

### Requirement for geotechnical report

**56 (1)** For the purposes of this section:

“construction” means

- (a) the new construction of a building or other structure, or
- (b) the structural alteration of or addition to an existing building or other structure . . .

99 The City was also free to have carved out exceptions to the broad definition. The definition could have read, for example, “construction means . . . to remove or excavate, except for the purpose of preparing the ground for erection of the building.” Or it could have read, “construction means . . . to add, except where the material added is sand or other materials for the purpose of preloading the bearing surface.” Or it could have specifically excluded preloading and other soil densification processes, as it purported to do in documentation external to the Building Bylaw, and outside of City Council, in the form of the May 2018 Bulletin.

(...)

101 The City addresses the long list of actions constituting construction by arguing that those verbs, when read as a whole, are indicative of the *building* being constructed, and not mere site preparation *for* building construction (the City's emphasis). Specifically, the word "excavate," most engaged with the process of clearing organic matter and substituting permanent structural fill and preload, must be read in the context of the words that surround it in the definition of "construction." The City argues that in this context, "excavate" only refers to the excavation of a foundation of a structure, and would not extend to the digging of a pit for the removal of organic topsoil and replacement with more solid fill.

102 The breadth and meaning of the 15 verbs listed in the definition undermines the City's argument. Further, those verbs are not limited to the actual erection of the building structure. The definitional verb "demolish," is not indicative of a building being erected: it is antithetical to that concept. Demolition instead represents a preliminary step directly necessary (as opposed to desirable) for the eventual erection of the building, just as is the soil densification process. Similar observations apply to the definitional verb "remove." The definitional verbs "alter", "move", "locate", "relocate", and "shore" also more suggest necessary preparation rather than specific steps in building erection. In any case, the 15 verbs convey a very broad and wide meaning with respect to actions that will constitute "construction" as defined in the Building Bylaw.

103 Considering the process of necessary excavation, filling, and pre-loading to be part of the definition of "construction" does not undermine the City's stated purpose of the Building Bylaw: to move matters forward. They are necessary steps in moving the project forward: indeed, it is doubtful that the City would issue a building permit unless the owner made provisions for soil densification, as in the form of the submitted geotechnical report.

104 The City analogizes to the removal of trees not constituting "construction." That was not the case before the decision maker or now before this Court, and each case and process will have to be measured on its own terms against the individual construction bylaw. That said, one could distinguish between steps that are necessary for and closely connected to the physical erection of the building and those steps that are peripheral. But, again, excavation, filling, and preloading on the building footprint, as a necessary preliminary step for the erection of the building on the specific location those steps are carried out clearly constitute "construction" on the wording and the purpose of the Building Bylaws.

105 The City argues that it would be absurd to take the broad definition of "construction" at face value, as any act involving one of the 15 listed verbs would constitute "construction." The City raised the example of removal of the small scoop of soil. Again, that hypothetical is not before the Court. And the converse absurd hypothetical also undermines the City's thesis. Under the City's urged meaning, a home owner's pouring of a 1 m<sup>2</sup> square concrete foundation, or the erection of a single 2x4 would suffice to constitute "construction" so long it would form a physical part of the resultant building.

106 This leads to a final observation. If the petitioner had poured concrete rather than permanent structural fill into the excavated pit after removal of the topsoil, the City would accept that construction had occurred under the Building Bylaw. Insofar as the concrete

pad eventually poured into the excavation onto the permanent structural fill will itself become partly intermingled and fused with the fill, that fill itself will physically be part of the ultimate building structure. In other words, there is no meaningful distinction between the deposit of structural fill, which the City argues would not constitute “construction”, and the pouring of concrete, which clearly would.

### *3. Context and purpose*

107 The Decision is also unreasonable in the contextual reality of construction in the City. A preloading process taking several months is standard for the City.

108 The City argues that if a property owner such as the petitioner is worried that the preload process will take longer than the six months under the ordinary building permit life, or one year under the extended life, there is nothing to stop the property owner from preloading before applying for and obtaining the building permit. But excavating, preloading, and compacting, with mounds of sand five metres high on a large building footprint is an expensive and extensive process. It is not reasonable to expect a landowner to embark on that process in advance, where the building permit may ultimately be denied. In that case, the owner would have to cart away the mound of sand at further expense. The irrationality of this expectation provides context for assessing the reasonableness of the Decision in the City of Richmond, where such preloading is in most cases a necessary stage in the construction of a building.

[The Court noted that other City enactments expressly anticipated that soil densification would occur after the issuance of a building permit.]

(...)

### *4. The May 2018 City Bulletin*

111 The City placed great weight on the fact that the May 2018 City Bulletin expressly does not “deem” (in its odd phrasing) soil densification and pre-loading to constitute “construction”.

112 As a point supporting the City’s submission, the Supreme Court of Canada has recognized the importance of policy in assessing the reasonableness of an administrative decision maker’s interpretation of its governing statutory provisions. That Court has described such policies as forming part of the “broader context” of a provision whose interpretation is under review: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 (S.C.C.) at para. 85. Any applicable policy in effect when a decision is made can constitute “a useful indicator of what constitutes a reasonable interpretation of the . . . section”: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at para. 72.

113 Continuing this reasoning, *Vavilov* emphasizes the importance of policy in guiding administrative decision-making as one of the primary means by which administrative bodies promote consistency between decisions, and guard against arbitrariness (at para.

130). In fact, a failure to adequately address an established policy or practice may be sufficient to render a decision unreasonable in itself: *Vavilov* at para. 131. Accordingly, *Vavilov* suggests that a reviewing court may consider “publicly available policies or guidelines that informed the decision maker’s work” as part of the relevant context of a decision under review: para. 94.

114 Policies are not, however, binding law. They cannot be used to undermine the lawful limits on an administrative body’s authority: *Medina Moya v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 971 (F.C.) at para. 10. An unreasonable policy cannot save an unreasonable decision. In particular, where there is only one reasonable interpretation of a given provision, a decision-making body cannot override the lawful interpretation of its governing statute through issuance of a later policy, or otherwise. As explained in *Vavilov*:

[68] Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker’s interpretation of its authority, precise or narrow statutory language will necessarily limit the number of reasonable interpretations open to the decision maker — perhaps limiting it one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature’s intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect. Without seeking to import the U.S. jurisprudence on this issue wholesale, we find that the following comments of the Supreme Court of the United States in *Arlington*, at p. 307, are apt:

The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision-making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies’ authority. Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow . . .

115 In other words, policy can and should shape the contours of acceptable decision-making under a given provision. However, it cannot transgress the limits of the authority delegated to decision makers under the relevant statute. Where the legislature has established a clear line — for example, where the decision is reviewable on a correctness standard, or where there is only one reasonable interpretation of a given provision — a policy cannot enlarge the scope of acceptable decision-making beyond that limitation. Where the provision is more ambiguous, a policy can only enlarge the scope of reasonableness as far as “the ambiguity will fairly allow”. The City Bulletin’s deeming provision, issued eight months after the Permits were issued, and 16 years after the enactment of the Building Bylaw, with its broad and plain wording, purports to exercise a quasi-legislative function beyond the conception of policy as contemplated by *Vavilov*.

116 Further, the decision makers' primary task was to interpret and apply the statutory provision in question: the Building Bylaw. That process focuses on the meaning and purpose of the provision and the intention of the legislative body that passed the enactment at the time it was passed. As stated recently in *R. v. Anand*, 2020 NSCA 12 (N.S. C.A.):

[37] Consistent with these provisions is the original meaning rule, which requires courts to interpret the words in a statutory provision as they would have been understood at the time of enactment ...

117 Again, the decision maker is not permitted to interpret the enactment based upon changing policies of the governing body and City staff *ex post facto*. To do so would undermine the rule of law: a member of the public and the City itself would have to make decisions based on a moving target, and a city could drive statutory interpretation based upon its current mutable policies and objectives. The present exercise involves the interpretation of a prosaic building bylaw; no constitutional principles of Lord Sankey's "living tree" are engaged. As stated in *Vavilov* at para. 121:

The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

118 Again, the Bulletin was issued 16 years after the enactment of the Building Bylaw. It was issued by staff, rather than being voted upon by elected Council as a formal amendment to the duly enacted Building Bylaw. Further, whatever effects the Bulletin purports to have on the interpretation of the Bylaw, neither the byline nor the Bulletin purports to have retroactive effect to vary the status of "construction" carried out before its issuance. The law is presumed not to have retroactive effect unless the legislation (in this case, the bylaw) expressly and explicitly indicates that it is to have retroactive effect: see, for example, *Martin v. Chilliwack (City)*, 2003 BCSC 942 (B.C. S.C.) at para. 26. The Bulletin thus offers limited if any assistance as to the interpretation of meaning and purpose of the bylaw as enacted, or as to the meaning of the bylaw at the time the Permits were issued and renewed.

[The Court rejected the City's claim that by seeking an extension of the permits, Minster had conceded that they would expire because no construction had occurred.]

## 6. Conclusion

122 In conclusion, per *Vavilov*, based on the record, the larger context, and the relevant constraints on the decision maker, the Decision that the actions of the petitioner did not constitute "construction" under the specific definition set out in the Building Bylaw was unreasonable. The Decision rests ultimately on an untenable distinction between physical construction and site preparation that is not borne out by the text, context, or purpose of

the Building Bylaw. As such, the Decision does not fall within a range of reasonable outcomes defensible in light of the facts and law.

[The application for judicial review was allowed and the City's decisions quashed.]

According to the Chambers judge, because of the extraordinarily broad and inclusive nature of the language chosen by the Richmond City Council to define “construction” in its Building Regulation Bylaw, it would have been quite difficult for the City to justify its narrower definition, which was contradicted by contextual elements, such as the prevalence of lengthy periods of preloading as a necessary part of construction projects in Richmond.

The British Columbia Court of Appeal allowed the City of Richmond’s appeal in *Yu v Richmond (City)*, [2021 BCCA 226](#), finding, at para 67, that the chambers judge had erred by conducting his own interpretation of section 5.10.1, assessing the city’s interpretation against it, and by holding that his interpretation of the building by-law was the only reasonable one. Interpreting section 5.10.1 in light of the building by-law as a whole, the Court of Appeal decided that the narrower interpretation proposed by the city was not excluded by the language of the by-law.

## 2. Relevant statutory, international or common law

Statutory and common law and, in some contexts, international law, impose constraints on how and what an administrative decision maker can lawfully decide. For instance, a reasonable interpretation of a statute that specifies a standard well-known in law and in the jurisprudence, such as “reasonable grounds to suspect” will be one that is consistent with the established understanding of that standard. Similarly, it would be unreasonable for a decision maker to interpret a statutory provision without regard to a relevant precedent in which a court had interpreted that provision. As the majority noted at para 112:

...[W]here an immigration tribunal is required to determine whether an applicant’s act would constitute a criminal offence under Canadian law [for the purposes of an inadmissibility determination]... it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.

International law also operates as an important constraint in certain areas of decision making, such as refugee protection, immigration and, as illustrated in *Vavilov* itself, citizenship law. The majority states, at para 114:

It is well established that legislation is presumed to operate in conformity with Canada’s international obligations, and the legislature is “presumed to comply with ... the values and principles of customary and conventional international law”: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 40. Since *Baker*, it has also been clear that international treaties and conventions,

even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power...

In *Vavilov*, the majority faulted the Registrar of Citizenship (and the analyst upon whose report the Registrar had relied) for ignoring the reasoning of the Federal Court in several decisions bearing on the interpretation of s. 3(2) of the *Citizenship Act*. These indicated that what mattered for the purpose of excluding from citizenship the Canadian-born children of diplomatic or consular officers or other representatives or employees in Canada of a foreign government was not what their parents did, but whether these parents had diplomatic privileges and immunities. It was, the majority stated at para 188, “a significant omission... to ignore the Federal Court’s reasoning when determining whether the espionage activities of Ms. Vavilova and Mr. Bezrukov were sufficient to ground the application of s. 3(2)(a).”

Similarly, Canada’s international treaty obligations operated as a significant constraint on what the Registrar could reasonably decide. *Vavilov* had presented a compelling argument, supported by the legislative history, that s. 3(2)(a) was intended to implement a narrow exception to the international law principle of *jus soli* (acquisition of citizenship through birth on Canadian soil regardless of parents’ nationality) in a manner compatible with established principles of international law as recognized in the Vienna Convention on Diplomatic Relations, Can. T.S. 1966 No. 29, which confers immunity on members of a diplomatic mission that are not nationals of the receiving state, and the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, 500 U.N.T.S. 223, art II, which confirms that “[m]embers of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.” In holding that the Registrar’s decision was unreasonable, the majority noted its failure to refer to the relevant international law and to respond to *Vavilov*’s submissions on this point.

*Canada (Public Safety and Emergency Preparedness) v Taino*, 2020 FC 427 is another illustration of a reviewing court determining that a decision maker’s decision was unreasonable because the decision maker had interpreted a statutory provision without regard to a precedent in which a court had adopted a contrary interpretation.

### ***Canada (Public Safety and Emergency Preparedness) v Taino, 2020 FC 427***

[Taino was a citizen of the Philippines who entered Canada and obtained permanent residence at the age of 12. He was stripped of his permanent residence and a deportation order was issued against him when he committed serious crimes linked to his addiction to crystal meth. After being arrested by the Canadian Border Services Agency and placed in immigration detention on the grounds that he was unlikely to appear for his removal, Taino applied for a Pre-Removal Risk Assessment (“PRRA”) which concluded that he was at risk in the Philippines. His PRRA application was referred to National Headquarters for a balancing

of the risk he faced in the Philippines against the danger he posed to the Canadian public. Taino was then released from detention on stringent terms and conditions. Unfortunately, he breached these when he was convicted of robbery and sentenced to 244 days of prison and 18 months of probation. Upon his release from prison, he was transferred to immigration detention in December 2019 and detained on the grounds that he was a danger to the public and unlikely to appear for his removal. His detention was continued after two detention reviews. In January 2020, Taino received a positive decision on his outstanding PRRA and was advised by Immigration, Refugees and Citizenship Canada that, as a result of this decision, arrangements to enforce his removal had been suspended. The removal order remained valid but was stayed by operation of the law and was presently unenforceable. At a subsequent detention review, a member of the Immigration Division of the Immigration and Refugee Board ordered that Taino be released from detention on the grounds that, absent an *enforceable* removal order, keeping him in immigration detention was arbitrary and infringed his right under s. 9 of the *Charter* to be free from arbitrary detention. The Minister of Public Safety and Emergency Preparedness sought judicial review of this decision, arguing that the Member's interpretation of the relevant provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 was unreasonable.]

**Diner J.:**

(...)

## **V. Analysis**

### **A. Was the Member's Interpretation of the Law Reasonable?**

36 The fact at the heart of the Member's Decision is the decision under subsection 112(3) of the Act granting Mr. Taino a positive, albeit restricted, PRRA decision. The Minister argues that in concluding that Mr. Taino's detention under an unenforceable removal order was arbitrary contrary to section 9 of the *Charter*, the Member erred in a plain reading of the law, as well as her interpretation of the jurisprudence. Mr. Taino counters that the Member's interpretation was not only reasonable, it was also correct.

37 In *Vavilov*, the Supreme Court instructs that we use the modern approach to statutory interpretation as articulated by Professor Driedger in *Construction of Statutes* (2nd ed. 1983). That is, we are to read the words of a statute in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the Act, along with the intention of Parliament (at para 117). I cannot reconcile the Member's conclusion that the Minister lacks legal authority to seek continued detention where there is no enforceable removal order with a plain reading of the law within the context of the scheme and objective of the Act. Subsection 58(2) states:

**58(2)** The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an admissibility hearing or is subject to a removal order and that the permanent resident or the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada. (...)

38 The enforceability of a removal order is not a prerequisite to detention, particularly when this provision is contrasted with section 48, which defines the concept of an *enforceable* removal order:

**48(1)** A removal order is enforceable if it has come into force and is not stayed.

**(2)** If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.  
(...)

39 The legislation thus specifically distinguishes between a removal order that is enforceable and one that is not. Other sections of the immigration legislation which specify “enforceable” removal orders include sections 206, 209, 215, 222, 224, 250, 273, 274 and 276 of the *Regulations*. The legislation does not include a requirement that a removal order be enforceable in order to effect detention. Rather, it simply requires the existence of a valid order. Certainly, detention is permitted, and sometimes occurs, in other contexts where removal orders are not enforceable, such as for pending refugee and PRRA claimants, if there are underlying concerns, including identity, flight risk, or danger.

40 Going back to an ordinary reading of the statute in Mr. Taino’s situation, the Tribunal can keep an individual detained, having taken into account the prescribed factors, if s/he is a danger to the public. We must assume that Parliament deliberately chose not to make such a distinction in section 58. Therefore, the mere existence of a removal order, along with a danger opinion, may suffice to justify continued detention, after consideration of the section 248 factors that incorporate *Charter* section 7 considerations (see discussion of those factors below).

41 Recognizing that *Vavilov* reminded reviewing courts tasked with deciding whether an interpretation of a statutory provision was reasonable that they are not to conduct a “*de novo* analysis of the question or ‘ask itself what the correct decision would have been’” (at para 116), this approach does not permit reading in new language that changes the meaning of the home statute. As I will explain, the reading in of the term “enforceable” removal order that occurred in this case had already been rejected by two prior decisions of this Court.

42 Turning to the Member’s analysis, which was significant, spanning paragraphs 56-65 of her Decision, she wrote at paragraphs 59 and 62:

Section 58(2) of the IRPA, which provides the Immigration Division authority to detain somebody who is not already in detention, similarly only authorizes detention of a person who is the subject of an examination or an admissibility hearing or the subject of a removal order. As such, the legislative scheme makes it a mandatory prerequisite to the use of immigration detention that the person being detained is the subject of a removal order or a process that could result in a removal order being issued against them, regardless of who is initiating a person’s detention.

...

While it is true that in s. 58(1)(b) of IRPA that there is no explicit reference to removal, as set out above, the legislative scheme does not permit the detention of a person for immigration purposes unless there is a removal order in existence or a process that could lead to a removal order being made. As a result, there is no free-standing immigration authority to detain any permanent resident or foreign national in Canada that might be dangerous. If a foreign national or permanent resident is not inadmissible or subject to a proceeding that could result in them being inadmissible, they cannot be detained by immigration authorities regardless of how dangerous they might be.

43 The Member makes valid and entirely reasonable findings and I agree with her on these principles of statutory interpretation. Where we depart, however, is her conclusion that immigration detention must remain hinged to an ongoing removal process and that, once it becomes unhinged from that process, such as in this case with a positive (restricted) PRRA, a person's detention will automatically become arbitrary contrary to section 9 of the *Charter*. She writes at paragraph 64:

It is also worthwhile noting that, practically speaking, the Canadian detention review process is structured upon the assumption that the detained person is the subject of removal efforts or a proceeding that could result in a removal order. This is perhaps most evident in how the section 248 factors are regularly assessed at hearings before the Immigration Division. For example, as noted above, when assessing the anticipated length of detention, as required by section 248(c) of the IRPR, the issues that are canvassed at hearings are how long before a person's removal can occur or before the process that they are being detained for (admissibility bearing, examination etc.) which could lead to a removal order will take place. It is in this context that the anticipated length of detention is typically determined.

44 When viewed in light of the authority to detain provided in subsection 58(2), the Member's conclusion that "the practical day-to-day realities of the detention review process further supports a finding that the detention of an individual must be tethered to a removal order or a process that could result in a removal order being issued" (at para 65), does not reconcile with either the fact that (i) Mr. Taino still has an underlying removal order that the restricted PRRA did not eliminate, and (ii) a plain reading of subsection 58(1) of the Act regarding release:

**58(1)** The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that

(a) they are a danger to the public;

(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

[Three additional circumstances are omitted]...

45 The combined effect of the two key detention provisions of the Act reproduced above (subsection 58(2) and paragraph 58(1)(a)) is that a foreign national may (i) be detained if subject to a removal order, and (ii) remain detained if declared a danger to the public. In other words, assuming a valid removal order exists, any of the circumstances in paragraphs (a)-(e) of subsection 58(1) may justify refusing to release the detainee. These are not conjunctive factors. Rather, any one of the five enumerated circumstances may justify ongoing detention.

(...)

52 In the language used by the jurisprudence, removal — and the existence of a removal order — is one hinge in the machinery of immigration control. But so, in my view, is danger. That is a second hinge that may necessitate detention. In fact, I do not think it is any coincidence that danger to the public is enumerated first by Justice Rothstein (as he then was) in *Sahin v. Canada (Minister of Citizenship & Immigration)* (1994), 85 F.T.R. 99 (Fed. T.D.), 1994 CanLII 3521 [*Sahin*], in the list of considerations for detention or release that were later codified in section 248 of the *Regulations*, and which also came first amongst those factors. Indeed, as Justice Rothstein stated about that first factor, “I would think that there is a stronger case for continuing a long detention when an individual is considered a danger to the public.”

53 *Sahin* was decided under the previous immigration legislation. The current Act places even more importance on the safety of Canadians than the previous one, prioritizing security as a key aim as is made clear by various of its section 3 objectives (*Medovarski v. Canada (Minister of Citizenship & Immigration)*, 2005 SCC 51 (S.C.C.) at para 10).

54 I further agree with the Minister that the Member’s interpretation unreasonably departed from subsequent jurisprudence of this Court, including most notably *Canada (Minister of Public Safety & Emergency Preparedness) v. Samuels*, 2009 FC 1152 (F.C.) [*Samuels*], where this Court held that it is unnecessary to read into subsection 58(2) a requirement that a removal order be enforceable in order to justify detention. In that decision, Justice Tremblay-Lamer held (at paras 27-31):

A removal order that is stayed is not void. Although it cannot be executed pending a ruling on a protected person’s application for permanent residence or the passing of the deadline to file such an application, it still exists and is valid and, in my opinion, the person against whom it was issued is still “subject to it.”

The Respondent is, in effect, asking the Court to read the exclusion of stayed removal orders into subsection 58(2), which would then provide (in the part relevant to this case) that “[t]he Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national ... is subject to an enforceable removal order and that the permanent resident or the foreign national is a danger to the public...”

I am not persuaded by the Respondent’s submission that this reading is necessary to ensure that the provision complies with the *Charter*. Pursuant to subsection 57(2)

of the *IRPA*, the Respondent has a right to have his detention reviewed every 30 days. The purpose of these reviews is to take into account any new events in the Respondent's case. The Immigration Division must, pursuant to section 248 of the *Regulations*, consider the anticipated length of his future detention and the existence of alternatives to detention. In my view, these elements confirm that the statutory scheme created by Division 6 of the *IRPA* and the *Regulations* already reflects concerns associated with the *Charter*.

I add that the *Charter's* guarantee of the right to liberty is not absolute; the *Charter* only prohibits deprivations of liberty inconsistent with principles of fundamental justice. The Respondent makes no submissions on whether detention for a limited (though admittedly potentially significant) period, of a person who is a danger to the public is in fact inconsistent with such principles. In the absence of any debate on this point, I do not think it this Court's role to re-write the statute in the way suggested by the Respondent.

I find that the Tribunal had jurisdiction to order the continued detention of the Respondent, if it was satisfied that he was a danger to the public.

[Underline added; italics in original.]

55 As already explained above, I agree with Justice Tremblay-Lamer that when the words of subsection 58(1) are read in their grammatical and ordinary sense, as well as harmoniously with the scheme and object of the *Act*, one cannot read in the word "enforceable" before removal order... Parliament could have — but did not — write "enforceable" in the detention provision of the statute, whereas it did in other provisions.

56 The Member's decision to read in that language is, in my view, equivalent to a declaration of constitutional invalidity. Rather than attacking the scheme and fashioning a subsection 24(1) *Charter* remedy, as the Member did in this case, a constitutional challenge under *Charter* subsection 52(1) invalidating a key section of the statute would require a proper foundation and procedure. I note that no notice of constitutional question was filed in this case. Without a proper constitutional challenge, I see no reason to depart from the *Samuels* interpretation, and the Member did not provide a reasonable basis to do so.

57 In this regard, I note that the Member was not only obligated to explain her departure from *Samuels*, but also from *Isse v. Canada (Minister of Citizenship & Immigration)*, 2011 FC 405 (F.C.) at paragraphs 27-28 [*Isse*], where Justice Mosley of this Court adopted and applied *Samuels*, as follows:

I agree with the respondent that the Immigration Division retains jurisdiction to determine whether a foreign national should be detained or released on conditions so long as there is a valid removal order in existence, even if removal is stayed and can't be effected because of the Minister's decision not to issue a danger opinion. Respect for the principle of *non refoulement* and the Immigration Division's jurisdiction to detain an individual who faces a valid removal order and is found to be a danger to the public are not mutually exclusive concepts.

To construe the Act as the applicant submits would, as Justice Tremblay-Lamer noted in *Samuels*, above, require that the word *enforceable* be read into subsection 58 (2) of the Act. Accordingly, I find that the Member was correct to assert that “the removal order is still valid and it is still in force so you are properly detained for removal”.

[Italics in original.]

58 In both *Isse* and *Samuels*, there was a strong element of risk to the public. Both gentlemen suffered from serious mental illness and long-term substance abuse problems, along with lengthy criminal records. As a result, at some point both had become inadmissible, lost their prior permanent residence status, and received removal orders. Ultimately, both decisions held that detention may occur even in the presence of an unenforceable removal order.

59 In my view, Mr. Taino, throughout his most recent immigration detention and ID hearings, remained subject to a valid removal order, which was stayed due to operation of the law when he received his positive, restricted PRRA. That is because paragraph 114(1)(b) of the Act stipulates that a decision to allow a subsection 112(3) PRRA has the effect of staying the removal order.

60 Translating this to plain English, this means that Mr. Taino’s removal order currently remains. It still exists. It is simply inactive, or in abeyance. That, too, could be said to varying degrees for Messrs. Samuels’ and Isse’s removal orders. The Member correctly pointed out that the facts of both *Isse* and *Samuels* were different and that neither of those cases involved a final determination barring the applicant’s removal.

61 However, that their factual matrices differed will invariably be a valid observation in the field of immigration law. People come to Canada from a multitude of countries, hail from diverse backgrounds, immigrate through various categories and, in some cases, later become inadmissible and subject to removal for a host of different reasons. That diversity certainly describes the paths of Messrs. Samuels, Isse, and Taino. Despite those differences, certain fundamental commonalities exist in all three cases, namely (i) the existence of valid removal orders, (ii) an element of danger based on their past conduct, and (iii) the attendant need for the ID to adequately protect the public. In Mr. Isse’s case, this included significant constraints on his liberty through the ID’s conditions on release, which Justice Mosley approved.

62 To briefly review some of those factual distinctions specifically on the issue of the status of their removal orders, Mr. Samuels was given a positive PRRA and, at the time of the 2009 hearing, the Minister was seeking a danger opinion, which could have led to Mr. Samuels’ removal from Canada. The ID held that while a danger opinion was being sought, it was likely to take a considerable amount of time and could be negative, so that it “wouldn’t be fair” to keep Mr. Samuels in detention. The Tribunal noted that the respondent had “a pretty impressive criminal file,” but concluded that “if there’s no removal in sight, [the Tribunal is] not responsible to protect Canadian society anymore” (*Samuels* at para 14). The Federal Court reversed this finding.

63 In Mr. Isse's case, the Minister decided not to pursue a danger opinion. That did not negate the fact that he had committed violent crimes to result in his loss of status, and thus an inadmissibility finding leading to a removal order.

64 I do not see these factual distinctions in the status of the *Samuels* and *Isse* removal orders as impacting the fundamental ratio in those cases vis-à-vis the interpretation of the law on a plain reading of the legislation. Neither case involved detention for imminent removal. Both had a long history of non-compliance with immigration and criminal law. And like Mr. Taino, Mr. Samuels benefitted from a statutory stay of removal at the time of his judicial review due to his positive PRRA. Despite these similarities, the Member found (at paras 68 and 70-71):

While these decisions are persuasive, I do not find that either of them is determinative of the *Charter* section 9 issue before me. Not only is Mr. Taino in a slightly different position factually from the Applicants in *Isse* and *Samuels*, but the Court's decisions in those cases did not squarely address the Charter issue currently before me. Furthermore, there is more recent caselaw which has explicitly grappled with the applicability of s. 9 of the *Charter* in the immigration detention context which has reached a contrary view and found that immigration detention is unlawful once it becomes unhinged from its immigration related purpose of removal.

...

Similarly, although Justice Tremblay-Lamar [sic] did canvass the Charter ramifications of her decision in a little more detail in *Samuels*, she explicitly noted that the *Charter* implications of an unenforceable removal order were not argued before her and she therefore did not engage with that specific issue in her determination:

[30] I add that the *Charter*'s guarantee of the right to liberty is not absolute; the *Charter* only prohibits deprivations of liberty inconsistent with principles of fundamental justice. The Respondent makes no submissions on whether detention for a limited (though admittedly potentially significant) period, of a person who is a danger to the public is in fact inconsistent with such principles. In the absence of any debate on this point, I do not think it this Court's role to re-write the statute in the way suggested by the Respondent.

[Emphasis added by Member.]

As such, the decisions in *Isse* and *Samuels* do not squarely address the issue that I must decide: namely, whether the unenforceability of Mr. Taino's removal order renders his detention arbitrary contrary to s. 9 of the *Charter*. As such, I find that they are not determinative of the issue before me.

65 It is true that much has developed in the decade since *Samuels* and *Isse* were issued, including numerous trial and appellate decisions in different provinces on *habeas corpus* applications based on section 9 of the *Charter*. In addition, Justice Fothergill issued his decision in *Brown v. Canada (Citizenship and Immigration)*, 2017 FC 710 (F.C.) [Brown], upholding the constitutionality of the detention scheme, while certifying a question regarding length of detention that is currently on reserve at the Federal Court of Appeal. I

will turn to some of this case law next, none of which I feel justifies the analysis or conclusion in this case, or has the effect of reversing the decisions in *Samuels* and *Isse*.

[Justice Diner noted that the *habeas* releases resulting in findings of arbitrary detention differed from Taino’s case for two main reasons. First, the test for *habeas corpus* decisions differed from the statutory test under the *Act*. Second, the *habeas* cases involved much longer periods of detention of applicants who were arguably not considered to represent a danger to the public.]

76 Here, we have neither a *habeas corpus* application, nor a situation of indefinite detention. Rather, we have a long detention, at least as classified by the Immigration and Refugee Board of Canada’s *Chairperson Guideline 2: Detention* (after this judicial review, now lasting over 100 days). And while Mr. Taino’s detention may no longer be as strongly hinged to immigration control purposes because one hinge has been taken off the door to his release, namely by the positive restricted PRRA and resulting stay of removal, a second hinge nonetheless continues to attach the door preventing his freedom: his present and future danger to the Canadian public, as found both in his danger assessment, and also in the Member’s Decision.

77 Finally, Mr. Taino emphasizes *Brown*, pointing out that Justice Fothergill of this Court held that “there may be circumstances where immigration detention violates the *Charter* because it has continued for an excessive period of time, *there is no reasonable prospect of removal to the detainee’s country of citizenship*, or the conditions of detention have become intolerable” (at para 4, emphasis added).

78 I note that the length of detention is only one element to be considered. In Justice Fothergill’s laundry list of minimal requirements for lawful detention for immigration purposes under the *Act* and the *Regulations*, contained in paragraph 159 of *Brown*, he noted that “[d]etention may continue only for a period that is reasonable in all of the circumstances, including the risk of a detainee absconding, *the risk the detainee poses to public safety* and the time within which removal is expected to occur” (at para 159(e), emphasis added).

79 Indeed, the danger was a large part of the restricted PRRA decision, comprising approximately half of the officer’s 20-page decision, which outlined in detail Mr. Taino’s history of convictions, reprieves, and repeated non-compliance with prior orders and probation terms. And as already noted, the Member conceded that the situation could change, writing “Mr. Taino does not have permanent status in Canada and there are circumstances that could arise in the future that would result in the Minister seeking to revisit the issuance of Mr. Taino’s stay” (at para 109).

80 In sum, I find that it was unreasonable for the Member to depart from the most relevant precedents, namely those decisions rendered for immigration purposes under the *Act* and the *Regulations*, rather than those that decided detention issues based on a different legal test (*i.e. habeas corpus*) and in different contexts (*i.e.* longer detentions that had, in the main, become unhinged). To render a reasonable decision as to why *Isse* and *Samuels* no longer apply, the Member “would have to be able to explain why a different

interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramification of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 *Alta. L.R.* 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent" (*Vavilov* at para 112). I find that situation to be present here.

[Justice Diner held that the Member's conclusion that Taino's detention was arbitrary and violated s. 9 of the *Charter* predetermined her decision as to whether Taino should be released and that the Member should simply have applied the statutory test. Finally, the conditions placed by the Member on Taino's release were unreasonable because they provided insufficient oversight in addressing his underlying addiction and protecting the public from the danger he posed. Justice Diner quashed the decision and remitted the matter to the same Member for redetermination.]

Do you agree that the Member had not adequately distinguished the relevant Federal Court precedents that found that continued detention of a foreign national was authorized under the IRPA so long as they were subject to a valid removal order and were a danger to the public? While this may not have been the case in *Taino*, might a reviewing court's analysis of whether a binding precedent is appropriately distinguished shift into a non-deferential reassessment of relevant distinguishing facts and of the correctness of a decision maker's interpretation of statutory provisions?

### 3. Principles of statutory interpretation

The merits of a decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision according to the modern principle of statutory interpretation described by the Supreme Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21: the words of a statute must 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". While a decision maker is not required to engage in a formalistic statutory interpretation exercise in every case, it must touch on the most salient aspects of text, context and purpose and, where the meaning of a provision is disputed, its reasons must demonstrate that it was alive to those essential elements. Although a decision maker's failure to consider a pertinent aspect of text, context or purpose is not likely to undermine the decision as a whole if it is a minor aspect of the interpretive context, a failure to consider a key contextual element would be indefensible and unreasonable where the decision maker may well have arrived at a different result had it considered that element. In *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67, decided a day after *Vavilov*, a majority of the Court held, at para 52, that a decision maker's failure to consider a particular piece of the statutory context (for example, a specific section), particularly where it was not raised by the parties, will not

necessarily render the interpretation unreasonable, unless the omitted aspect causes the reviewing court to lose confidence in the outcome reached. Significantly, the *Vavilov* majority noted, at para 124, that in some cases, it may become clear to the reviewing court that the “interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue.”

In *Vavilov*, the majority acknowledged that the phrase “other representative or employee in Canada of a foreign government” in s. 3(2)(a) of the *Citizenship Act*, if considered in isolation, could apply to a spy working for a foreign government. However, it faulted the Registrar and the analyst upon whose report the Registrar had relied for failing to justify their interpretation of the term against that provision’s immediate context and against the purpose of s. 3 as informed by the international treaties it was meant to implement. Specifically, s. 3(2)(c) also excluded from automatic citizenship persons born in Canada whose parents were employees of the United Nations or another international organization to whom were granted diplomatic privileges and immunities certified to be equivalent “to those granted to a person... referred to in paragraph (a).” The Registrar did not address the clear implication that, for s. 3(2)(c) to make any sense, the “other representatives or employees of a foreign government” in s. 3(2)(a) also had to have diplomatic privileges and immunities. As noted above, the Vienna Convention on Diplomatic Relations and the Optional Protocol to this Convention indicated that the purpose of s. 3 was to create a narrow exception to acquisition of citizenship by birth by excluding children of parents who benefit from diplomatic immunity.

An excellent illustration of the role of the principles of statutory interpretation in reasonableness review is found in the Supreme Court’s decision in *Canada Post Corp. v Canadian Union of Postal Workers, supra*. The union representing postal workers complained that Canada Post had failed to respect its duty, under s. 125(z.12) of the *Canada Labour Code*, to ensure that the local work place committee inspect every part of the workplace at least once a year when it decided to limit these inspections to the postal depot building rather than including letter carrier routes and locations where mail is delivered. Letter carriers travel 72 million linear kilometres and deliver mail to 8.7 million points of call. An Appeals Officer with the Occupational Health and Safety Tribunal of Canada (OHSTC) determined that the statutory obligation to inspect applied only to the parts of the workplace over which the employer had control, and that carrier routes and points of call were excluded. The union sought judicial review of this decision. Justice Rowe, writing for a majority of the Supreme Court, upheld the Appeals Officer’s interpretation of s. 125(z.12) as reasonable. Justice Abella, writing for herself and Justice Martin, decided that it was unreasonable.

***Canada Post Corp. v. Canadian Union of Postal Workers, 2019 SCC 67***

**Rowe J. (Wagner C.J. and Moldaver, Karakatsanis, Gascon, Côté and Brown JJ. concurring):**

1 This appeal concerns an application for judicial review of a decision by the Occupational Health and Safety Tribunal Canada ("OHSTC"). The administrative decision maker was tasked with interpreting a provision of the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("Code"), to determine whether the employer, Canada Post Corporation ("Canada Post"), complied with its work place health and safety obligations. He determined that Canada Post was not in contravention of its work place inspection obligation under the Code. The application for judicial review was dismissed at the Federal Court, and allowed on appeal.

2 The appeal before this Court provides an opportunity to apply the framework for judicial review set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.). The standard of review is reasonableness. This Court's role is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints. For the reasons that follow, I find that the decision of the OHSTC is reasonable and would therefore allow the appeal with costs throughout.

[A recitation of the facts is omitted.]

**II. Issue**

6 The Appeals Officer concluded that s. 125(1)(z.12) applied only to parts of the work place over which the employer had control. The sole issue before this Court is whether the Appeals Officer's interpretation of s. 125(1)(z.12) of the Code was reasonable.

**III. Occupational Health and Safety Scheme**

7 The Code generally applies in respect of employment on or in connection with the operation of any federal work, undertaking or business. The Code is comprised of three parts. Part I deals with industrial relations. Part II deals with occupational health and safety, and is the Part relevant to this appeal. Part III deals with minimum labour standards, including work hours, wages, vacations and holidays.

8 The purpose of Part II is set out in s. 122.1: "to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies". Part II of the Code imposes duties on employers and employees.

9 There is a general duty on every federally-regulated employer to "ensure that the health and safety at work of every person employed by the employer is protected" (s. 124). The Code sets out specific health and safety obligations incumbent on employers in ss. 125 to 125.3. This appeal concerns one of the specific obligations created by s. 125(1)(z.12), which reads as follows:

### Specific duties of employer

**125 (1)** Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

.....

**(z.12)** ensure that the work place committee or the health and safety representative inspects each month all or part of the work place, so that every part of the work place is inspected at least once each year;

Employees also have duties under the Code. Section 126 sets out employees' duties in respect of health and safety. The *Canada Occupational Health and Safety Regulations*, SOR/86-304 ("Regulations"), are prescribed for the purposes of the provisions dealing with the duties of employers and employees (ss. 125, 125.1, 125.2 and 126) (see s. 1.3 of the Regulations).

10 For larger work places (with twenty or more employees), the scheme places the primary responsibility for identifying and resolving health and safety hazards with joint work place committees composed of employers and employees. Section 135(1) of the Code provides for the mandatory establishment of a work place health and safety committee for each "work place controlled by the employer at which twenty or more employees are normally employed". The committee must be comprised of at least two people, and at least half of the members must be employees who "do not exercise managerial functions", and, subject to any regulations, have been selected by the employees or, where, applicable, the trade union in consultation with employees not so represented (Code, s. 135.1(1)).

11 The Code sets out the duties of the committee in s. 135(7), one of which is to inspect the work place. The provision states that the committee "shall inspect each month all or part of the work place, so that every part of the work place is inspected at least once each year" (s. 135(7)(k)). The committee's work place inspection obligation corresponds with the employer's duty to ensure work place inspection set out in s. 125(1)(z.12).

12 Should a disagreement between employees and their employer arise in relation to any of these obligations, the parties must first attempt to resolve the issue through an internal complaint resolution process (s. 127.1). If this fails, a delegate of the Minister — at the relevant time, this delegate was the HSO — shall investigate and may issue directions to resolve the matter (ss. 127.1, 140 and 145).

13 The direction of the Minister's delegate can be challenged before an appeals officer (s. 146). The appeals officers are grouped under the OHSTC. The powers of an appeals officer, as well as procedural requirements for proceedings before an appeals officer, are outlined in ss. 146.1 and 146.2. These include a requirement to provide written reasons (s. 146.1(2))...

14 Canada Post and the Union have established protocols to promote work place health and safety. For example, the Workplace Hazards Prevention Program ("WHPP") provides an

“exemplary … protocol for identifying and reporting hazards that are encountered at the points of call” (2014 OHSTC 22 (Can. O.H.S.), at para. 100). Another example is Canada Post Policy 1202.05, Hazards and Impediments to Delivery on Route, which outlines the steps that letter carriers, supervisors and superintendents must take to “identify and correct hazards and impediments to delivery”.

15 While employer policies fall outside the statutory scheme, it is useful to illustrate how Canada Post seeks to fulfil the purposes of the Code in practice. The occupational health and safety scheme created by the Code, the Regulations, and policies specific to the employer operate together as a net of overlapping obligations designed to protect the health and safety of federally-regulated workers. As the Appeals Officer noted, the WHPP demonstrates “how the Code and its Regulations are implemented to protect the health and safety of employees performing all kinds of activities in all kinds of work places” (para. 100).

#### **IV. Decisions Below**

##### **A. Occupational Health and Safety Tribunal Canada**

16 In his reasons, the Appeals Officer gave a lengthy description of the parties’ submissions before setting out his analysis of the four contraventions cited by the HSO. The parts of his reasons that deal with the contravention to s. 125(1)(z.12) are relevant to this appeal.

17 Based on the wording of s. 125(1), the Appeals Officer first determined that the obligations arising from this subsection applied only in respect of a work place (paras. 87-88). After considering the definition of “work place” at s. 122(1), as well as the remedial purpose of health and safety legislation and relevant jurisprudence, he concluded that “work place” had to be interpreted broadly so as to include “all places where an employee works, whether or not they are under the employers’ control” (para. 92). For letter carriers, this included places outside the Burlington Depot, such as points of call and lines of route.

18 The Appeals Officer then turned to the scope of the obligations under s. 125(1). He concluded that the provision dealt with two situations: when the employer controls both the work place and the activity; and when the employer controls the activity, but not the work place (para. 93). In his view, a close reading of the obligations created by s. 125(1) reveals that some obligations apply to both situations while others can only apply where the employer has control over the work place.

19 The Appeals Officer concluded that s. 125(1)(z.12) can only apply to work places over which the employer has control “because the purpose of the work place inspection obligation is to permit the identification of hazards and the opportunity to fix them or to have them fixed. Control over the work place is necessary to do so” (para. 96). Since Canada Post has no control over lines of route or points of call, he determined that the obligation to ensure that the work place was inspected by the Committee could not apply to these locations: “I fail to see how an employer can effectively ensure that an inspection be carried out in accordance with (z.12) at a work place over which it has no control” (para. 99).

Finally, he noted that the WHPP already had in place procedures for identifying and reporting hazards encountered by letter carriers. This program shows how the Code and its Regulations can be implemented to protect the health and safety of workers in different settings.

#### ***B. Federal Court***

[The Federal Court held the Appeals Officer's decision was reasonable; his interpretation was consistent with the provision's wording and purpose and the outcome furthered the purpose of the Code.]

(...)

#### ***C. Federal Court of Appeal***

21 Nadon J.A. allowed the appeal and reinstated the HSO's direction. In his view, s. 125(1) is clear and unambiguous: the employer must fulfil every obligation enumerated by the provision if it controls either the work place or the work activity... The interpretation put forth by the Appeals Officer was therefore unreasonable because it constituted a redrafting of the provision, which would limit the obligations of employers with regard to work place health and safety. Furthermore, Nadon J.A. held that the Appeals Officer's finding that Canada Post could not fulfil the obligation of s. 125(1)(z.12) since it did not control the work place was unreasonable. This was based on the record, which showed that Canada Post was able to identify and address safety hazards on routes and points of call through its various policies and prevention programs (paras. 64-65).

22 Rennie J.A. concurred with Nadon J.A. in the result but set out a different approach. Based on the words "to the extent that" in s. 125(1), he held that the question was not whether an obligation existed, but rather what was the extent of that obligation based on the level of control the employer exerted over the work activity (paras. 77-78). Since it was not contested that Canada Post controlled the work activity of letter carriers, Rennie J.A. agreed with Nadon J.A that the Appeals Officer's decision was unreasonable (para. 81).

23 In dissent, Near J.A. held that it was reasonable for the Appeals Officer to determine that some obligations under s. 125(1) — including para. (z.12) — apply only if the employer has control over the work place (paras. 17-18). In his view, this interpretation was not inconsistent with the fact that Canada Post can identify and resolve hazards at points of call through its health and safety policies. Near J.A. pointed out that the various obligations under s. 125(1) are of different natures. If the inspection obligation applies to the letter carrier routes and points of call, Canada Post would not merely be obligated to attempt to identify and fix potential hazards, it would be obligated to ensure that such hazards are identified and fixed, including those on private property (para. 20). He concluded that the Appeals Officer's interpretation was consistent with the purpose of the Code without extending the employer's obligation beyond what is reasonable and logical (para. 21).

### **V. Analysis**

#### **A. The New Administrative Law Framework**

[The majority noted that it would apply the new *Vavilov* framework to the appeal. It adopted a reasonableness standard of review and noted that the Appeal's Officer's decision was reasonable under the approach to reasonableness review set out in either *Dunsmuir* or *Vavilov*.]

(...)

### ***B. Determining the Applicable Standard of Review***

27 In *Vavilov*, this Court set out a revised framework for determining the applicable standard of review for administrative decisions. The starting point is a presumption that a standard of reasonableness applies. This presumption can be rebutted in two types of situations. The first is where the legislature has statutorily prescribed a standard of review or where it has provided for an appeal from the administrative decision to a court. The second is where the question on review falls into one of the categories of questions that the rule of law requires be reviewed on a standard of correctness. None of these situations for departing from the presumption of reasonableness review apply here. The Appeals Officer's decision is reviewable on a standard of reasonableness.

### ***C. Conducting Reasonableness Review Under Vavilov***

28 In *Vavilov*, this Court held that “[r]easonableness review aims to give effect to the legislature’s intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law” (para. 82). The Court affirmed that “it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies” (para. 86 (emphasis in original)).

29 *Vavilov* provides guidance for conducting reasonableness review that upholds the rule of law, while according deference to the statutory delegate’s decision. While deferential review has never meant showing “blind reverence” to statutory decision makers (*Dunsmuir*, at para. 48), in *Vavilov* the Court re-emphasized that judicial review considers not only the outcome, but also the justification for the result (where reasons are required). Reasons, the Court wrote, “are the primary mechanism by which administrative decision makers show that their decisions are reasonable” (para. 81). “[W]here reasons are provided but they fail to provide a transparent and intelligible justification ... the decision will be unreasonable” (*Vavilov*, at para. 136).

30 In this case, the Appeals Officer was required to give written reasons (Code, s. 146.1(2)). He did so, and in this case provided detailed reasons for his decision. As I will discuss below, the “discipline of reasons” (R. J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 134, cited in *Vavilov*, at para. 80) as exercised in this case “demonstrate[s] that the decision was made in a fair and lawful manner” (*Vavilov*, at para. 79). His reasons cogently explain “the rationale for [the] decision” (*Vavilov*, at para. 81). The administrative decision maker’s reasons in this case were exemplary. However, it is important to note that what is required of statutory delegates to justify their decision will depend on the context in which the decision is made. The reviewing court should be

mindful that perfection is not the standard (*Vavilov*, at para. 91). Instead, “when read in light of the evidence before it and the nature of its statutory task, the [administrative decision maker]’s reasons [should] adequately explain the bases of its decision” (*N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.) , at para. 18, quoting *P.S.A.C. v. Canada Post Corp.*, 2010 FCA 56, [2011] 2 F.C.R. 221 (F.C.A.) , at para. 163, per Evans J.A., dissenting; this Court adopted Evans J.A.’s reasons: see 2011 SCC 57, [2011] 3 S.C.R. 572 (S.C.C.)). The reasons should demonstrate that the decision conforms to the relevant legal and factual constraints that bear on the decision maker and the issue at hand (*Vavilov*, at paras. 105-7).

31 A reasonable decision is “one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review “[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion” (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand “the basis on which a decision was made” (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

32 A reviewing court should consider whether the decision as a whole is reasonable: “what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review” (*Vavilov*, at para. 90). The reviewing court must ask “whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision”...

33 Under reasonableness review, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (*Vavilov*, at para. 100). The challenging party must satisfy the court “that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable” (*Vavilov*, at para. 100). In this case, that burden lies with the Union.

34 The analysis that follows is directed first to the internal coherence of the reasons, and then to the justification of the decision in light of the relevant facts and law. However, as *Vavilov* emphasizes, courts need not structure their analysis through these two lenses or in this order (para. 101). As *Vavilov* states, at para. 106, the framework is not intended as an invariable “checklist for conducting reasonableness review”. The structure I have adopted is one that is convenient and useful in the circumstances of this case.

#### *(1) The Appeals Officer’s Decision Was Based on an Internally Coherent Reasoning*

35 As I discuss below, the Appeals Officer’s analysis followed a rational and logical line of reasoning. He employed well-established principles of statutory interpretation, engaged with the submissions and evidence before him, and drew on his knowledge of the field when considering the practical implications of his interpretation.

36 Before this Court and the courts below, the Union argued that the Appeals Officer's decision was internally inconsistent. The Union submitted that the Appeals Officer's findings with respect to Canada Post's health and safety practices and policies (for example, conducting route audits, and a protocol for identifying and resolving hazards) demonstrated that the employer had the capacity to fulfil the obligation set out in s. 125(1)(z.12). Therefore, the conclusion that para. (z.12) could not apply to a work place outside the control of the employer was unreasonable.

37 I agree with Near J.A. that the Appeals Officer's decision was not rendered unreasonable by, on the one hand, recognizing that Canada Post through its internal policies seeks to identify and resolve hazards for letter carriers, including the audit of certain routes, while also concluding that Canada Post does not have the capacity to "ensure all areas of the work place outside the physical Canada Post building are inspected annually" (para. 20). Canada Post's discretionary policies (pursued in furtherance of its responsibilities under the Code) take into account practical considerations regarding the work of letter carriers. The duty under para. (z.12) is mandatory; if applicable, Canada Post would have been obligated to ensure that every part of the work place was inspected annually, regardless of any impracticalities arising from the nature of the work of its employees.

38 Far from being internally incoherent, the Appeals Officer's reasoning demonstrates his in-depth understanding of the ways in which Canada Post fulfils the purposes of the Code, bearing in mind the practical limitations of a work place spanning 72 million kilometres of postal routes. With respect to the Union's position, Canada Post's ability to carry out *some* route audits does not imply that it has the capacity to inspect *all* routes in a year. Further, as I explain below, the Appeals Officer's interpretation of the provision centred on control over the work place, not the finite capacity of the employer to fulfil the obligation. Findings related to the employer's capacity to carry out such extensive route audits are supplementary to the Appeals Officer's reasoning regarding how the statutory scheme should operate in the circumstances of this case.

39 Accordingly, I find that the Appeals Officer's reasons do not in any way display a fatal flaw in rationality or logic.

*(2) The Appeals Officer's Decision Was Defensible in Light of the Relevant Legal and Factual Constraints*

**(a) The Appeals Officer's Interpretation of Section 125(1)(z.12)**

40 The administrative decision maker "holds the interpretative upper hand" (*British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.) , at para. 40). When reviewing a question of statutory interpretation, a reviewing court should not conduct a *de novo* interpretation, nor attempt to determine a range of reasonable interpretations against which to compare the interpretation of the decision maker. "[A]s reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did" (*Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301 (F.C.A.), at para. 28, quoted in *Vavilov*, at para. 83). The reviewing

court does not “ask itself what the correct decision would have been” (*Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, [2003] 1 S.C.R. 247 (S.C.C.) , at para. 50, quoted in *Vavilov*, at para. 116). These reminders are particularly important given how “easy [it is] for a reviewing court to slide from the reasonableness standard into the arena of correctness when dealing with an interpretative issue that raises a pure question of law” (*New Brunswick Liquor Corp. v. Small*, 2012 NBCA 53, 390 N.B.R. (2d) 203 (N.B. C.A.), at para. 30).

41 With respect, the majority in the Court of Appeal appears to have conducted a *de novo* interpretation of the impugned provision; it also failed to engage adequately with the Appeals Officer’s reasoning. Such an approach, whereby a “court embarks on its own interpretation of the statute to determine the reasonableness of the tribunal’s decisions,” is in tension with the guidance of the majority reasons in *Vavilov* on how to conduct reasonableness review, as it leaves “little room for deference” (J. M. Evans, “Triumph of Reasonableness: But How Much Does It Really Matter?” (2014), 27 C.J.A.L.P. 101, at p. 109). Taking a “reasons first” approach rather requires the reviewing court to start with how the decision maker arrived at their interpretation, and determine whether it was defensible in light of the interpretative constraints imposed by law.

42 Where the meaning of a statutory provision is in dispute, the administrative decision maker must demonstrate in their reasons that they were alive to the “essential elements” of statutory interpretation: “the merits of an administrative decision maker’s interpretation of a statutory provision must be consistent with the text, context and purpose of the provision” (*Vavilov* , at para. 120). Because those who draft statutes expect that the statute’s meaning will be discerned by looking to the text, context and purpose, a reasonable interpretation must have regard to these elements — whether it is the court or an administrative decision maker tasked with the interpretative exercise (*Vavilov* , at para. 118). In addition to being harmonious with the text, context and purpose, a reasonable interpretation should conform to any interpretative constraints in the governing statutory scheme, as well as interpretative rules arising from other sources of law. In this case, the Appeals Officer’s interpretation was constrained by interpretative rules within the Code, the *Interpretation Act*, R.S.C. 1985, c. I-21, and common law rules of statutory interpretation.

43 The Appeals Officer’s interpretation was guided by the general rule set out in s. 12 of the *Interpretation Act* that “[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects” (quoted in OHSTC reasons, at para. 91). As I discuss below, the Appeals Officer’s reasons amply demonstrate that he considered the text, context, purpose, as well as the practical implications of his interpretation... His focus on practical implications did not supplant the need to ensure consistency with the text, context and purpose of the provision, but rather “enrich[ed] and elevate[d] the interpretive exercise” (*Vavilov* , at para. 119). He demonstrated a sustained effort to discern legislative intent throughout his analysis, and did not simply “reverse-engineer’ a desired outcome” (*Vavilov*, at para. 121).

**(i) The Text of Section 125(1)(z.12)**

44 In deciding whether the inspection obligation under para. (z.12) required Canada Post to inspect letter carrier routes and points of call, the Appeals Officer determined that he had to interpret the term “work place”, as well as the “scope of the specific obligations arising from subsection 125(1)” (para. 93).

45 Starting with the introductory text of s. 125(1), the Appeals Officer determined that “[i]t is clear ... that, in order for any obligation under subsection 125(1) to apply to an employer, it must be in respect of a work place” (para. 88). The Appeals Officer began his interpretation with the statutory definition of “work place” at s. 122(1). The definitions in s. 122(1) apply to Part II of the Code (Occupational Health and Safety). Section 122(1) states: “*work place* means any place where an employee is engaged in work for the employee’s employer”.

46 Despite the submission of Canada Post that what constitutes a work place depends on whether the employer controls the location or work activity, it was not open to the Appeals Officer to deviate from the definition provided by the governing statute. The Appeals Officer’s interpretation conformed to the definition of “work place” in the Code. He concluded that “‘work place’ must be interpreted broadly to account for all the areas in which an employee may be engaged in work, and in this case, in light of the necessary mobility of a letter carrier” (para. 91). The Appeals Officer followed prior OHSTC decisions on this point... [Citations omitted].

47 Turning to the scope of the obligations arising from s. 125(1), the Appeals Officer noted that “[t]he very precise wording ... indicates that the obligations set out in subsection 125(1) centre around the notion of control” (para. 93). In his view, the phrases “every work place controlled by the employer”, and “every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity” in s. 125(1) are to be read disjunctively: “There is a clear distinction between situations where work places are controlled by the employer and those where they are not” (para. 93).

48 Before this Court, the Union argued that the Appeals Officer’s interpretation is contrary to the plain text of the statute. In its view, nothing in the introductory language of s. 125 indicates that the obligations listed in s. 125 are meant to apply exclusively to one or the other of the two circumstances. The Union says that the word “and” in this context is to be read *conjunctively*, meaning that all the obligations apply to employers that control the work place, and to employers that control the work activity. Further, the Union submitted that even when read disjunctively, as long as one pre-condition is met (control of the work place or control over the work activity), all of the obligations follow.

49 I agree with Near J.A. that the word “and” can be read conjunctively or disjunctively depending on the context (para. 16). The use of the word “and” in the opening phrase of s. 125(1) does not preclude the Appeals Officer’s conclusion that the provision indicates that certain obligations apply only where the employer has control over the work place, nor does the French “*ainsi que*”. In any event, the text of the opening language of the provision, read in isolation, is not so clear so as to be determinative of the matter.

**(ii) The Statutory Context**

50 The Appeals Officer had regard to the broader statutory context of the obligations under s. 125(1), noting “[it is] clear from a plain reading of the obligations that: (i) some obligations apply to any employer, whether or not they control the work place, as long as they control the work activity, and (ii) other obligations, in order to be executed, require that the employer have control of the physical work place” (para. 93). The Appeals Officer considered specific obligations that in his view, support his interpretation. For example, he referred to para. (t), which obliges the employer to “ensure that the machinery, equipment and tools used by the employees in the course of their employment meet prescribed health, safety and ergonomic standards and are safe under all conditions of their intended use”, concluding that this obligation is applicable to all employers, regardless of whether they control the work place, as long as they control the work activity. Conversely, para. (a), which requires that employers “ensure that all permanent and temporary buildings and structures meet the prescribed standards” is an example of an obligation that applies only where an employer has control over the work place (para. 97).

51 While the Appeals Officer’s reasons demonstrate that he turned his mind to the context of s. 125(1)(z.12), he did not need to consider every related provision of the Code in his analysis. Before this Court the parties made submissions regarding how s. 135 — which establishes and sets out the duties of the committee — should bear on the interpretation of the obligations under s. 125(1). Section 135(1) reads:

**135 (1)** For the purposes of addressing health and safety matters that apply to individual work places, and subject to this section, every employer shall, for each work place controlled by the employer at which twenty or more employees are normally employed, establish a work place health and safety committee and, subject to section 135.1, select and appoint its members.

Subsection (7) sets out the duties of the committee. Paragraph (k) mirrors the work place inspection obligation in s. 125(1)(z.12):

(7) A work place committee, in respect of the work place for which it is established,

.....

(k) shall inspect each month all or part of the work place, so that every part of the work place is inspected at least once each year;

Counsel for Canada Post submitted that ss. 135(1) and 135(7)(k), when read together, make clear that the inspection obligation therein (which mirrors s. 125(1)(z.12)) applies only to the controlled work place. In response, counsel for the Union argued that s. 135(1) requires only that a committee be established for each controlled work place at which twenty or more employees are employed. The Union continued that subs. (7)(k) does not indicate that the committee, once established, has jurisdiction only over those parts of the work place that are controlled by the employer.

52 The Appeals Officer did not refer to s. 135(1). The foregoing argument was not made before him; it was raised for the first time before the Court of Appeal by an intervener. The

fact that the Appeals Officer did not refer to s. 135(1) in his analysis does not render his interpretation unreasonable. Administrative decision makers — and for that matter, judges — are not required, on their own account, to consider every aspect of the statutory context that might bear on their decision (*Vavilov*, at para. 122). In our system, the parties frame the arguments to be considered. Failure to consider a particular piece of the statutory context that does not support a decision maker’s statutory interpretation analysis will not necessarily render the interpretation unreasonable. The impact of such an omission will be case-specific and will depend on whether the “omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached” (*Vavilov*, at para. 122).

53 On my reading, not only does s. 135(1) not cause me to lose confidence in the outcome reached, this provision provides, if anything, only additional support for the Appeal Officer’s interpretation of s. 125(1)(z.12). The possibility that the justification provided might have been strengthened by reference to s. 135(1) does not affect the reasonableness of his decision.

### **(iii) The Purpose of Section 125(1)(z.12)**

54 The purpose of Part II of the Code is provided at s. 122.1: “[t]he purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.” A reasonable interpretation of any provision under Part II should be informed by the overarching objectives of Part II of the Code.

55 The Appeals Officer concluded that in order to fulfil the obligation in para. (z.12), control over the work place is necessary because the purpose of the work place inspection obligation is to “permit the identification of hazards and the opportunity to fix them or to have them fixed” (para. 96). He considered the practical implications of the interpretation in light of the purpose of the provision, and agreed with the submissions of Canada Post that “it would be impractical for an employer to perform [the work place inspection] obligation in respect of structures it neither owns nor has a right to alter” (para. 97). A reviewing court must pay “[r]espectful attention to a decision maker’s demonstrated expertise” when considering whether an outcome reflects a reasonable approach given the “consequences and the operational impact of the decision” (*Vavilov*, at para. 93). Here, the Appeals Officer had “dealt with and implemented most, if not all, of the employer obligations under subsection 125(1)” (para. 94), and also demonstrated this expertise through his reasons by, for example, demonstrating his familiarity with the statutory scheme and the different types of obligations it imposes on employers (para. 95; see also *Vavilov*, at para. 94). While the parties’ concessions on this point are not binding on us, they do, in this case, speak to the Appeals Officer’s findings on the point. The purpose of the obligation as described by the Appeals Officer appears to have been accepted by the parties before the Court of Appeal (F.C.A. reasons, at para. 18, per Near J.A.). In my view, the purpose of para. (z.12) imputed by the Appeals Officer is consistent with the broad, purposive interpretation afforded to remedial legislation.

56 In accordance with the statutory purpose of Part II of the Code, the Appeals Officer noted that Canada Post promotes the health and safety of its employees “in all the

elements of their work” through its various policies and assessment tools, even though it lacks the necessary control over the work place to fulfil the inspection obligation under s. 125(1)(z.12) (para. 100). For example, the Appeals Officer referred to the WHPP, which sets out a “detailed protocol for letter carriers and supervisors with respect to delivery hazards, including the identification, investigation, and resolution with customers” (OHSTC reasons, at para. 60). The WHPP was developed by Canada Post and the Union as a prevention program in accordance with the obligations of the Code, the Regulations and the Collective Agreement (see Code, s. 125(1)(z.03) and Regulations; see also A.R., vol. III, at p. 22).

57 Before this Court, Canada Post submitted that the Appeals Officer’s interpretation is congruent with the scheme of the Code and does not undermine its purposes. It noted that, as an employer, it is bound by the general duty set out in s. 124: “[e]very employer shall ensure that the health and safety at work of every person employed by the employer is protected.” The Union argued that the interpretation of s. 125(1) given by the Appeals Officer created such limitations on the duties of the employer so as to be contrary to the statutory purpose. Further, the Union submitted that if the purposes of the obligations under s. 125 could be met by s. 124 and the creation of the WHPP, then s. 125(1) would be redundant.

58 The Appeals Officer inferred from the text of s. 125(1) that the legislator intended the employer to be bound to the fullest extent possible: “the wording ... indicates to me that the legislator drafted the section in this way in order to ensure that the employer be bound to the fullest extent possible by the obligations under the Code and its Regulations” (para. 95). While we presume that the legislator does not speak in vain, in my view, an interpretation that allows for an overlapping “net” of obligations ensuring work place health and safety is appropriately broad so as to apply to the myriad of work activities and work places regulated by the Code. Where one obligation cannot be met due to the nature of the work place, employers are nonetheless bound to ensure health and safety by other measures provided for in the scheme. Accordingly, I am not persuaded by the Union’s argument that the Appeals Officer’s interpretation of the obligations under s. 125(1) renders the provision redundant, and is therefore unreasonable.

59 An interpretation which imposed on the employer a duty it could not fulfil would do nothing to further the aim of preventing accidents and injury. While the Appeals Officer’s interpretation does limit the application of the obligations under s. 125(1), those obligations — and specifically the inspection obligation — cannot be fulfilled by an employer that does not control the work place. A different interpretation of the statute would not change that reality. As the Ontario Court of Appeal held in *Blue Mountain Resorts Ltd. v. Bok*, 2013 ONCA 75, 114 O.R. (3d) 321 (Ont. C.A.) (cited in OHSTC reasons, at paras. 26-28, 50 and 74), while public welfare statutes are generally to be given a liberal interpretation, broad language may be given a narrower interpretation to avoid absurdity (paras. 24 and 29). Accordingly, the Appeals Officer’s interpretation did not frustrate the statutory purpose set out in s. 122.1 of the Code so as to render his decision unreasonable.

**(b) The Appeals Officer Accounted for the Submissions of the Parties and the Evidence Before Him**

60 While a decision maker is not necessarily confined to the parties' submissions, "[t]he principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties" (*Vavilov*, at para. 127). As always, this will vary with the circumstances of the case at hand. Here, where the Union and Canada Post made detailed submissions, the circumstances called for the Appeals Officer to address those submissions. As this Court explained in *Vavilov*, "a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (para. 128). The Appeals Officer contended with the submissions of the parties throughout his analysis. While he agreed with the Union on the interpretation of "work place", he ultimately accepted the submission of Canada Post that it cannot inspect parts of the work place over which it has no control.

61 A reviewing court may conclude that a decision is unreasonable where the decision maker failed to take into account the evidence and submissions before them at first instance. The "evidentiary record and the general factual matrix" act as constraints on the reasonableness of a decision, and must be taken into account (*Vavilov*, at para. 126). However, while a reviewing court should ensure the decision under review is justified in relation to the relevant facts, deference to a decision maker includes deferring to their findings and assessment of the evidence. Reviewing courts should refrain from "reweighing and reassessing the evidence considered by the decision maker" ... [Citations omitted.]

62 Over the course of the five-day hearing, the Appeals Officer heard evidence specific to the dispute before him, including evidence of: the time per day that a letter carrier generally spends delivering mail; the time values associated with delivery at each point of call according to the "letter carrier route measurement system"; the time it takes to perform a "work place audit" by Committee members; and prior route audits conducted in accordance with the WHPP to locate and correct hazards. The Appeals Officer noted statistics provided at the hearing by the HSO relating to the activities of letter carriers and the ground they cover in carrying out their work activities. He also considered examples of Canada Post's occupational health and safety policies and programs described above, which were referred to by the parties.

63 The Appeals Officer's decision responded to the issue before him, and took into account the detailed submissions of both parties. There is no indication that he failed to consider the evidence presented at the hearing, or that he based his decision on a misapprehension of the evidence, thereby rendering his decision unreasonable.

64 Decision makers, simply by reciting evidence and submissions made to them, do not thereby immunize their reasons from challenge on the basis that they have failed to have regard to something that is relevant and significant. Recitation is not justification, or as the reasons in *Vavilov* state, at para. 102:

Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in

understanding the rationale underlying a decision and “are no substitute for statements of fact, analysis, inference and judgment”... [Citations omitted.]

Further, depending on the circumstances of the case, a detailed statement of evidence and submissions may not be needed. That said, in *this* case, the Appeals Officer made more clear and complete the basis for his decision by the thoroughness with which he reviewed the evidence and the submissions.

## **VI. Conclusion**

65 Before the Appeals Officer, it was undisputed that Canada Post does not have physical control over individual points of call or lines of route, and that many of the points of call are private property. The Appeals Officer further found that Canada Post cannot alter nor fix the locations in the event of a hazard. The Appeals Officer applied his interpretation of the provision to these facts and concluded the obligation to inspect the work place “is one that can only apply to an employer who has control over the physical work place. [Therefore,] subsection 125(1)(z.12) does not apply to any place where a letter carrier is engaged in work outside of the physical building [in] Burlington” (para. 99).

66 The Appeals Officer’s conclusions followed from a clear line of reasoning. With due regard to the submissions before him, he interpreted s. 125(1)(z.12) using well-established principles of statutory interpretation. The interpretation he arrived at is harmonious with the text, context and purpose of the provision and aligns with past decisions of the OHSTC. He applied his interpretation to the facts of the case and justified his conclusion.

67 I agree with Near J.A. that the Appeals Officer’s decision was reasonable. I would therefore allow the appeal with costs throughout and restore the Appeals Officer’s order rescinding the contravention of s. 125(1)(z.12) as directed by the HSO.

### **Abella J. (dissenting) (Martin J., concurring):**

68 The issue in this appeal is whether the safety inspection obligation in the *Canada Labour Code* applies to the mail routes where Canada Post’s letter-carriers spend three-quarters of their time.

[A recitation of the facts is omitted.]

(...)

73 I agree with the majority in the Federal Court of Appeal. In my view, the Appeals Officer’s conclusion was unreasonable and inconsistent with the purpose and text of the safety inspection provision.

### **Analysis**

74 There is no dispute between the parties about the applicable standard of review or principles of statutory interpretation. The dispute is over how they should apply to the statutory provision at issue... [The text of s. 125(1)(z.12), also found at para 9 of the majority judgment, is omitted.]

(...)

75 In particular, the dispute revolves around whether it was reasonable for the Appeals Officer to conclude that the safety inspection duty found in s. 125(1)(z.12) requires employers to inspect only those parts of the workplace that they physically control.

76 Section 125(1)(z.12) is found in Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2, and is part of an extensive web of employer responsibilities designed “to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment” (s. 122.1; see also *Canada (Attorney General) v. PSAC*, 2015 FCA 273, [2016] 3 F.C.R. 33 (F.C.A.) , at para. 17). These responsibilities flow from a general obligation placed on employers under s. 124 to ensure workplace safety:

#### **General duty of employer**

**124** Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

77 Section 125 gives substance to this overriding obligation (*Public Service Alliance of Canada* , at para. 17; *Atomic Energy of Canada Ltd., Re*, 2013 OHSTC 21 (Can. O.H.S.), at para. 58). It places 45 specific duties on employers, including the safety inspection provision at issue in this appeal. All of these duties are introduced by language stipulating that they apply in all *workplaces* controlled by employers *and* to all employer-controlled *work activities* carried out by employees (*Aviation General Partner Inc. v. Jainudeen*, 2013 OHSTC 32 (Can. O.H.S.) , at para. 62; *Laroche v. Canada Border Services Agency*, 2010 OHSTC 12 (Can. O.H.S.) , at paras. 121-22; *Canada (Public Works and Government Services), Re* 2009 LNOHSTC 35, at para. 68; *Morrison v. Canada Post Corp.* 2009 LNOHSTC 32, at para. 226):

#### **Specific duties of employer**

**125 (1)** Without restricting the generality of section 124, every employer shall, in respect of *every workplace controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer*, to the extent that the employer controls the activity ....

78 This is an unambiguous dual legislative direction to employers that their safety obligations — including the inspection duty — apply both to *workplaces* they control *and*, if they do not control the actual workplace, to every *work activity* that they do control to the extent of that control. Nothing in the text of s. 125(1) limits an employer’s inspection duty to workplaces under its physical control. The Appeals Officer’s interpretation effectively ignores the second part of s. 125(1), which simultaneously imposes the inspection duty on employers for work activities in workplaces they do *not* control. I agree with Nadon J.A. that in so restricting the scope of s. 125(1)(z.12), the Appeals Officer “redrafted the provision”.

79 On a plain reading of s. 125(1)(z.12), if Canada Post controls the activities of its letter-carriers, it is bound by the inspection duty. The Appeals Officer acknowledged that Canada Post has extensive and strict control over mail delivery by letter-carriers. As he noted, it sets their routes down to minute details and dictates the manner of the mail delivery, “right

down to the way they hold their satchels and how they walk the routes". This not only shows that Canada Post controls the "work activity" of letter-carriers, it shows that the control is stringent. This brings Canada Post's work arrangements with its letter-carriers squarely within the language of s. 125(1).

80 This interpretation is also the only one that is true to the purpose of s. 125(1) in general and the safety inspection provision in particular (*Ontario (Ministry of Labour) v. United Independent Operators Ltd.*, 2011 ONCA 33, 104 O.R. (3d) 1 (Ont. C.A.), at para. 31). Section 125(1) aims to protect workers from safety hazards — a purpose that is undermined if the safety inspection duty, a core protection within s. 125(1), is confined to workplaces under an employer's physical control. In drafting s. 125(1), Parliament clearly anticipated that not all employees work under the same physical conditions, or in workplaces their employers physically control. By drafting s. 125(1) to cover workplaces within *and* outside an employer's physical control, Parliament sought to protect the thousands of employees working outside an employer-owned location. The beauty of s. 125(1) is that all employees are afforded the same quality of safety protection wherever they work, so long as their work is controlled by their employer.

81 The inspection duty is an obvious fit with the protective purpose of s. 125(1), and is essential to the preventive approach to workplace hazards adopted in Part II of the *Labour Code*. Section 122.1 states that the purpose of Part II of the *Code* is "to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies". The following section, 122.2, explains that: "[p]reventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees."

82 These provisions highlight Parliament's implementation of a preventive approach to workplace safety, an approach clearly expressed through the safety inspection duty. Safety inspections exist to proactively identify hazards *before* workers are exposed to them, and ensure that they will either be fixed or avoided. And as the intervener Workers' Health and Safety Legal Clinic submitted, proactive safety inspections are especially important for non-unionized workers, who may have limited negotiating leverage to encourage inspection through individual requests to employers (*Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.) , at pp. 1002-3).

83 It bears remembering that the inspection duty was a crucial part of the package of workplace safety reforms introduced in 1995 in response to the 1992 Westray Mine tragedy in Nova Scotia in which 26 miners were killed. The subsequent public inquiry identified poor inspection procedures as a key cause of the tragedy. As Justice K. Peter Richard wrote, "[m]anagement failed, the inspectorate failed, and the mine blew up" (*The Westray Story: A Predictable Path to Disaster — Report of the Westray Mine Public Inquiry* (Nova Scotia, 1997), at p. 606 (Justice K. Peter Richard, Commissioner)). The widespread anger and pressure on government following the mine explosion led to the review of the occupational health and safety provisions of labour legislation both provincially and federally.

84 Among the proposals emerging from the Westray Inquiry was the recommendation that there be regular workplace inspections by joint health and safety committees (Eric Tucker, “Diverging Trends in Worker Health and Safety Protection and Participation in Canada, 1985-2000” (2003), 58 *I.R.* 395, at p. 413). These recommendations were enacted in 2000 through amendments to Part II of the *Labour Code*.

85 The inspection obligation was introduced in s. 125(1)(z.12). As the Parliamentary Secretary to the then-Minister of Labour explained, the purpose of Part II of the *Code* was to “protect workers” by “moderniz[ing]” the *Code’s* approach to health and safety regulations and by improving employees’ knowledge about hazards in their workplaces:

The resulting amendments were formulated, first, to ensure that Part II continues to do what it is supposed to do, namely, protect workers; second, to align Part II with occupational health and safety regulations in other jurisdictions; and third, to modernize the Part II approach to occupational health and safety regulations.

.....

Part II of the code ... establishes three basic employee rights in the health and safety area: *the right to know about hazards in the workplace and ways of dealing with them*, the right to participate in correcting those workplace hazards, and the right to refuse work which the employee believes to be dangerous or unhealthy. [Emphasis added.]

(*House of Commons Debates*, vol. 136, No. 71, 2nd Sess., 36th Parl., March 24, 2000, at p. 5207 (Mrs. Judi Longfield))

86 The government also emphasized the need for greater worker participation in identifying workplace hazards:

Overwhelmingly, the parties agreed that the existing code has worked well and that it could form a basis and a foundation for the new and improved system. In particular, the parties agreed that the time had come for a new approach to the regulation of workplace health and safety. This agreement is reflected in Bill C-12, which is based on the philosophy that the proper role of the Government of Canada is to *empower* workers and employers to *assume responsibility for the regulation of their own workplace*.

... Workers and employers should be given the *power and discretion to identify and resolve new and emerging health and safety hazards*. [Emphasis added.]

(*Debates*, at pp. 5207-8)

87 Safety inspections were highlighted as the first of five “important and necessary” features of the new legislation, ensuring that workplace health and safety issues could be resolved pre-emptively. As the Parliamentary Secretary explained:

Five features of the bill seem to be particularly important and necessary. First, as a result of this bill, local health and safety committees will be mandated to conduct

regular workplace inspections and will be given increased powers in dealing with complaints. This will *permit the parties to identify and solve problems swiftly* as they arise. This will be done with government guidance and it *will enhance the role of the health and safety committees*. [Emphasis added.]

(*Debates*, at p. 5208)

88 Safety inspections were therefore a central methodology by which Parliament intended to broaden preventive health and safety protections for workers. The intent of Parliament was to empower and enable the identification of danger to prevent accidents before they occurred. It makes little sense that Parliament, having expressly chosen under s. 125(1) to extend safety protections to activities in workplaces *outside* an employer's control, would have intended that a core part of those protections — the safety inspection duty — be exempt from that extension.

89 The preventive purpose of the inspection obligation further reinforces that it was not meant to apply only to workplaces under an employer's physical control. As the Appeals Officer acknowledged, the inspection obligation allows workplace safety committees to "identif[y and] ... fix [hazards] or to have them fixed". These purposes are no less crucial for employees who work in locations which are not under an employer's physical control, such as those who work outdoors or whose employment involves regular travel. I agree with the Canadian Union of Postal Workers that by restricting inspections to locations where the employer exercises property rights, the Appeals Officer's decision risks leaving workplace health and safety committees unable to proactively identify and address the hazards that may arise in the areas where letter-carriers work. This makes pre-emptive safety protections, which were intended for all employees, unavailable for those whose employment is not confined to a particular physical location.

90 Finally, a narrowing of the inspection duty is inconsistent with the expansive definitions of "workplace" found in the Appeals Officer's own reasons and in many provincial health and safety statutes. Ontario's legislation, for example, defines a "workplace" as "*any land, premises, location or thing at, upon, in or near which a worker works*" (*Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 1(1)). Alberta's *Occupational Health and Safety Act* defines "work site" as a location where a worker "is, or is likely to be, engaged in any occupation" (S.A. 2017, c. O-2.1, s. 1(bbb)). Newfoundland and Labrador, Prince Edward Island, and Saskatchewan all have similarly expansive wording (*Occupational Health and Safety Act*, R.S.N.L. 1990, c. O-3, s. 2(n); *Occupational Health and Safety Act*, R.S.P.E.I. 1988, c. O-1.01, s. 1(y); *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1, s. 3-1(1)(hh)). The uniting feature of all these statutes is a functional, purposive definition of a "workplace" that centers on where the worker performs his or her employment, not on whether the employer controls the physical premises.

91 This brings us back to s. 125(1)(z.12). The employer has a duty to

ensure that the work place committee or the health and safety representative inspects each month all or part of the work place, so that every part of the work place is inspected at least once each year[.]

92 This language should not be interpreted in isolation to shrink an employer’s duty to protect workers from safety hazards; it should be read as part of s. 125(1), which expressly imposes the duty in connection with any work activity “to the extent that the employer controls the *activity*”. This means that safety inspections should be done in a way that protects employee safety as much as possible in the circumstances, not in a way that deprives whole categories of workers — those who work outside a physical building — from protection.

93 The crux of Canada Post’s argument against this remedial and purposive interpretation is that it would be “impractical” to implement. That, as Nadon J.A. observed, “is not ... a legitimate reason for the Appeals Officer to depart from the clear intent of the legislative provision”. Central to Canada Post’s argument — and the Appeals Officer’s decision — is the flawed premise that an employer can only address hazards identified during an inspection if the employer exercises control over the area being inspected. It is clear, however, that through the high degree of control it traditionally imposes over its letter-carriers’ activities, Canada Post can protect its employees from hazards on mail routes without physically controlling the *routes* themselves. Canada Post’s control over its employees’ work activities gives it several options for addressing hazards on mail routes, such as instructing employees to avoid certain portions of their routes pending resolution of those hazards by the party with the capacity to do so. Canada Post can also provide its carriers with equipment or guidance designed to mitigate potential hazards revealed by a safety inspection (see for example: *Canada Occupational Health and Safety Regulations*, SOR/86-304, s. 12.1). These are precisely the kinds of protective measures s. 125(1) contemplates when it says “to the extent that the employer controls the [work] activity”. That Canada Post can take such steps is borne out by the extensive evidence before the Appeals Officer that it has, in fact, already implemented schemes to address hazards on mail routes, despite lacking physical control over them.

94 In addition, the Appeals Officer’s interpretation of s. 125(1)(z.12) turned on feasibility concerns limited to *one* employer: Canada Post. Section 125(1)(z.12), however, applies to *all* employers subject to the *Labour Code*. I cannot accept that Parliament intended that a provision binding on all federally-regulated employers be interpreted based on whether it is easy or difficult for any particular employer to implement.

95 But in any event, the obligations on Canada Post under s. 125(1)(z.12) are expressly not categorical — as Rennie J.A. observed, they are to be fulfilled “*to the extent* that the employer controls the [work] activity”. This language eschews an all-or-nothing view of safety obligations, in favour of a context-specific approach capable of accommodating the diverse group of federally-regulated employers to which s. 125(1) applies. Inspections were clearly intended to be done in a way that protects employee health and safety as well as possible in the circumstances. The fact that the inspections may be difficult to carry out does not support eliminating the duty completely.

96 The flexibility anticipated by s. 125(1) is underscored by Parliament’s delegation of inspection responsibilities to joint health and safety committees. Section 135(1) of the *Labour Code* requires that a workplace health and safety committee be established for

workplaces of twenty or more employees. The responsibilities of this committee include participating in all of the inquiries, investigations, studies and inspections pertaining to the health and safety of employees (s. 135(7)(e)) and inspecting all or part of the workplace each month (s. 135(7)(k)).

97 The role of joint health and safety committees such as the one at Canada Post is to recognize workplace hazards, evaluate the hazards and risks that may cause incidents, and participate in the development and implementation of programs to protect employees' safety and health. These committees are the main route through which workers participate in workplace health and safety, and provisions for joint committees are found in every provincial and federal labour law regime... [Citation omitted.] They give effect to the principle that workers who bear the risk of being injured, made ill or dying from unsafe and unhealthy work should have a say in the regulation of hazardous working conditions... [Citation omitted.] Moreover, empirical research shows that health and safety systems that include worker voices are "positively and consistently associated with lower injury rates, lower lost time accident rates, and lower injury reporting" ... [Citation omitted.] These committees not only enhance participation, they promote pragmatic effectiveness.

98 By delegating the safety inspection obligation to joint workplace committees, Parliament clearly contemplated a flexible inspection process sensitive to workplace-specific concerns and limitations. As the Canadian Union of Public Employees and the Professional Institute of the Public Service of Canada note in their intervener factum, joint health and safety committees "have a great deal of scope to find practical and workable solutions" to fulfill the inspection obligation. Section 135.1(14), for example, allows the committee to establish its own rules of procedures for its operation. I agree with both interveners that "it was the intent of parliament to leave decisions as to the conduct of investigations largely up to Joint Committees ... who being in the work places and trained in health and safety issues, are best placed" to fulfill these obligations.

99 As a result, these committees can tailor inspections to suit workplace needs and capacity. In this case, for example, the Joint Health and Safety Committee in Burlington suggested a number of different inspection options, the most extensive of which would have required 18 days for the Committee to inspect all of the letter-carrier routes in its jurisdiction. This is the type of flexible, localized approach that s. 125(1) contemplates. Just because inspections may be difficult does not mean that they do not have to be done at all, and just because hazards cannot be fixed entirely does not mean that nothing can be done to address them.

100 The Appeals Officer's reasoning process was "deeply flawed"... He acknowledged that safety inspections are meant to protect employees from workplace hazards, but failed to give this purpose, and the plain language of s. 125(1), any meaningful effect, let alone a "generous" interpretation... He assumed that Canada Post could do nothing to protect workers from safety hazards on mail routes without physically controlling the routes, despite extensive, unchallenged evidence to the contrary. He relied on concerns about impracticality that were specific to Canada Post, despite the broad application of s. 125(1) to all federally-regulated employers. He adopted an all-or-nothing approach to safety

inspections, despite the express guidance in s. 125(1) that employer safety obligations apply only to “the extent that the employer controls the [work] activity”.

101 By reading out the words and purposes of the safety inspection duty, the Appeals Officer came to an unreasonable conclusion that subverted not only the preventive purpose of the employer safety duties in s. 125(1), but of the specific goal in s. 125(1)(z.12) to ensure that inspections are carried out to make workplaces as safe as possible. On a proper reading of the applicable provisions, Canada Post contravened its statutory duty in s. 125(1)(z.12) by preventing the Joint Health and Safety Committee in Burlington from inspecting local mail routes for safety hazards.

102 I would dismiss the appeal with costs.

#### *Appeal allowed*

#### **Notes and Questions**

A comparison of the majority and dissenting judgements in *Canada Post* is instructive. The majority focuses its review on the Appeals Officer’s decision. Under this “reasons first” approach, it begins by looking at how the Appeals Officer arrived at his interpretation. The dissent begins not by seeking to understand the impugned decision on its own terms but by making sweeping and categorical statements about what it views as the only possible interpretation of the statutory provision at issue. The language it uses is striking:

- s. 125(1) is an *unambiguous* dual legislative direction to employers;
- On a *plain reading* of s. 125(1)(z.12), if Canada Post controls the activities of its letter carriers, it is bound by the inspection duty;
- [The dissent’s] interpretation is also *the only one* that is true to the purpose of s. 125(1) in general and the safety inspection provision in particular;
- Parliament *clearly* anticipated that not all employees work under the same physical conditions, or in workplaces their employers physically control;
- The inspection duty is an *obvious* fit within the protective purpose of s. 125(1).

In your view, when reasonable judges at both the Federal Court, Federal Court of Appeal and Supreme Court of Canada have disagreed about whether a specific interpretation of a statutory provision is reasonable, is this interpretation likely to be “clearly” or “obviously” “deeply flawed” and unreasonable?

After making the case for its interpretation of s. 125(1)(z.12), the dissent spends only two of its three final paragraphs directly addressing the Appeals Officer’s “deeply flawed” reasoning process. A reasonable interpretation is one that is defensible in light of any applicable factual and legal constraints. Can you recognize the majority’s “defences” to the “flaws” identified by the dissent? For example, while the dissent argues that only the broadest interpretation of s. 125(1) – one that would extend the inspection duty to workplaces not controlled by the employer – can achieve Parliament’s objective of preventing workplace accidents and injury to health, the Appeals Officer took a more limited view of the scope of s. 125(1). While acknowledging that

certain aspects of s. 125(1) could not be carried out in workplaces not controlled by the employer, he found that other provisions of the *Code*, including s. 124 (the general duty on employers “to ensure that the health and safety at work of every person employed by an employer is protected”) and s. 125(1)(z.03) (the employer’s duty to develop, implement and monitor, in consultation with the workplace committee, a program for the prevention of hazards in the workplace) would achieve Parliament’s overall objective. Is this view of the framework for protection set up by the *Code* defensible or is it deeply flawed?

The decision of the Federal Court in *Smith v Canada (Attorney General)*, 2020 FC 629 is another illustration of the reasonableness review of a decision maker’s interpretation of a statutory provision. This time, the reviewing court determined that the decision maker had failed to properly consider key elements of the interpretive context, including some of the words of the provision, the legislative history of the provision, the context in which the provision was found and a complete review of the evidence of Parliamentary intention. The decision maker in this case was a Judicial Conduct Review Panel (“Review Panel”) established by the Vice-Chair of the Canadian Judicial Council’s (CJC) Judicial Conduct Committee under the *Canadian Judicial Council Inquiries and Investigations Bylaws* 2015, SOR/2015-203 to decide whether an Inquiry Committee should be constituted under s. 63(3) of the *Judges Act*, RSC 1985, c J-1 to inquire as to whether the Honourable Justice Patrick Smith, a judge of the Ontario Superior Court, should be removed from office. The Review Panel was composed of three members of the CJC (drawn from amongst the chief justices and associate chief justices of provincial and territorial superior courts), a puisne judge and a layperson.

#### ***Smith v Canada (Attorney General), 2020 FC 629***

[In April 2018, Lakehead University, located in Thunder Bay, Ontario, wrote Justice Smith urgently requesting that he accept an appointment to the position of Interim Dean of its Bora Laskin Faculty of Law (the “Law School”), whose mandate was to focus on “Aboriginal and Indigenous Law, National Resources and Environmental Law and small firm and sole practice.” The Law School’s second permanent Dean, Angelique EagleWoman, had resigned earlier in 2018, alleging institutional racism. Before becoming a judge, Justice Smith had practiced law in Thunder Bay for 25 years. He also had significant expertise in Aboriginal and Indigenous law. Justice Smith informed the Honourable Heather Forster Smith, Chief Justice of Ontario’s Superior Court of Justice, of the request. Chief Justice Forster Smith wrote to the Federal Minister of Justice, the Honourable Jody Wilson-Raybould, expressing her support for Justice Smith to accept the Interim Dean role, and proposing to grant him a leave of absence of up to six months as authorized by s. 54 of the *Judges Act*, provided that his role was confined to “academic leadership” and that he not accept any remuneration from the University. Minister Wilson-Raybould replied that she had no concerns about granting Justice Smith the special leave proposed by the Chief Justice. Soon after Justice Smith’s appointment as Interim Dean, the Executive Director of the CJC wrote Justice Smith raising concerns that his appointment as Interim Dean may have breached s. 55 of the *Judges Act* (which prohibits

judges from engaging “in any occupation or business other than his or her judicial duties”) or the ethical duties of judges (notably, to avoid becoming involved in public controversy, given the circumstances leading to his appointment). The Executive Director referred the matter to the Honourable Robert Pidgeon, Senior Associate Chief Justice of the Québec Superior Court, in his capacity as Vice-Chairperson of the Judicial Conduct Committee of the CJC. After considering submissions from Justice Smith and Chief Justice Forster Smith, including a legal opinion provided by the Chief Justice arguing that Justice Smith’s appointment did not contravene s. 55 of the *Judges Act*, Pidgeon ACJ decided that the matter “might be serious enough” to warrant Justice Smith’s removal from his judicial office and referred the matter to the Review Panel. The Review Panel decided, in November 2018, that Justice Smith’s decision to accept the position of Interim Dean contravened s. 55 of the *Judges Act* which, in its view, required judges, subject to a limited number of exceptions, to confine themselves to their judicial role. Moreover, it found that he had breached an ethical obligation to avoid becoming involved in public controversy and had impermissibly used the prestige of judicial office to bolster the Law School. However, it found that as Justice Smith’s conduct involved no bad behaviour or improper motives, it was not serious enough to warrant removal from the bench. Accordingly, it decided against constituting an Inquiry Committee, a decision endorsed by Justice Pidgeon. Justice Smith sought judicial review of the decision of the Review Panel. This excerpt bears solely on the claim that the Review Panel’s decision was unreasonable.]

**Zinn J.:**

(...)

#### **IV. ANALYSIS**

##### ***I. Is the Review Panel Decision Reasonable?***

52 The Review Panel reached two conclusions concerning the conduct of Justice Smith. First, that Justice Smith breached section 55 of the *Judges Act*. Second, that Justice Smith breached his ethical obligation “to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office” and he and the Superior Court of Justice, in lending their support to the Law School, put their reputations at risk.

53 All parties agree, as does the Court, that the standard of review of the Review Panel decision is reasonableness, regardless of whether one is reviewing its interpretation of section 55 of the *Judges Act* or its finding that Justice Smith breached his ethical obligations.

[A detailed summary of the *Vavilov* approach to reasonableness review is omitted].

58 In *Vavilov*, like the present matter, the decision under review involved the decision-maker’s interpretation of a statutory provision. The Supreme Court at paragraphs 115 to 124 provides extensive guidance to a reviewing court when reviewing such decisions. The main principles therein on which I rely in reviewing the Review Panel’s interpretation of section 55 of the *Judges Act*, are the following:

1. The proper approach to interpreting a statutory provision, whether done by a court or an administrative decision maker, is the “modern principle” of statutory interpretation, that is, that the words of a statute must 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” (paragraphs 117 - 118);
2. “[T]he merits of an administrative decision maker’s interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.” ... “[T]he usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are ‘precise and unequivocal’, their ordinary meaning will usually play a more significant role in the interpretive exercise” (paragraph 120); and
3. “[E]ven though the task of a court conducting a reasonableness review is not to perform a *de novo* analysis or to determine the ‘correct’ interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue” (paragraph 124).

[Justice Zinn dismissed the CJC’s argument that it played a constitutional role in the discipline of judges and that this role demanded that a reviewing court defer to its assessment of judicial conduct.]

63 I also agree with the submissions of the Attorney General of Canada regarding deference. Although the concept of deference in judicial review continues to have a role, *Vavilov*, at paragraphs 30 and 31, makes it clear that the previous rationale for the proposition that deference is owed by a reviewing court to the decision-maker’s relative expertise, no longer holds true:

While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review.

...

We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis.

64 In summary, as the Supreme Court states at paragraph 58 of *Vavilov*, “the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review.”

65 The CJC also cites paragraph 49 of *Moreau-Bérubé* wherein the Supreme Court of Canada writes, “There is no basis upon which one could claim that a single judge sitting in judicial review of a decision of the Council would enjoy a legal or judicial advantage.” With respect, I may not enjoy a legal or judicial advantage to the Review Panel, but neither do I suffer any disadvantage. Indeed, one might ask what advantage the Review Panel has in this matter in light of the Attorney General and two judges’ associations, one of which represents superior court judges across Canada, expressing the view that the Review Panel’s decision is unreasonable. The point surely is that judicial review is not a quantitative analysis, but a qualitative one; one judge is as well placed as several when performing that task.

66 In any event, *Moreau-Bérubé* was decided before *Vavilov* and the Supreme Court of Canada’s “revised framework” for judicial review of administrative decisions. Thus, it must be read with some caution. The comment the CJC relies on is directed at the suggested expertise of the decision maker and that is no longer the separate consideration it once was.

(...)

#### *i. Section 55 of the Judges Act*

68 I turn first to consider whether the Review Panel’s interpretation of section 55 of the *Judges Act* is reasonable. Did it read the words of that section “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?”

69 In conducting this exercise it is important to recall that federal statutes are bilingual, in French and in English, and both are equally authoritative. The shared meaning principle stipulates that in cases of discrepancies between the English and French versions of a statute, the meaning common to both versions must be accepted, unless evidence of legislative intent indicates otherwise: *R. c. Bois*, 2004 SCC 6 (S.C.C.). If the meaning of one version is broader than the other, the narrower version should be adopted: *Sandoz Canada Inc. v. Canada (Attorney General)*, 2014 FC 501 (F.C.).

70 Section 55 was first enacted in 1905 as section 7 of *An Act to amend the Act respecting the Judges of Provincial Courts*, SC 1905, 4-5 Edward VII, c 31. The marginal note to section 7 is “Judges restricted to judicial duties / Les juges ne s’occuperont que de leurs fonctions judiciaires” and it reads as follows:

No judge mentioned in this Act shall, either directly or indirectly as director or manager of any corporation, company, or firm, or in any other manner whatever, for himself or for others, engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties.

Aucun juge mentionné en la présente loi ne se livrera, soit directement soit indirectement, en qualité de directeur ou gérant de corporation, de compagnie ou de maison d’affaires, ou en aucune manière, pour lui-même ou au compte d’autres personnes, à une occupation ou affaire autre que ses fonctions judiciaires; mais chacun de ces juges se consacrera exclusivement à ses fonctions judiciaires.

71 This provision is section 33 of the *Judges Act*, RSC 1906, c 138, headed “JUDGES NOT TO ENGAGE IN BUSINESS / LES JUGES NE PEUVANT SE LIVRER AUX AFFAIRES” and with a marginal note that reads “No judge to engage in business other than his judicial duties / Les juges doivent se consacrer exclusivement à leurs fonctions judiciaires”. It reads as follows:

No judge of the Supreme Court of Canada or the Exchequer Court of Canada or any superior or county court in Canada shall, either directly or indirectly as director or manager of any corporation, company, or firm, or in any other manner whatever, for himself or others, engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties.

Aucun juge de la cour Suprême du Canada, de la cour de l’Échiquier du Canada, non plus que d’une cour supérieure ni d’une cour de comté au Canada, ne peut se livrer ni directement ni indirectement, en qualité de directeur ou gérant de corporation, de compagnie ou de maison d’affaires, non plus qu’en aucune autre manière, pour lui-même ou au compte d’autres personnes, à une occupation ou affaire autre que ses fonctions judiciaires; mais chacun de ces juges est tenu de se consacrer exclusivement à ses fonctions judiciaires.

72 The heading of sections 55 to 56.1, as they currently read, is “EXTRA-JUDICIAL EMPLOYMENT / FONCTIONS EXTRAJUDICIALES” and the marginal note for section 55 is “Judicial duties exclusively/Incompatibilités”. Section 55 reads:

No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties

Les juges se consacrent à leurs fonctions judiciaires à l’exclusion de toute autre activité, qu’elle soit exercée directement ou indirectement, pour leur compte ou celui d’autrui.

73 The Review Panel at paragraphs 38 and 39 of its decision says of section 55:

Although its wording has been changed periodically, the section has always been comprised of two foundational components:

- (a) A prohibition on judges carrying on extra-judicial activities; and
- (b) A requirement that judges devote themselves exclusively to their judicial duties.

The prohibition, and the requirement are set forth in clear and explicit terms in the current version of section 55.

[emphasis added]

74 The noted prohibition component on “carrying out extra-judicial activities” is found in the first phrase of the English language version of the section — “No judge shall ... engage in any occupation or business other than his or her judicial duties...” However, the French language version reads differently. A more literal translation of the French version is that “Judges shall devote themselves to their judicial functions to the exclusion of any other

activity.” This does not appear to have the two components noted by the Review Panel. Rather, it is directed only to the second foundational component identified by the Review Panel — a requirement that judges devote themselves exclusively to their judicial duties.

75 I agree with the Review Panel that the “prohibition” it identifies is set out in clear and explicit terms in the English version. However, the Review Panel does not accurately capture that prohibition in its passage quoted above. The prohibition is not, as it writes, “on judges carrying on *extra-judicial activities*.” Rather, as the section explicitly states, it is on judges engaging “in any *occupation or business other than* his or her judicial duties.”

76 Although subsequently the Review Committee interprets the phrase “occupation or business” it does so in isolation from its context. The full phrase — “any occupation or business other than his or her judicial duties” — provides an important interpretative context. Properly read, it says that judicial duties are an occupation or business. They are therefore reliable examples of what is meant by the phrase “occupation or business” guiding the reader in how the phrase is to be interpreted. The same holds true if one looks to the French language phrase “à leurs fonctions judiciaires à l’exclusion de toute autre activité.”

77 The failure to include and examine this critical qualifier in its initial summary of the section leads me to wonder whether the Review Panel is engaging in “reverse engineering” to achieve a desired outcome rather than discerning the meaning and legislative intent of the section. The Supreme Court of Canada at paragraph 121 of *Vavilov* expressly warned against that manner of proceeding. In any event, in ignoring the context, the Review Panel’s reasoning fails to apply properly the modern principle of statutory construction.

78 When the Review Panel does turn its attention to the phrase “occupation or business” albeit standing alone, it concludes that it is to be broadly interpreted. It reaches that conclusion by looking at the French language equivalent — “activité” — and dictionary definitions of the English language word occupation:

The prohibition in the English version is expressed in terms of an “occupation or business”, whereas the French version uses the broader term “activité.” The English version by referring to “occupation or business” may imply that the prohibition is limited to some form of remunerative livelihood, but the French version, by using the broader term, is more explicit in prohibiting any activity other than judicial functions.

The broader interpretation of the word “occupation” to include non-remunerative pursuits and activities is consistent with various dictionary definitions of the word and with the French version of section 55. [emphasis added]

79 This reasoning exhibits neither justification nor intelligibility. It is problematic in several respects, including the failure to consider the entire phrase as previously discussed.

80 First, the Review Panel states that the “broader interpretation of the word ‘occupation’ to include non-remunerative pursuits and activities is consistent with various dictionary definitions of the word” but it does not point to any dictionary definition it relies

on. The record contains none, leading me to question whether any were before the Review Panel.

81 Second, while *one* use of the English word “occupation” might be said to include non-remunerative activity — such as in the statement “On Saturdays my occupation is chauffeur because every Saturday I drive my son to his football match” — others (and I suggest most) clearly reflect remunerated activities. In response to the question: “What is your occupation?” I daresay the response of four members of the Review Panel would be “Judge” — a paid occupation.

82 Third, the Review Panel only examines the word “occupation” and ignores the word “business” in section 55. In my view, the plain and clear import when it is said that one is engaging in business is that they are being remunerated.

83 The view of the Review Panel that section 55 is to be interpreted as prohibiting *any* activity (remunerated or not) other than judicial functions is not one shared by all. Indeed, as Pidgeon ACJ himself noted in his letter referring the matter to the Review Panel, in 2015, the Chief Justice of the Ontario Court of Appeal, the Honourable George Strathy, in response to a request from the Judicial Conduct Committee regarding the interpretation of sections 55 and 56 of the *Judges Act*, said:

The words “occupation and business” cannot be interpreted to apply to any activity. Otherwise they would prohibit such things as hobbies or personal activities. The words “occupation or business” certainly prohibit judges from engaging in any remunerative employment or business, but they cannot be interpreted to prohibit any unremunerated activity.

[emphasis added]

84 The Review Panel considers the legislative history of section 55 and, in reference to the opinion of Murray Segal, notes, “some of the remarks during the initial debates in the House of Commons in 1905, including those of Prime Minister Laurier, reflected a concern to restrict the commercial activities of judges.” In those debates, the Prime Minister, responding to a question of whether the provision would prevent judges from acting as arbitrators in a reference involving Canada and the Provinces, responded:

But what parliament intends and what we are all agreed to is that judges should not be allowed to participate in any kind of business which is of a commercial character; they should not be directors of insurance companies or banks or such. But as regards anything of a judicial character, I do not think any one has the intention of preventing the judges from acting.

[emphasis added]

85 A statement made by the Prime Minister at the time as to the intent of Parliament and its members ought to be accorded significant weight, if not considered conclusive on the issue of Parliamentary intent. However, in response to the Prime Minister’s statement, the Review Panel writes:

[O]ther members took a broader view. The Minister of Justice, Charles Fitzpatrick (later Chief Justice of Canada) commented that “The less a judge has to do with matters which are not clearly within the scope of his duties, the better for himself and the dignity of the bench.”

86 I agree with the submission of the Attorney General of Canada, that the Review Panel ignores the context in which that statement was made. In extracting a single sentence from its context, the Review Panel gives it a meaning it does not have.

87 The Minister of Justice had been asked by Mr. Foster whether the provision being debated would prevent judges from “going on commissions.” The context discloses that the Minister of Justice was not, as the Review Panel says, stating his preference that judges do *nothing* outside their judicial duties, rather his comment focuses on judges sitting on minor commissions, as the full report shows:

**Mr. FOSTER.** Will that [clause] prevent judges from going on commissions? We know that a good deal of discussion has arisen of late about judges being appointed to commissions at various times. Sometimes these are high matters of interest in which it might be desirable to appoint judges; but in other cases they are minor matters, and the judges are left open to a great deal of criticism and cross currents of opinion, which do not seem to add very much to the dignity of the bench or to the respect in which judges should be held throughout the country. In fact, when you take a judge from the bench and make him commissioner in a matter involving other than legal points, you rather take his robe of dignity from him. He becomes then more like an ordinary individual and becomes subject to criticism to which a judge ought not to be subject. He comes down, so to speak, into the general arena, and stands to get a good deal of dust upon his clothes. I would like to know how far this goes towards preventing judges taking up commissions of the smaller kind and which are outside their judicial functions, or international affairs. I quite agree that on an international commission it may be quite necessary to have judges; but the Minister of Justice will understand what I allude when I say that there are commissions and employments which, when participated in by judges, detract from the general respect to which the bench ought to be held.

**Mr. FITZPATRICK.** This amendment to the Act respecting judges will operate as a clear notice that judges are not to be employed in connection with commissions, except where it is important in the public interest that they should be so employed. I think the less a judge has to do with matters which are not clearly within the scope of his judicial duties, the better for himself and the dignity of the bench. Of that I am absolutely convinced. I would even go so far as to say that I entertain grave doubts as to the constitutionality of such appointments. That question arose in Parliament when it was decided by the British Parliament to refer matters arising out of contested elections to the courts. When the courts were first charged with the duties investigating such matters, Chief Justice Cockburn wrote a strong letter of protest from the constitutional standpoint. That protest was of no avail, but nevertheless it showed that there was considerable doubt as to the right of the judges to sit in such

matters. There are cases, however, where it is in the public interest that we should utilize the service of the judges outside the bench, but only in matters of urgent public necessity.

88 The Attorney General of Canada also references Bill 13 in 1906, which proposed further amendments to the section. It was introduced, but failed to receive Royal Assent. Importantly, and not referenced by the Review Panel, there was further discussion “providing additional insight into the intention of Parliament.” Specifically, there was reference to the ability of a judge to teach in a law school, notwithstanding the restrictions set out in the *Judges Act*. The same Minister of Justice, Mr. Fitzpatrick, was asked whether “the law of last year excludes also the teaching in universities.” The Minister responded that it did not prohibit teaching:

No. I would be disposed, myself, to think, and I was acting upon that supposition, that those who are engaged in the teaching of the law in connection with our universities would not come within the law of last session. I think that must fairly be considered as in line with the performance of their professional work and I expressed that opinion, I think, last session when the Act was passed. [emphasis added]

I will add that it is my experience that judges are not remunerated when asked to teach in law schools.

89 When considering the legislative history of section 55, the Review Panel does not address or consider the original wording of the provision. The English language version reads, “No judge … shall, either directly or indirectly as director or manager of any corporation, company, or firm, or in any other manner whatever … engage in any occupation or business other than his judicial duties ....” The French language version reads, “Aucun juge … ne peut se livrer ni directement ni indirectement, en qualité de directeur ou gérant de corporation, de compagnie ou de maison d’affaires, non plus qu’en aucune autre manière … à une occupation ou affaire autre que ses fonctions judiciaires.”

90 In neither language do these words support the conclusion of the Review Panel that the intent of Parliament was to restrict judges from performing non-remunerative engagements. To the contrary, they are focused on remunerative commercial engagements.

91 At paragraph 43 of its decision, the Review Panel asserts that the legislated exceptions to the general prohibition in section 55 reinforces the broader interpretation it has given to section 55:

Furthermore, the broader interpretation of the word “occupation” to include non-remunerative pursuits and activities is reinforced by the narrow and specific exceptions to the general prohibition in section 55.

92 It states that the narrow and specific exceptions are those set out in sections 56 and 56.1 of the *Judges Act*; namely, (1) a judge acting in a specific dispute resolution capacity when expressly authorized by an Act of Parliament or a Provincial Legislature, or the Governor in Council or lieutenant governor in council of a province, (2) a judge acting as an

arbitrator or assessor of compensation or damages under a public Act of Canada or a province, and (3) Madam Justice Arbour serving as Prosecutor of the United Nations International Tribunal.

93 The Review Panel provides no reason or explanation why these exceptions provide support for its “broader interpretation of the word ‘occupation’ to include ‘non-remunerative’ pursuits and activities.” Indeed, it is not obvious or evident how these exceptions support the view of the Review Panel. Its reasoning is unintelligible.

94 It is to be noted that none of these exceptions is stated to be on a non-remunerated basis. When a judge is appointed by Parliament or a Legislature to head a commission or act as an arbitrator, his or her judicial compensation under the *Judges Act* continues and pursuant to section 57, there is no additional remuneration. However, in my view, that does not mean that these exceptional duties are done on a non-remunerative basis. Rather, they are done for the judge’s regular remuneration. The remuneration received when performing these exceptional duties cannot be said to be remuneration for judicial duties, as the judge is not performing his judicial duties when acting as a commissioner or arbitrator. Even if it were otherwise, the exception regarding Justice Louise Arbour in section 56.1 expressly provides that she may elect to receive a leave of absence to accept the position offered by the United Nations without receiving her judge’s pay if she receives remuneration from the United Nations. In fact, the record shows that the United Nations insisted that she not be remunerated as a judge but that it pay her. In her circumstance, one of the exceptions the Review Panel relies on to support its interpretation, it is without doubt that the exception to judicial duties is remunerated. Accordingly, it cannot be said to support the interpretation given by the Review Panel.

95 For these reasons, I find that the analysis of the Review Panel, the manner in which it reaches its interpretation of section 55, is not in keeping with the modern principle of interpretation. The Review Panel, in its analysis, fails to read the words of the section “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.” Specifically, it ignores some words; it fails to properly consider the legislative history of the provision; it fails to properly consider the context in which the provision is found; and it fails to properly consider all of the evidence of Parliamentary intention. As such, the reasoning is flawed and leads to an unreasonable conclusion on interpretation.

96 The Review Panel concludes its interpretation of section 55 at paragraphs 46 to 48 of its decision, as follows:

In summary, section 55 of the *Judges Act* contains a prohibition on judges carrying on extra-judicial activities and a requirement that judges devote themselves exclusively to their judicial functions. In circumstances in which Parliament is of the view that there is a sufficiently important public goal to justify judges engaging in other activities, it has legislated specific, narrowly defined exceptions.

Accordingly, the Review Panel has concluded that:

- (a) Section 55 requires judges, subject to a limited number of narrow exceptions, to confine themselves to their judicial role, and
- (b) Subject to those exceptions, judges are prohibited from engaging in any other occupation, whether paid or unpaid.

The above-noted conclusions are consistent with the objectives of maintaining judicial independence and the preservation of the dignity and respect associated with the judicial office. Section 55 of the *Judges Act* is also intended to promote the efficient administration of justice and to uphold the dignity and integrity of the judiciary by restricting judges, except in very limited circumstances, to performing judicial functions. [emphasis added]

97 The Review Panel does not explain what it means by “any other occupation, whether paid or unpaid” but at paragraph 43 it describes its “broader” interpretation of the word “occupation” to include “non-remunerative *pursuits and activities*” [emphasis added].

98 Counsel for the CJC, in its memorandum, says that the interpretation the Review Panel gives to section 55 is that it is “to prohibit judges from devoting their ‘*productive time*’ to vocations other than judging, such that they will work as judges” [emphasis added]. In my view, counsel’s characterization does not reflect the interpretation given the section by the Review Panel. Nowhere in its decision does the Review Panel use the phrase “productive time” or the word “vocation.”

99 It is unclear what legal counsel means by “productive time.” Other than time when sleeping, it is arguable that all of one’s time is productive time. As I pointed out at the hearing, my experience is that judging is not a 9 am to 5 pm, 5 days a week job. Judges, like lawyers and many others, work days, nights, and weekends.

100 The Review Panel’s interpretation of “occupation” as including “non-remunerative *pursuits and activities*” gives it a much broader definition than the word “vocation.” “Pursuits and activities” includes most of what one does in daily life, including taking children and grandchildren to soccer and ballet classes, attending choir practice, going to the gym, quilting and knitting, etc. Again, as was pointed out to counsel at the hearing, the phrase “pursuits and activities” includes writing a mystery novel. Even if written at night and on weekends, as our former Chief Justice did, is that a nonjudicial activity done in a judge’s productive time? If so, did the former Chief Justice of Canada breach section 55 of the *Judges Act* in doing this prior to her retirement? Her activity certainly conflicts with the interpretation of section 55 given by the Review Panel.

101 This question and these examples illustrate the unreasonableness of the outcome of the Review Panel’s interpretation. Its interpretation restricts judges from all non-judicial activities or pursuits, other than the narrow exceptions in sections 56 and 56.1 of the Act.

102 For these reasons, I find the interpretation given by the Review Panel to section 55 of the *Judges Act* to be unreasonable.

[The application for judicial review was allowed and the Review Panel’s decision quashed.]

The Supreme Court in *Vavilov* observes that decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. Why do you think that this particular decision making context required it? Do you think that the Federal Court is holding the Review Panel to a higher standard, particularly in relation to the requirements of justification, transparency and intelligibility? If so, why might this be the case?

#### 4. Evidence before the decision-maker

The *Vavilov* majority reaffirmed, at paras 125-126, that reviewing courts should generally defer to first instance decision makers' factual findings in part because they have heard all the evidence and observed the witnesses, giving them an advantageous position relative to reviewing courts. An administrative decision maker "may assess and evaluate the evidence before it" and "absent exceptional circumstances, a reviewing court will not interfere with its factual findings" by, for example, reweighing and reassessing that evidence. However, a decision may be set aside as unreasonable where the decision maker has "fundamentally misapprehended or failed to account for the evidence before it". Such was the case in *Baker, supra*, where the immigration officer both relied on irrelevant stereotypes rather than considering relevant evidence regarding Baker's humanitarian and compassionate circumstances and made conclusions that were not based on the evidence actually before him.

*Sadiq v Canada (Citizenship and Immigration)*, 2020 FC 267 is another example of a decision held to be unreasonable because the decision maker failed to account for the evidence before it. Sadiq and her son, citizens of Nigeria, made a refugee claim based on threats from her husband's family and on her son's membership in a particular social group, namely, a person with autism. Sadiq's in-laws, believing that her son's disability was caused by evil forces and reflected poorly on their family, sought to pressure Sadiq to participate in a "traditional cleansing" through ritual killing. Her husband and a friend hid Sadiq and her son. In an affidavit, Sadiq's brother stated that her husband's family forced him to disclose her hiding location by holding and beating him until he shared the location. Sadiq and her son fled to the United States. Her husband informed her by phone that his family's elders continued to search for her and had enlisted the help of the police to question and detain the friend with whom she had hid. She claimed refugee status in Canada. The Refugee Protection Division (RPD) denied her claim based on credibility concerns. On appeal, the Refugee Appeal Division (RAD) allowed her son's appeal, granting him refugee status, but dismissed Sadiq's appeal. It found that there was no evidence she "was discriminated or persecuted by the paternal family or Nigerian Society" and that she had not provided "any evidence to establish any forward-facing fear of persecution in Nigeria based on her status as a parent" of her son. Accordingly, she had not established that she faced a serious possibility of persecution if returned to Nigeria. Justice Alan Diner of the Federal Court determined that this decision was unreasonable.

### III. Analysis

13 The parties agree that these issues raise no exception to the reasonableness presumption established by *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.) [Vavilov]. There, the Supreme Court clarified that decision makers are constrained by their factual and legal context (at para 90). Reasonableness review must therefore balance a respectful deference to specialized administrative decision makers such as RAD members with a robust review (at para 26). This review includes a requirement for responsive reasons, such that decision makers demonstrate that they have actually *listened* to the parties (emphasis in Vavilov at para 127).

#### A. The RAD overlooked evidence of forward-looking risk

14 The Applicant submits that the RAD erred by overlooking whether the evidence that her in-laws were persistent in their pursuit of her and her son, and were willing to harm others in this pursuit, constitutes a forward-looking risk for her. She submits that the affidavits from her friend, brother and husband provide the following three facts supporting a finding of future risk: (1) her in-laws were willing to beat and detain a person until they provided information about her and her son's whereabouts; (2) her in-laws were able to enlist police help to question and detain the friend who provided a hiding place; and (3) her in-laws continued to ask about her and her son's whereabouts.

15 The Respondent, on the other hand, maintains that the evidence does not indicate the Applicant will be at risk of harm, as she is not a person with any disability; one line from her husband's affidavit — that her family members continue to come looking for her and her son — does not meet the required threshold of evidence to establish risk.

16 I cannot agree with the Respondent's view. The RAD failed to refer to or acknowledge affidavit evidence that the Applicant's in-laws were willing to use force to detain others to find her son. Moreover, the RAD did not refer to her brother, who deposed in his Affidavit that he was detained and beaten by the Applicant's in-laws in their quest to locate her disabled son.

17 Contrary to the Respondent's submissions, the presumption that a decision maker has considered all the evidence is rebutted when the reasons ignore contradictory evidence relating to a central issue (*Iduozee v. Canada (Citizenship and Immigration)*, 2019 FC 38 (F.C.) at para 29). Clearly, the more important the evidence that is not specifically mentioned and analyzed in the tribunal's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence" (*Cepeda-Gutierrez v. Canada (Minister of Citizenship & Immigration)*, [1998] F.C.J. No. 1425 (Fed. T.D.) at para 17). In the circumstances, the three affidavits contained important evidence.

18 The Respondent submits that the evidence in the Applicant's brother's Affidavit that her in-laws beat him is untested and speculative. While that *could* have been one rationale for disbelieving it, or giving no weight to the evidence, the RAD did not provide any such justification. Rather, it provided no rationale on the point.

19 *Vavilov* is clear that the decision maker must provide reasons and not leave it to the Court to draw the lines between the evidence and the outcome, in that “close attention must be paid to a decision maker’s written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made” (at para 97). Failure to do so with important contradictory evidence was unreasonable.

The RAD’s decision in *Sadiq* was unreasonable because it failed to engage with or even mention evidence adduced by the applicant which directly spoke to the central issue – the existence of a forward-facing risk of persecution – and contradicted the RAD’s conclusion that she had not established a serious possibility of persecution. This was not a question of the reviewing court disagreeing with the RAD’s views on the quality of the evidence adduced by Sadiq and the weight that should be attributed to that evidence. The RAD had not dealt with Sadiq’s evidence on a central issue and had offered no justification for failing to do so.

In contrast to *Sadiq*, the Federal Court refused to interfere with a decision maker’s treatment of evidence in *Torrance v Canada (Attorney General)*, 2020 FC 634. Torrance, formerly a self-employed bicycle courier who had become a quadriplegic following an accident, had unsuccessfully applied for a Canada Pension Plan (CPP) disability pension. Torrance had been unable to establish that he had contributed to the CPP 4 out of the 6 years preceding his accident. Torrance had claimed that the denial of his pension was caused by administrative errors and erroneous advice from Employment and Social Development Canada (ESDC), the government department charged with administering the CPP, and had unsuccessfully litigated the matter before the Federal Court and Federal Court of Appeal. The Court of Appeal had determined that ESDC had properly concluded that it could not count 1998 as a contributory qualifying year because Torrance had failed to file his tax return within 4 years of the due date and was statute-barred under the *Canada Pension Plan Act*, RSC 1985, c C-8 to make retroactive CPP contributions on his self-employed earnings. In 2018, when he applied to ESDC for disabled contributor’s benefits for his children, Torrance once again alleged that he had received erroneous advice from ESDC and that there had been an administrative error made with respect to his application for a CPP disability pension. After conducting an investigation of his allegations, a Minister’s Delegate with ESDC issued a reconsideration decision that upheld the original decision to deny Torrance’s CPP application. She determined that ESDC had applied the correct legislation to determine Torrance’s eligibility for a pension, concluded that the issue of alleged administrative errors on his 1998 earnings was *res judicata* as the Federal Court of Appeal had found no errors, decided that no administrative error had in fact been made and finally, held that a “late applicant” provision in the *Act* only applied where there were sufficient years of valid contributions and could not help Torrance. Torrance sought judicial review of the redetermination decision, arguing, *inter alia*, that the Minister’s Delegate had not summarized and responded to information contained in a detailed letter he had sent ESDC. Justice Denis Gascon of the Federal Court dismissed the application for judicial review:

54 The Minister’s Delegate has a broad discretion when rendering decisions under the CPP Act and her decision is entitled to a high degree of deference from the Court given her specialized expertise. Here, the Minister’s Delegate has thoroughly reviewed the evidence before the CPP officials, including all submissions made by Mr. Torrance, and Mr. Torrance has not persuaded me that the conclusions of the Minister’s Delegate were not based on the evidence that was actually before her (*Vavilov* at para 126). This is not a situation where the decision maker has fundamentally misapprehended or failed to account for the evidence. I am instead satisfied that the Minister’s Delegate has meaningfully grappled with the key issues and central arguments raised by Mr. Torrance regarding his CPP Application and that she was alert and sensitive to the evidence. A judicial review is not a “line-by-line treasure hunt for error” and a reviewing court must instead approach the reasons and outcome of a tribunal’s decision as an “organic whole”... When the reasons are considered as a whole, it is clear that that the Minister’s Delegate engaged in a thorough and detailed assessment of the evidence before concluding to an absence of erroneous advice or administrative error in the treatment of Mr. Torrance’s CPP Application. There is no reason for the Court to intervene.

55 At the hearing, Mr. Torrance alleged with insistence that some elements of his August 9, 2018 Letter had been left unaddressed in the April 2019 Decision. He additionally asserted that the Minister’s Delegate performed her own evaluation, rather than reviewing the alleged erroneous advice and administrative errors by ESDC officials on his CPP Application. I have reviewed Mr. Torrance’s August 2108 Letter thoroughly and I am satisfied that the April 2019 Decision reasonably addressed all of the main allegations put forward by Mr. Torrance in these submissions.

56 In his 10-page-long August 2018 Letter, Mr. Torrance advanced the following erroneous advice and administrative errors: 1) an allegation of using the incorrect legislation and his claim that the legislation in effect in 1998 when he suffered his injury (namely, with the 4 out of 6 years rule) needed to be used in order to determine his contributory qualifying years; 2) an allegation of failing to consider the year 1998 containing self-employment earnings reported to CRA and the required CPP contributions paid; 3) an allegation of using the incorrect legislation (i.e. a MQP ending in December 1997) as opposed to the correct legislation that came into effect 1998; and 4) an allegation of not considering his earnings and contributions for the years 1997 and 1998.

57 Contrary to Mr. Torrance’s submissions, the April 2019 Decision confirmed that Mr. Torrance was ineligible for a CPP Disability Pension after considering and analyzing each of these four allegations. For the first and third allegations, the Minister’s Delegate expressly concluded that the correct legislation was used for the purposes of Mr. Torrance’s CPP Disability Pension. Regarding the second and fourth allegations, the Minister’s Delegate determined that both issues were already disposed of by final decisions of this Court and the FCA, in *Torrance 2008* and in *Torrance FCA*.

58 It is well recognized that decision makers are presumed to have weighed and considered all the evidence presented to them unless the contrary is shown (*Kanagendren v. Canada (Minister of Citizenship and Immigration)*, 2015 FCA 86 (F.C.A.) at para 36; *Florea*

v. Canada (Minister of Employment and Immigration), [1993] F.C.J. No. 598 (Fed. C.A.) at para 1). A failure to mention a particular piece of evidence does not mean that it was ignored (*N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 (S.C.C.) at para 16), and decision makers are not required to refer to each and every piece of evidence supporting their conclusions. It is only when an administrative decision maker is silent on evidence squarely contradicting its findings of fact that the Court may intervene and infer that the decision maker overlooked the contradictory evidence when making its decision (*Ozdemir v. Canada (Minister of Citizenship & Immigration)*, 2001 FCA 331 (Fed. C.A.) at paras 9-10; *Cepeda-Gutierrez v. Canada (Minister of Citizenship & Immigration)*, [1998] F.C.J. No. 1425 (Fed. T.D.), (1998), 157 F.T.R. 35 (Fed. T.D.) [*Cepeda-Gutierrez*] at para 17). The failure to consider specific evidence must be viewed in context and may be sufficient to a decision being overturned, but only when the non-mentioned evidence is critical and contradicts the decision maker's conclusion, and where the reviewing court determines that its omission means that the tribunal disregarded the material before it. This is not the case here, and Mr. Torrance has not pointed the Court to any evidence that would fit this exceptional situation.

Justice Gascon notes in *Torrance* that decision makers are presumed to have weighed and considered all the evidence presented to them. However, when dealing with evidence that is of central importance to a decision, boilerplate language attesting that the decision maker has carefully considered the evidence, without more, will not be sufficient and may lead a reviewing court to find the decision unreasonable. Such was the case in *Osun v Canada (Citizenship and Immigration)*, 2020 FC 295, which involved the judicial review of an immigration officer's decision to reject an application by Osun and her three young children, Nigerian citizens who had unsuccessfully sought refugee status in Canada, to remain in Canada on humanitarian and compassionate (H&C) grounds. A key factor in such decisions is a consideration of the best interests of any directly affected children. In the leading case of *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at paras 35 and 39, the Supreme Court directed that these best interests be well identified and defined and examined by immigration officers with a great deal of attention in light of all the evidence. In support of her H&C application, Osun had submitted a letter from a family therapist who noted that one of Osun's children was experiencing trauma symptoms by her fear of being deported to Nigeria, that the child required access to mental health services and that returning her to Nigeria would put her emotional, social and psychological well-being at risk. In reasons dismissing the application, the immigration officer had noted that s/he had given the letter "careful consideration," with no further comment. To Justice Alan Diner, writing at para 26, the officer's treatment of this important evidence rendered the decision unreasonable:

There was no assessment of the contents of this evidence, nor any mention of the letter's commentary on how removal may impact the child's mental health, a factor of hardship in itself. Considering the importance of this evidence — i.e. the one letter speaking to the child's mental health — I find the lack of any assessment, such as an explanation regarding why it was insufficient, renders the Decision unreasonable (*Vavilov* at para 98).

## 5. Submissions of the parties

Justification and transparency require that a decision maker's reasons "meaningfully account for the central issues and concerns raised by the parties". While recognizing, at para 128, that a decision maker cannot be expected to "respond to every argument or line of possible analysis" or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion", the majority stressed that a decision maker's failure to "meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it". "Responsive justification" or "responsive reasons" demonstrate that a decision maker has listened to the parties and confirm that the right to be heard guaranteed by the duty of procedural fairness has been respected.

In *Vavilov*, the applicant's lawyer had made detailed submissions arguing that s. 3(2) of the *Citizenship Act* should be interpreted in a manner that reflected the applicable principles of international law, including that children born to parents who enjoyed diplomatic immunity were not entitled to automatic citizenship by birth, and that their status in this respect was a narrow exception to the principle of *jus soli*. He had also submitted excerpts from the Parliamentary debate preceding the enactment of the *Citizenship Act* showing that the purpose of s. 3(2) was to align Canada's citizenship rules with these international law principles. The majority noted, at para 182, that the Registrar had not referred to the relevant international law, had failed to inquire into Parliament's purpose in enacting s. 3(2) and had not responded to Vavilov's submissions on the issue:

In the face of compelling submissions that the underlying rationale of s. 3(2) was to implement a narrow exception to a general rule in a manner that was consistent with established principles of international law, the analyst and the Registrar chose a different interpretation without offering any reasoned explanation for doing so.

*Mattar v The National Dental Examining Board of Canada*, 2020 ONSC 403 offers another example of a decision maker's failure to meaningfully account for the submissions of a party. Mattar, who was licensed to practice dentistry in Egypt and hoped to qualify as a dentist in Canada, took part in the National Dental Examining Board's (NDEB) Equivalency Assessment Process. She had three opportunities to pass the Assessment of Clinical Skills (ACS) component of this process but failed on all three attempts. For the ACS, candidates were required to carry out a "provisional crown restoration" on a "typodont," a working model of the teeth and gums. The ACS was governed by a comprehensive protocol which provided, *inter alia*, for invigilators to inspect each candidate's typodont for pre-existing damage before the exam. A day after failing her third ACS, Mattar submitted a Compassionate Appeal request. She related that she had been unable to complete the crown restoration in time because of a defective typodont (which had, according to her, a big cut in the gingiva) and that the invigilator had declined her numerous

requests for a replacement typodont despite granting similar requests from other students and had refused her request for a few extra minutes to finish her work. She stated that she had experienced a nervous breakdown on account of this unfair treatment which had “ruined [her] whole second day” of the ACS and affected her ability to complete it successfully. The Executive Committee of the NDEB denied her Compassionate Appeal and issued the following reasons:

The Committee reviewed the documentation provided including the Participant Communication Forms and invigilator notes. The participant claims there was a “big cut” on the gingiva which impacted his/her ability to complete the provisional crown requirement in the time allotted. The documentation from the Assessment shows that the Invigilators followed NDEB procedures by signing the ID card indicating the typodont was acceptable. The Participant Communication Form does not indicate a cut in the gingiva, but does mention that “the gingival was too under the gingiva”. Therefore, the Committee concluded that there were no conditions that disadvantaged the participant or prevented him/her from performing the provisional crown restoration requirement. The Committee also noted that there was evidence that the participant was disruptive during the Assessment and did not follow regulations regarding submitting the provisional crown restoration requirement.

Mattar sought judicial review of the decision before Ontario’s Divisional Court:

***Mattar v The National Dental Examining Board of Canada, 2020 ONSC 403 (Div. Ct.)***

Aitken J., Pattillo J., and Penny J.

**Aitken J.:**

(...)

**Reasonableness Review of Executive Committee Decision on the Compassionate Appeal**

(...)

45 As stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 47, reasonableness “is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process”, as well as “with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”. As emphasized in *Vavilov*, at para. 86, where reasons for a decision are required, it is not enough for the outcome of a decision to be *justifiable* — the decision must also be *justified* by way of those reasons to those impacted by the decision. And further at para. 98: “[w]here a decision maker’s rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.”

46 The Executive Committee is a committee of experts who must make use of their technical knowledge and skills, as well as other factors, when considering Compassionate Appeals. They are not lawyers or judges who are used to writing legal arguments, briefs, or judgments. This must be kept in mind when considering the adequacy of their reasons in the context of the task facing them.

47 That being said, the reasons provided by the Executive Committee respecting Mattar's Compassionate Appeal contain a gap that this court cannot fill through speculation as to what the Executive Committee might have been thinking when it made its decision or through the court adding its own justification for the outcome arrived at by the Executive Committee (see *Vavilov*, at para. 96). Although the written reasons of an administrative body do not have to meet a standard of perfection, they do have to convey to the affected party that his or her key submissions were considered and dealt with in an intelligible and transparent fashion. As stated in *Vavilov*, at para. 127:

The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

48 In her written submissions to the Executive Committee in support of her Compassionate Appeal, Mattar made three key submissions: (1) she had been provided with a defective typodont which the Invigilators refused to replace; (2) the Invigilators refused to give her a few extra minutes to complete the provisional crown restoration; and (3) as a result of the unfair treatment she received from the Invigilators, she suffered "a nervous breakdown". She was crying, she was totally shaken, and she was panicking until the end of the assessment. According to her, the situation with the Invigilators had ruined her whole second day.

49 In its reasons for denying Mattar's Compassionate Appeal, the Executive Committee explained, albeit very briefly, its reasoning process for concluding that there were no conditions relating to the typodont that disadvantaged Mattar and prevented her from performing the Provisional Crown Restoration requirement. As well, the Executive Committee advised that, on the basis of the documentation submitted by Mattar and the Invigilators, the Invigilators had conducted themselves in accordance with NDEB procedures. What the Executive Committee failed to do, however, was to make any reference to Mattar's mental or emotional state at the time based on her belief that she had been treated unfairly and to explain why the Executive Committee did not consider her evidence in that regard sufficient to warrant success on the Compassionate Appeal. For all Mattar knows, the Executive Committee failed to take her mental health issues into account when rendering its decision on the appeal.

50 It could be argued that, since the Executive Committee rejected Mattar's submission that there had been a problem with the typodont and found that the Invigilators had acted appropriately, it followed that the Executive Committee must have found that whatever stress and panic Mattar experienced following the Provisional Crown Restoration test did not arise from circumstances beyond her control. But this is not the only inference that could be drawn from the Executive Committee's reasons. It is possible that the Executive

Committee did not believe Mattar when she claimed to have suffered a sort of panic attack. It is possible that the Executive Committee concluded that Mattar was simply being disruptive after not getting the extra time she wanted to complete the task. It is also possible, however, that the Executive Committee did not turn their minds to Mattar's third submission at all. We simply do not know. Mattar was entitled to reasons which explained the basis upon which the Executive Committee declined the Compassionate Appeal due to Mattar's alleged mental or emotional state on the second day of the ACS.

51 The NDEB pointed to the closing line in the Executive Committee's reasons to the effect that there was evidence that Mattar was disruptive during the assessment and did not follow regulations regarding submitting the Provisional Crown Restoration requirement. The NDEB urged the court to infer from this statement that the Executive Committee must have taken into account Mattar's mental and emotional state following the problems she experienced with the typodont. It would be inappropriate for the court to guess at what the Executive Committee was trying to convey through this sentence in its reasons. The obligation was on the Executive Committee to make its reasoning process transparent and intelligible. It did not live up to that obligation.

52 The Compassionate Appeal decision is set aside and Mattar's Compassionate Appeal is remitted back to the Executive Committee for reconsideration with an expanded record to include all information and documentation relating to Mattar's medical issues (including that relating to migraines) provided by Mattar to the Appeals Panel as part of the record on the regular appeal.

[The application for judicial review was granted in part.]

In *Mattar*, the Executive Committee failed to address one of the appellant's three key submissions. What would happen if an appellant submitted a compassionate appeal with 20 individual submissions? Would the Executive Committee be bound to engage with each of these in its reasons denying the appeal or could it identify a smaller subset of key submissions and only address those? Could a reviewing court second-guess the Committee's judgement and fault it for failing to address, in its reasons, a submission or issue it had judged to be peripheral?

## 6. Past practices and past decisions

Unlike courts, administrative decision makers are not rigidly bound by their previous decisions. However, as the majority notes at para 131, a decision maker that departs from long-standing practices or established internal authority "bears the justificatory burden of explaining that departure in its reasons" failing which its decision will be unreasonable. As noted in the previous chapter, while the majority declined to recognize as a category of questions demanding correctness review questions of law on which there was persistent discord amongst the members of an administrative tribunal, it held, at para 132, that reviewing courts could manage the risk of arbitrariness posed by such discordance:

When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

These internal structures include access to past reasons and summaries of past reasons allowing decision makers to learn from each other's work, standards, policy directives or internal legal opinions to encourage uniformity and guide the work of frontline decision-makers, plenary meetings of a tribunal's members to foster coherence and avoid conflicting results as well as less formal methods, including training materials, checklists and templates to streamline and strengthen institutional best practices, so long as these do not result in a fettering of decision making.

In *Canada (Attorney General) v Honey Fashions Ltd.*, 2020 FCA 64, the first of the two illustrative case excerpts that follow, the Federal Court of Appeal decided that while the impugned administrative decision, examined in isolation, might have been a reasonable interpretation of the applicable statutory framework, the decision maker's failure to justify, in its reasons, its departure from its longstanding, contrary practice rendered the decision unreasonable. In *Labourers International Union of North America Local 183 v GDI Services (Canada) LP*, the second excerpted case, the Ontario Divisional Court upholds as reasonable an arbitrator's decision in the face of an ongoing internal disagreement on how to reconcile the operation of collective agreements with third parties' ability to ban workers from work sites.

#### ***Canada (Attorney General) v Honey Fashions Ltd., 2020 FCA 64***

Richard Boivin, Yves de Montigny, Mary J.L. Gleason JJ.A.

[Goods imported to Canada are subject to the *Customs Act*, RSC 1985, c 1 and other legislative measures by which duties and taxes are assessed. However, the Governor in Council may, by way of a remission order, remit all or a portion of the duties paid by an importer. In 1988, the Department of Finance introduced remission orders to help Canadian textile and apparel manufacturers. The Textile and Apparel Remission Order (TARO) Program allowed listed "eligible companies" to import certain goods (items of textile or apparel) and to have the duties they paid remitted back, up to a certain allocation, effectively allowing them to import goods duty-free. Some of these eligible companies did not import sufficient goods to realize their full remission allocation. They found ways to transfer a portion of their remission entitlement to non-eligible companies for a fee. Non-eligible companies would on occasion import goods and pay the required duties but arrange to be subsequently replaced as the "importer of record" by an eligible company who would file a "name change request" and claim remissions. In 2010, the Canadian Border Services Agency (CBSA) undertook a comprehensive Quality Assurance Review (QAR) of the TARO Program and suspended the processing of all remission claims. In 2012, it issued Memorandum D8-11-7, setting out new terms and conditions to govern the administration of the TARO Program. In particular, it set

out new requirements (listed in Memorandum D17-2-3) governing how “name change requests” could be obtained, requiring proof that a name change be the result of an error and supported by extensive documentation. In 2014, the CBSA enacted the TARO 2014 Program to govern the administration of the TARO Program from 2008 to 2012 and ensure that eligible companies received their full entitlement to remission up to 2012. Honey Fashions, an eligible company, filed claims for remission (totaling over \$ 3 million) related to goods imported by non-eligible companies between 2009 in 2011 and accompanied these with a name change request making Honey Fashions the importer of record. A senior official of the CBSA denied two of these claims on the basis that the documents provided “do not clearly establish that the name change is the result of an error of the importer or the [CBSA] or that the terms of Memorandum D17-2-3 have been met.” Honey Fashions sought judicial review of the decision, arguing, *inter alia*, that it was arbitrary and unreasonable because CBSA had consistently, prior to 2010, allowed it to claim remissions by filing a name change with the agreement of the initial importer. Its application was allowed at the Federal Court by the applications judge. CBSA appealed to the Federal Court of Appeal.]

***Yves de Montigny J.A.:***

(...)

32 In the case at bar, the appellant claims that the CBSA’s decisions comply with the rationale and purview of the statutory scheme under which the decisions were made, namely section 7.1 of the *Customs Act* and the TAROs. For situations like this, the D8-11-7 Memorandum directs parties to file name change requests “in accordance with instructions set out in CBSA Memorandum D17-2-3”. In each of the remission claims at issue, Honey Fashions provided accounting documentation that identified another company as importer of the qualifying goods. The drawback claims included letters noting the CBSA’s memorandum on importer name changes, and indicating that “incorrect party has been named as importer of record” ...

33 The D17-2-3 Memorandum is very clear on what documentation is required in support of a name change application (see paragraph 14, above). A pre-importation partnering agreement would have been acceptable substantiating evidence, as well as any documents clearly establishing that the claimant was the true importer. Honey Fashions did not provide the necessary documentation; instead, it tried to rely on a declaration that it was assuming the obligations of importer of record with the consent of the original importer (Appeal Book, vol. 1, pp. 300, 387).

34 I agree with the appellant that for the CBSA to comply with the *Customs Act*, it had to ensure that the person who causes the goods to be exported to Canada was truly the importer before it could approve retroactively an importer name change request. This is consistent with section 7.1 of the *Customs Act*, which requires that all information provided to the CBSA shall be true, accurate and complete, and with the plain and ordinary meaning of “importer”. There is certainly an argument to be made that if the CBSA is precluded from excluding post-importation involvement and is forced to accept name change requests on the basis of a partnering agreement entered into after the goods are effectively imported

to Canada, it would be constrained from performing its regulatory functions of verification and would be acting contrary to section 7.1 of the *Customs Act*.

35 If the reasonableness of the decisions under review were to be assessed on the sole basis of their conformity with the overall legislative scheme pursuant to which they were made, they might pass muster. The decisions of the CBSA are arguably consistent with the *Customs Act* and the applicable TAROs. To that extent, they may be considered reasonable in the abstract.

36 The respondent claims, however, that the impugned decisions of the CBSA are at odds with past practices and past decisions. Relying on testimonial and documentary evidence, Honey Fashions argued that there was a consistent and longstanding departmental practice of accepting post-importation name changes on the basis of post-partnering agreements. The Applications Judge accepted that evidence in the following terms:

[47] The uncontradicted evidence before the Court is that Honey Fashions has participated in the TARO Program since its inception, that it was not a major importer of apparel but took full advantage of its entitlements under the program by becoming the importer of record of goods previously imported by others. It did so by filing a name change with the CBSA to record it as the importer of record, with the agreement of the initial importer. This procedure was accepted and arguably endorsed by the CBSA. Until the decisions under review were made “CBSA officials consistently accepted the name change notification to change the importer of record, and processed Honey Fashions’ remission applications on the basis that Honey Fashion was the importer of record.” The change in the procedure for changing the importer of record had dramatic consequences to Honey Fashions.

37 In its initial submissions, the appellant stressed that the doctrine of *stare decisis* does not apply to administrative decision makers, and that they are not required to explain the differences between two separate decisions. Following the release of *Vavilov*, counsel recognized that departures from longstanding practices or established internal authority must now be explained, but argued that there was no such departure in the case at bar. In a somewhat specious argument, counsel contends that the CBSA’s practice has not changed in the context of a claim for remission of customs duties because its decision to accept the name change in the past is not a practice but a substantive outcome. To quote from their written submissions (at paragraph 6 of their January 31, 2020 letter), “[e]ssentially, Honey Fashions conflates *their* alleged long-standing practice of submitting post-importation name change requests without substantiating evidence, with the CBSA’s past *decisions* to accept *their* request without substantiating evidence”. In my view, this is a distinction without a difference and, as such, an argument without merit.

38 First of all, I note that the Supreme Court uses “past practices” and “past decisions” interchangeably in *Vavilov*, and is more concerned with the need for coherence and justification than with semantics. What matters is that like cases be treated alike and that outcomes shall not be dependant on the identity of the individual decision maker (at para. 130). In that spirit, it matters not whether a course of action is labelled as “past practices”

or “past decisions”. Of course, I agree with the appellant that the CBSA must always be able to exercise its discretion to determine how and when verification for compliance is conducted, and to consider importer name change requests in the context of its evaluation of remission of customs duty claims under TARO. However, if the evidence establishes that the CBSA has consistently allowed importer name change requests for remission of customs duties without requiring substantiating evidence showing pre-importation partnering agreements, these past decisions amount to past practices (both for Honey Fashions and the CBSA).

39 As previously mentioned at paragraph 18 of these reasons, both the 2011 and 2012 claims were rejected without any explanation or justification as to why those claims ought to be treated differently from earlier ones. This is particularly egregious considering that the 2009 claim had been accepted on the basis of the same information given by Honey Fashions (although admittedly on the basis of the pre-QAR policies and before CBSA issued the D8-11-7 Memorandum). Once again, this is not to say that the CBSA was bound to follow the same course of action it had followed in the past. CBSA was indeed entitled to modify its policy in order to comply with the *Customs Act*, provided that in so doing, its interpretation is reasonable. However, in the circumstances of this case, the CBSA should have provided an explanation to Honey Fashions with respect to its departure from past practice. As the Supreme Court stated in *Vavilov* (at para. 131):

We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

40 I am therefore of the view that the decisions of the CBSA were not reasonable in light of this important contextual consideration in the present case. It was not sufficient to claim, *ex post facto*, that the decisions made by the CBSA official complied with the rationale and purview of the statutory scheme under which they were made. In light of the impact of the decisions on the respondent, CBSA had to provide it with an explanation as to why the past practice was not followed and, presumably, why a post-importation partnering agreement would be contrary to section 7.1 of the *Customs Act* and would undermine the customs scheme when such agreements had been accepted without question in the past. Accordingly, on the basis of the recent teachings of the Supreme Court in *Vavilov*, it was open to the Federal Court to hone in on the fact that the CBSA official made no reference to his earlier decision or to the longstanding departmental practice of accepting name change requests without certain supporting documentation. I therefore agree with the Federal Court’s conclusion that the CBSA’s decisions lack justification, transparency and intelligibility.

(...)

46 In light of all the foregoing, I am of the view that the Federal Court did not err in finding that the decision by the CBSA not to accept the name change requests was

unreasonable. If anything, that conclusion is bolstered by the recent decision of the Supreme Court in *Vavilov*, with its insistence on the need for a reasonable decision to be justified in light of the legal and factual constraints that bear on that decision. A decision maker cannot deviate from earlier decisions or from a longstanding past practice, especially when it is too late for those affected by these decisions to adjust their behaviour accordingly, without providing a reasonable explanation for that departure.

[The appeal was dismissed and Honey Fashions' remission claims were returned to the CBSA for redetermination.]

One might be forgiven for wondering what Honey Fashions gained from its successful application for judicial review. The remissions claims were returned to the CBSA for a redetermination. It would be open to the CBSA to deny the claims once again. However, before making a decision, it would have to provide Honey Fashions with an opportunity to argue that allowing post-importation name change requests to enable eligible companies to claim remission for goods previously imported by others is not contrary to the *Customs Act*. If the CBSA then denied the claims, it would have to provide reasons justifying why it believes that this practice now undermines the customs regime – even though it did not object to the practice when it audited Honey Fashions or flag it as an unacceptable or illegitimate practice during its Quality Assurance Review. While the ultimate outcome might not change, a reasoned decision justifying that outcome would address perceptions of arbitrariness and unfair treatment experienced by Honey Fashions the first time around.

***Labourers International Union of North America Local 183 v GDI Services (Canada) LP,  
2020 ONSC 1018***

Leitch, Sachs, Myers JJ.

[The Labourers International Union of North America Local 183 (the Union) had exclusive bargaining rights for the employer's employees who provided cleaning and maintenance services at the Toronto-Dominion Centre, a major office tower complex in Toronto. Cadillac Fairview, the owner of the TD Centre, had hired GDI to provide cleaning services pursuant to a written agreement that, *inter alia*, required GDI to "promptly replace any personnel whose performance or conduct [Cadillac Fairview], in its sole opinion, regards as unsatisfactory." In 2016, Cadillac Fairview directed GDI to remove its employee, Teresa Da Cruz, from the TD Centre because of an incident that Cadillac Fairview characterized as "unacceptable behaviour". GDI suspended her with pay. Several weeks later, GDI informed her that Cadillac Fairview had revoked her access to TD Centre on an indefinite basis and that GDI could therefore not permit her to work at the TD Centre. Because the "workplace," for purposes of the collective agreement, was limited to the TD Centre, GDI had no other work available for Da Cruz and placed her on indefinite layoff. GDI never sought to establish that it had cause to discipline Da Cruz or just cause to terminate her employment, nor did it justify its decision to sever her employment based on the "just cause" standard in the collective agreement. Instead, it accepted Cadillac Fairview's right as the building owner and under its contract with

GDI to bar people from the TD Centre. GDI did unsuccessfully ask Cadillac Fairview to reconsider its position and lift the site ban. The Union grieved GDR's decision to suspend Da Cruz and to lay her off, claiming that she had been unjustly terminated contrary to the collective agreement and deprived of her collective agreement right not to be terminated without just cause. GDR asserted that, given its contract with Cadillac Fairview and that company's site ban, it had laid off Da Cruz for lack of work. At the arbitration, GDR and the Union each relied on one of two competing lines of arbitral jurisprudence on the issue of whether employers ought to be held to the just cause provisions of a collective agreement regardless of a site ban by a third party. GDR relied on a line of cases that held that, absent some kind of negotiated relief in the collective agreement itself, an employer was entitled to lay off employees banned from a third party site when there was no other work for them. The Union relied on a line of cases that provided that if misconduct by an employee suspended at the behest of a third party was not established at arbitration, the arbitrator should treat the discipline as unjustified and compensate the employee for lost wages and benefits. The arbitrator distinguished the cases relied upon by the Union, holding that:

A just cause provision is not a guarantee that the availability of bargaining unit work to employees, or to a particular employee, will not be adversely affected by customer choices or other circumstances that are beyond the control of the employer.

He found that GDR had not disciplined Da Cruz under the collective agreement but had correctly regarded her as being laid off. The arbitrator found no breach of the collective agreement and dismissed the grievances. The Union sought judicial review in Ontario's Divisional Court.]

***Per curiam:***

(…)

56 The Arbitrator's decision is internally coherent with a rational chain of analysis that is justified in relation to the facts and law. He interpreted the collective agreement to recognize management's right to lay-off an employee who is the subject of a third-party site ban under a single site collective bargaining agreement. Article 13 of the collective bargaining agreement deals with seniority and bumping rights when there are layoffs, but it does not itself qualify or supersede management's right to lay-off as expressed in the management rights clause. The Arbitrator's decision was consistent with a well-established line of labour jurisprudence on the issue.

(…)

59 Whether we agree with every distinction drawn by the Arbitrator for every precedent case that he cited is not germane. The Arbitrator gave transparent and intelligible reasons for following the line of cases that he followed and for interpreting the collective agreement as he did. While one could spend many pages parsing each of the relevant precedents, we see no need to do so. None was binding upon the Arbitrator as he noted.

Moreover, this is not an area where a statute or the facts dictate a single result. There are two strands of case law.

60 At para. 132 of *Vavilov*, the Supreme Court of Canada dealt with the question of what a reviewing court should do where there are competing strands of case law:

[132] As discussed above, it has been argued that correctness review would be required where there is “persistent discord” on questions of law in an administrative body’s decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body’s decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

61 In this case, there is no single administrative tribunal whose members disagree on the applicable law regarding third party site bans. Rather, various arbitrators have decided the cases before them based on different considerations. The issue of whether actions taken by an employer are disciplinary depends on individual circumstances. As noted in the *Waste Management* decision quoted earlier in these reasons, the issue of third-party site bans is susceptible to negotiation among unions and employers. Individual collective agreements may treat the issue quite differently depending on the needs and wishes of each pairing of union and employer.

62 That being said, there is clearly disagreement on the question of whether taking away the job of an employee such as Ms. Da Cruz because of a third party site ban can be considered a “layoff” or should be treated as a “termination”, requiring that it be justified under the “just cause” provisions of the agreement. Doing the former, as was done in this case, has the effect of depriving a vulnerable employee of her employment and of doing so in a manner that gives her no opportunity to defend herself against the accusations that led to that deprivation or to engage the protection of the bargained for “just cause” provisions. Doing the latter requires the employer to continue to employ an employee when, through the actions of a party it cannot control, it has no work for that employee. The interests at stake on both sides are compelling and it is not surprising that the case law reflects disagreement on how those interests should be resolved. As a court reviewing the decision of an expert decision maker it is not our role to resolve the dispute, as yet. However, it is appropriate for us to signal that the dispute exists and that it would be helpful if an attempt could be made to achieve consistency on the matter.

63 In conclusion, the decision of the Arbitrator on uncontested facts was reasonable. Therefore, the application is dismissed.

The persistently discordant treatment of the question of how to reconcile collective agreement just cause protection with third party site bans does not exist within a single

administrative body, which could eventually use internal administrative structures to resolve the disagreement. Rather, it resides amongst hundreds of arbitrators who independently resolve grievances across the country. As noted by the Federal Court of Appeal in *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at para 54 with regards to the debate amongst unjust dismissal adjudicators appointed under the *Canada Labour Code* about whether dismissals without cause were automatically unjust:

...[B]ecause no one adjudicator binds another and because adjudicators operate independently and not within an institutional umbrella such as a tribunal, there is no prospect that the discord will be eliminated. There is every expectation that adjudicators, acting individually, will continue to disagree on this point, perhaps forever.

What, practically speaking, is the impact of the Divisional Court “signalling” that a dispute exists and inviting arbitrators to seek consensus? *Vavilov*’s requirement that decision makers who propose to depart from a conflicting line of authorities justify this departure will require arbitrators to engage with these conflicting authorities in their reasons, possibly sparking a dialogue between arbitrators that may promote consensus. Moreover, the existence of numerous court decisions signalling discord on an issue may attract attention from legislators and encourage legislative reform or, at the very least, prompt employers and unions to expressly address the issue in collective bargaining.

#### Note

In *Service d’administration PCR Ltée v Reyes*, [2020 FC 659](#) at paras 19-37, the Federal Court proposed a framework to assess the extent to which administrative decision-makers are expected to follow individual precedents or principles established in judicial or administrative authorities and applied it to assess the reasonableness of an arbitral award in which the arbitrator determined that the doctrine of the culminating incident did not help to justify the employee’s dismissal because the incidents preceding the dismissal were not similar enough to the “culminating incident.” The Alberta Court of Appeal is also of the view that the principle that unjustified departures from established authorities may render a decision unreasonable does not apply with equal vigour to *ad hoc* arbitrators: *Alberta Union of Provincial Employees v Alberta*, [2020 ABCA 284](#) at paras 13, 46-52.

#### 7. Impact of the decision on the affected individual

As illustrated in Part II of this text through the cases of Mavis Baker and Jean Webb, the greater a decision’s impact on affected individuals, the more significant the protections required by procedural fairness. A decision’s impact also affects the requirement of justification in reasonableness review. As the majority observes, at para 135:

Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to

that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

Accordingly, the majority states at para 133, “where the impact of a decision on an individual’s rights and interests are severe, the reasons provided to that individual must reflect the stakes” and the decision maker must explain “why its decision best reflects the legislature’s intention”. In such circumstances, concerns regarding arbitrariness “will be more acute” and a decision maker’s failure to grapple with the particularly severe or harsh consequences of the decision for the affected party may be unreasonable.

One area of administrative decision making to which this factual constraint is clearly relevant is the state’s control of migration and citizenship and, in particular, refugee protection. Refugee claimants’ claims of a well-founded fear of persecution if they are returned to their country of origin engage their security of the person interest and a negative decision on a protection claim by a pre-removal risk assessment officer or by the Immigration and Refugee Board can have severe consequences for the claimant, a point made quite forcefully in the following decision.

***Khan v Canada (Citizenship and Immigration), 2020 FC 438***

[Khan, a citizen of Pakistan, sought refugee protection on the basis of his fear of persecution by the Taliban and persecution for his membership in a political party opposed to the Taliban. Khan had borrowed money from a neighbour to pay for his brother’s medical treatment. When Khan failed to repay the loan, his neighbour told him he had to enlist with the Taliban because the money he had borrowed came from them. Khan alleged that he was threatened with death and forced into hiding. He fled to the United States and then Canada in 2015. In 2016, his father was abducted, beaten and tortured by the Taliban, who wanted to know Khan’s whereabouts. Khan’s son was later attacked, his father murdered and his mother wounded. Both the Refugee Protection Division and the Refugee Appeal Division rejected Khan’s claim, finding that his fear of persecution and allegations were not credible and that he had a viable internal flight alternative to Lahore, Pakistan. Khan sought judicial review of the RAD’s decision. One of his grounds of review was that the RAD had unreasonably refused to consider new evidence brought forward by Khan after the dismissal of his claim by the RPD.]

**Denis Gascon J.:**

(...)

***B. The RAD Decision***

(...)

11 In its June 2019 Decision, the RAD first considered the new evidence that Mr. Khan wished to adduce on appeal. In that regard, Mr. Khan had submitted: (1) an affidavit by him; (2) photos of his injured son; (3) hospital documents; (4) an attestation from a lawyer; (5) a certificate from a police station; (6) a death certificate explanation; and (7)

information from a law society. The RAD found the photos and the medical evidence to be irrelevant as there was no link between the evidence, the agent of persecution (i.e., the Taliban) and the events described in the RPD decision. The RAD also found that the photos were not substantiated beyond Mr. Khan's speculation, and that the medical documents were illegible. The RAD further considered that the death certificate explanation was suspicious and not credible because of a spelling mistake.

12 The RAD concluded that the new evidence was not admissible as it did not meet the requirements of subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and the relevance, newness and credibility factors set out in *Raza v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 385 (F.C.A.) [Raza].

13 Mr. Khan had also submitted additional evidence which he claimed was not reasonably available prior to the date of perfection of his appeal. These included: (1) an affidavit by him; (2) an email indicating an interpreter read his affidavit prior to his signing; (3) a photo of his deceased father; (4) his father's death certificate; (5) a proof of his mother's injuries; and (6) medical exhibits. In considering the admissibility of that evidence, the RAD determined that the additional evidence was not probative or relevant to the appeal, and therefore refused to accept it. As such, the RAD concluded that there was no need to consider, and consequently convene, an oral hearing.

(...)

### **C. The standard of review**

21 It is not disputed that the RAD's credibility findings and its treatment of the evidence before it are reviewable on a standard of reasonableness...

(...)

24 **Vavilov**'s revised framework for reasonableness requires the reviewing court to take a "reasons first" approach to judicial review (*Canada Post* at para 26). Where a decision maker has provided reasons, the reviewing court must begin its inquiry into the reasonableness of the decision "by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (**Vavilov** at para 84). The reasons must be read holistically and contextually in light of the record as a whole and with due sensitivity to the administrative setting in which they were given (**Vavilov** at paras 91-94, 97). However, "it is not enough for the outcome of a decision to be *justifiable* [...] the decision must also be *justified*" (**Vavilov** at para 86).

25 Before a decision can be set aside on the basis that it is unreasonable, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (**Vavilov** at para 100). An assessment of the reasonableness of a decision must be robust, but it must remain sensitive to and respectful of the administrative decision-maker (**Vavilov** at paras 12-13). Reasonableness review is an approach meant to ensure that the reviewing court only intervenes in administrative matters "where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the

administrative process” (**Vavilov** at para 13). It is anchored in the principle of judicial restraint and in a respect for the distinct role and specialized knowledge of administrative decision makers (**Vavilov** at paras 13, 75, 93). In other words, the approach to be followed by the reviewing court is still one of deference, especially with respect to findings of facts and the weighing of evidence. Absent exceptional circumstances, such as when the decision maker has “fundamentally misapprehended or failed to account for the evidence before it”, the reviewing court will not interfere with an administrative decision maker’s factual findings (**Vavilov** at paras 125-126).

### III. Analysis

26 As part of his arguments challenging the RAD’s Decision, Mr. Khan submits that the RAD unreasonably rejected various pieces of new evidence he had submitted, because they were not relevant and did not establish specific links to the events he had recounted. This new evidence found to be irrelevant included photographs of his son after the attack, hospital records and communication from his brother, his father’s death certificate, medical evidence, as well as photos corroborating incidents affecting family members. Mr. Khan argues that this refusal to admit his new evidence resulted in a complete failure by the RAD to consider the risks he faced. According to Mr. Khan, the RAD’s Decision is unreasonable as the test for the admissibility of new evidence based on relevance is whether the evidence is capable of proving any fact that is relevant to his claim for protection.

27 I agree with Mr. Khan and find that the RAD’s treatment of his new evidence was unreasonable.

28 To accept the new evidence provided by Mr. Khan, the RAD had to determine whether it was admissible under subsection 110(4) of the IRPA and the case law that has interpreted this provision. I do not dispute that an appeal before the RAD is not a second chance to submit evidence answering weaknesses identified by the RPD... I also acknowledge that the role of the Court is not to revisit the question of whether the new evidence should have been accepted, but to determine whether the RAD’s finding that the new evidence did not meet the well-recognized *Raza* criteria is reasonable... However, I am of the view that, in this case, the RAD misconceived the requirements set out in subsection 110(4) of the IRPA and unreasonably interpreted and applied the extended *Raza* factors in regard to relevance and credibility. This is sufficient to justify the Court’s intervention and to return the matter to the RAD for redetermination.

29 For new evidence to be admissible on appeal before the RAD, it must first fall into one of the three categories described in subsection 110(4) of the IRPA and contain (i) evidence that arose after the rejection of the refugee claim; (ii) evidence that was not reasonably available at the time of the rejection; or (iii) evidence that was reasonably available but that the person could not reasonably have been expected in the circumstances to have presented at the time of the rejection (*Singh* at para 34). Only new evidence that falls into

any of these three categories is admissible (*Singh* at para 35). Given the use of the word “or” in subsection 110(4), the test is disjunctive, not conjunctive...

30 In addition, in *Singh*, the Federal Court of Appeal determined that the admissibility criteria for new pre-removal risk assessment evidence are also applicable to the admissibility of new evidence under subsection 110(4) of the IRPA (*Singh* at paras 49, 64). These admissibility criteria were developed by the Federal Court of Appeal in *Raza*, and include the following elements: credibility, relevance, newness, materiality and express statutory conditions. Paragraph 13 of *Raza* summarizes them as follows:

[...]

1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.
2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.
3. Newness: Is the evidence new in the sense that it is capable of:
  - (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
  - (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
  - (c) contradicting a finding of fact by the RPD (including a credibility finding)?If not, the evidence need not be considered.
4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.
5. Express statutory conditions:
  - (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.
  - (b) If the evidence is capable of proving only an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

31 These criteria from *Raza* do not replace the three conditions mentioned in subsection 110(4) of the IRPA but add to them, since they are necessarily implied from the purpose of the provision. Thus, in deciding whether new evidence is admissible, the RAD must determine whether the criteria of credibility, relevance, newness and materiality set out in

*Raza* are met (*Singh* at para 49). However, the criteria set out in *Raza* require some adaptations when applied to subsection 110(4): for example, the materiality test is less rigid since the RAD has a broader mandate and can accept new evidence that, while not determinative, has an impact on the overall assessment of the claim (*Singh* at para 47).

32 The issue is therefore whether, in light of this case law, it was reasonable for the RAD to conclude that the new evidence submitted by Mr. Khan was not admissible. I am not persuaded that it was. True, the Decision analyzed the various documents submitted by Mr. Khan, and concluded that they did not meet some of the admissibility criteria of relevance, credibility and/or newness. These are determinations that demand deference from the reviewing court but, in the circumstances of this case, I am not persuaded that the RAD's conclusion to refuse to admit this new evidence is a rational and logical analysis in respect of the facts and law.

33 As set out in *Raza*, the test regarding the relevance of new evidence is whether the evidence is “capable of proving or disproving a fact that is relevant to the claim for protection”. In this case, the RAD's reasons do not explain or justify how the proposed new evidence regarding Mr. Khan's father's shooting death or the brutal attack on his son that lead to the amputation of his hand — in a region where the Taliban are known to be perpetrators of such acts — can be found not to be relevant to Mr. Khan's claim for protection.

34 These documents were related to allegations that constituted central elements of Mr. Khan's refugee claim, and I fail to see how they could be reasonably rejected by the RAD for lack of relevance. The RAD's reasons solely focus on the alleged absence of link between the new evidence (such as the photos or the medical documents) and the Taliban or the events described by Mr. Khan, but they do not explain or justify how the new evidence would be incapable of proving or disproving Mr. Khan's alleged fear of persecution from the Taliban. This, in my view, constitutes an error significant enough to set aside the Decision as allowing this new evidence could have had a material impact on the RAD's ultimate findings. In *Singh*, the Federal Court of Appeal observed that a generous approach must be taken to the notions of materiality, stating that “although the new evidence is not determinative in and of itself, it may have an impact on the RAD's overall assessment of the RPD's decision” (*Singh* at para 47). On appeal of RPD's decisions, the RAD has a broad mandate and may intervene to correct any error of fact, of law, or of mixed fact and law, and the approach to new evidence should reflect that. It does not mean that the new evidence will necessarily lead to a successful appeal, but it certainly requires the RAD to properly explain why new evidence directly related to central elements of a refugee claim cannot be accepted.

35 Mr. Khan had provided reasons for his belief that the attacks on his parents and son are a result of his conflict with the Taliban. If the RAD did not believe Mr. Khan's new evidence, or if it required corroborating evidence to do so, it was incumbent upon it to convene an oral hearing to assess the credibility of his evidence...

36 I recognize that the written reasons given by an administrative body must not be assessed against a standard of perfection (*Vavilov* at para 91). An administrative decision

maker's reasons do not need to be comprehensive or perfect. However, they need to be comprehensible and justified. The failure to meaningfully grapple with key issues or central arguments raised by a party may call into question whether the decision maker was actually alert and sensitive to matters before it and whether the decision exhibits the required degree of justification, transparency and intelligibility (*Vavilov* at paras 127-128). Here, we have a situation where, in my view, the RAD's shortcomings or flaws on the acceptability of Mr. Khan's new evidence are sufficiently central or significant to render the Decision unreasonable (*Vavilov* at paras 96-97, 100). In other words, there are sufficiently serious shortcomings in the Decision such that it cannot be said that it exhibits the requisite degree of justification, intelligibility and transparency. In my opinion, the reasons provided by the RAD are unable to demonstrate that the Decision on the issue of Mr. Khan's proposed new evidence was based on an internally coherent and rational chain of analysis and that it conforms to the relevant legal and factual constraints that bear on the RAD and the issue at hand (*Canada Post* at para 30; *Vavilov* at paras 105-107).

37 An administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96). A decision will not be reasonable if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (*Vavilov* at para 103). This is especially true where a decision has particularly harsh consequences for the affected individual, such as "decisions with consequences that threaten an individual's life, liberty, dignity or livelihood" (*Vavilov* at para 133). Here, the consequences of refusing the new evidence are particularly severe and harsh for Mr. Khan and his refugee claim, and such a situation called for the RAD to "explain why [his] decision best reflects the legislature's intention" and the case law on the relevance factor (*Vavilov* at para 133). I find that, in the particular circumstances of this case, the RAD has not done so. To echo the language of the Supreme Court in *Vavilov*, the omitted aspects of the analysis on the refusal of Mr. Khan's new evidence causes me "to lose confidence in the outcome reached" by the RAD (*Vavilov* at para 122; *Canada Post* at paras 52-53).

(...)

[The application for judicial review was granted.]

While acknowledging that assessments of the relevance of the evidence brought by the claimant before the RAD in view of determining whether it should be admitted demand deference from the reviewing court, Justice Gascon highlights that, given the grave consequences to Khan, the RAD must ensure that it has clearly explained the reasoning underlying its refusal to admit Khan's evidence. Though it is too early to tell, this aspect of *Vavilov* is likely to have a significant and lasting impact on the quality of the reasons delivered by officials and tribunal members involved in immigration and refugee protection decision making.

**Note**

In *Sticky Nuggz Inc v Alcohol and Gaming Commission of Ontario*, [2020 ONSC 5916](#) at paras 67-68, Ontario's Divisional Court held that a decision-maker's interpretation of a regulation governing the location of cannabis retail stores was not unreasonable for failing to consider the significant financial impact on the applicant.

**LINGERING QUESTIONS****Whither Doré? Review of discretionary decisions engaging the Charter**

As developed in Chapter 15, the Supreme Court decided, in *Doré v Barreau du Québec*, 2012 SCC 12, that in reviewing discretionary decisions of administrative decision makers that interfere with individuals' *Charter* rights, reviewing courts apply a reasonableness standard. In such cases, the reviewing court's role is to determine whether the decision reflects a proportionate balancing of the *Charter* protections in play with the statutory objectives underlying the decision. If, in exercising its statutory discretion, the decision maker has proportionately balanced the relevant *Charter* protection with the objectives of the statutory regime, the reviewing court will find the decision reasonable. The Court, at para 47, justified the application by reviewing courts of a deferential standard on the grounds that “[a]n administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values”. In addition to its familiarity with the objectives of its statutory regime, the administrative decision maker is also owed deference due to its proximity to the facts of the case.

While the *Vavilov* majority expressly opted, at para 57, not to revisit the approach to the standard of review set out in *Doré*, the *Vavilovian* approach to the standard of review framework and to reasonableness review is arguably in tension with some of the underpinnings of the *Doré* doctrine. First, *Vavilov* has repudiated expertise as a reason for deference in the context of selecting the standard of review. Indeed, at para 28, the majority disavowed the once “dominant approach” which underlies *Doré*'s rationale for reasonableness review, of accepting “that expertise simply inheres in an administrative body by virtue of the specialized function designated for it by the legislature”, noting that “if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying a reasonableness standard is appropriate from those for which it is not”.

Expertise remains relevant only to the extent it is demonstrated through the reasons offered by an administrative decision maker to justify its decision to the affected individual. But as noted by Mark Mancini, this justificatory approach and the central role played by reasons in

reasonableness review is not prominently featured in the Supreme Court's recent *Doré* jurisprudence:

...[I]n *Vavilov*, the Court endorsed a culture of justification as defining, in part, what administrators must do to make their decisions reasonable. Reasons are the centerpiece of the analysis, the coin in which administrators buy deference from the courts. A decision, in order to be reasonable, must not only be justified in result, but supported by cogent reasons that engage with a number of key factors, most notably the enabling statute.

But on the other hand, *Doré* mentions no requirements of reasonableness in the constitutional context. While *Doré* makes much of an equity between reasonableness and proportionality, arguing that the approach it adopted works the same "justificatory" muscles as the *Oakes* test, that equity has often amounted to little more than judicial rubber-stamping. Indeed, in *Trinity Western [Law Society of British Columbia v Trinity Western University*, 2018 SCC 32], the majority noted that all that was required from the Law Society in that case was that it was "alive" to the *Charter* issues. There was little in the way of reasoning requirements in terms of constitutional interpretive methodology, or other requirements for reasons. Even though TWU involved a law society, typically not subject to stringent reasoning requirements, there was no requirement *at all* for explicitly reasoned decision-making from the Law Society.

Mark Mancini, "The Conceptual Gap Between *Doré* and *Vavilov*" (27 April 2020), online: SSRN <<https://ssrn.com/abstract=3586079>> at 21.

Finally, with respect to constitutional questions, including the division of powers, the relationship between the legislature and other branches of the state and Aboriginal and treaty rights, the *Vavilov* majority endorsed, at para 56, a strong role for reviewing courts:

A legislature cannot alter the constitutional limits of executive power by delegating authority to an administrative body... The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

Under this logic, to the extent that an administrative decision maker in a *Doré*-like scenario decides the scope of a *Charter* right, either to determine whether it is engaged in the first place or in order to assess the magnitude of the *Charter* infringement for purposes of proportionately balancing the right with the statutory objectives, its decision must be subject to correctness review. A majority of the Court has refrained from bifurcating *Doré* review in this manner, prompting McLachlin CJC to offer, at para 116 of her concurring judgment in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, the following comment as a way of addressing what she judged to be "gaps and omissions" in the *Doré* framework:

[T]he scope of the guarantee of the *Charter* right must be given a consistent interpretation regardless of the state actor, and it is the task of the courts on judicial review of a decision to ensure this. A decision based on an erroneous interpretation of a *Charter* right will be unreasonable. Canadians should not have to fear that their rights will be given different

levels of protection depending on how the state has chosen to delegate and wield its power. [Underlining added.]

This approach to the judicial review of the scope of *Charter* protections strongly resembles that endorsed by the *Vavilov* majority. Significantly, the majority in *Trinity Western* chose not to comment on the Chief Justice's suggestion. As Mark Mancini, *supra*, at 29, observes, the tensions between *Vavilov* and *Doré* require "a correction"; what this will look like remains to be seen.

#### Note

*Lethbridge and District Pro-Life Association v Lethbridge (City)*, [2020 ABQB 654](#) at paras 104-112 illustrates that since *Vavilov*, some courts applying *Doré* have insisted that administrative decision-makers engage in their reasons in a robust discussion of whether their decisions proportionately balance any applicable *Charter* rights with the objective of the statutory regime.

#### Reasonableness review of "questions of authority"

As noted in the previous chapter on selecting the standard, the Supreme Court decided in *Vavilov* not to maintain "true questions of jurisdiction" as a category of questions requiring correctness review. It was of the view that the concern that delegated decision makers should not be free to determine the scope of their own authority could be addressed through the reviewing court's application of a robust reasonableness review. Under this robust reasonableness review, a reasonable decision is one that is justified in relation to the constellation of law and facts that operate as contextual "constraints" on the decision maker in the exercise of its delegated powers and "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt". Professor David Mullan observes that this characterization of what reasonableness review involves...

... may well raise for deference adherents immediate concerns. The terminology of "constraints", "limits" and "contours" is immediately suggestive of close scrutiny of decisions. It does not speak to expansive, generous interpretation of statutory mandates and the exercise of those mandates.

Mullan, *Judicial Scrutiny*, *supra*, at 444.

The legal constraint most relevant to the question of the scope of an administrative decision maker's authority is the governing statutory scheme, described by the majority as "the most salient aspect" of the legal context relevant to a particular decision. In a key part of its discussion of this constraint, the majority explained, at para 109, how reasonableness review allays the concern, formerly addressed by correctness review of "true questions of jurisdiction", that an administrative decision maker might interpret the scope of its authority beyond what the legislature intended:

Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues' concern (at para. 285), this does not reintroduce the concept of "jurisdictional error" into judicial review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision makers.

Does the majority's explanation fully answer the concurring judges' concern that non-deferential review of "jurisdictional questions" has returned through the back door of the application of *Vavilovian* reasonableness review? Professor Mullan expresses some reservations:

In traditional common law judicial review parlance, those constraints were categorized as questions of jurisdiction and one of the definitions of a true question of jurisdiction is surely the exercise of an "authority that was not delegated to" the decision maker. Moreover, it is hard to see how the incorporation of this conception of the outer limits of administrative decision-makers' powers into the world of reasonableness review actually admits of the possibility of judicial deference to the administrative decision maker's interpretation of the scope of the powers delegated to it. According to the majority reasonableness review "does not allow" such arrogations. That seems like a correctness standard to me.

Mullan, *Judicial Scrutiny, supra*, at 445

The majority's focus on the language chosen by the legislature to describe the limits and contours of the decision maker's authority as a significant constraint on the decision maker does evoke the possibility of a non-deferential review of the decision maker's interpretation of its enabling statute. However, the Court's description of reasonableness review, in *Canada Post, supra*, at para 26, as a "reasons first" approach that focuses on the administrative decision maker's justification for its decision signals that the starting point for review will remain the reasons setting out the decision maker's interpretation of its statutory grant of authority, not the reviewing court's first impressions based on its own analysis of the statutory language. Professor Paul Daly appears to be of this view. Commenting on the apparent conflict in paragraph 109 of the majority judgement between an approach to reasonableness based on justification and one based on the enforcement of jurisdictional limits, he notes:

The first sentence posits a test of justification, the second sentence posits clear limits enforceable by a reviewing court. What to make of this? Have jurisdictional questions been killed off as far as selecting the standard of review goes only to re-emerge, vital as ever, in the application of the reasonableness standard? On balance, I think the first sentence must prevail. After all, the majority insists that, in general, a reviewing court "may" rely on the contextual considerations to support a finding of unreasonableness; and references to "must" sit uneasily with the inherently deferential methodology for reasonableness review set out in *Vavilov*. But courts minded to police what they perceive to be jurisdictional

boundaries can certainly fasten on the language in the “governing statutory scheme” section of *Vavilov* to engage in intrusive reasonableness review.

Paul Daly, “The *Vavilov* Framework and the Future of Canadian Administrative Law” (2020) 33 C.J.A.L.P. 111 at 129.

### **Principles of statutory interpretation: a gateway to disguised correctness review?**

The *Vavilov* majority states, at para 120, that to be upheld as reasonable, “the merits of an administrative decision maker’s interpretation of a statutory provision must be consistent with the text, context and purpose of the provision”. The majority allows that the reasons of an administrative decision maker may look different than those of a court and need not include a “formalistic statutory interpretation exercise” in every case. Moreover, as illustrated in *Canada Post, supra*, a decision maker may omit to consider a pertinent, though minor, aspect of the provision’s text, context or purpose without undermining the decision as a whole. However, decision makers must, at a minimum, touch upon the most salient aspects of text, context and purpose; a decision that omits such a key aspect, causing the reviewing court to lose confidence in the outcome reached by the decision maker, will be unreasonable. Because the reviewing court will get the final say on whether a particular aspect of the text, context or purpose of the statutory provision is “salient”, “minor” or a “key” element, it may be difficult to maintain a clear boundary between reasonableness and correctness review. As Professor Mullan has observed:

... [I]t is relatively easy to see how the incorporation of the obligation to assess an administrative decision maker’s reasons on an issue of statutory interpretation by reference to “text, context and purpose” might perpetuate the tendency to engage in disguised correctness review. To the extent that the reviewing court sees the determination of the content of “text, context and purpose” as a primary or specialized court role, it will be against a correctness evaluation of these critical elements that judicial review will be conducted.

Mullan, *Judicial Scrutiny, supra*, at 446.

Insofar as the majority judgement in *Canada Post, supra*, models for lower courts the proper approach to reasonableness review of administrative decision makers’ interpretation of their home statutes, disguised correctness review may be avoided, although it should be noted that the conditions for deferential review in *Canada Post* were ideal: the Appeals Officer’s reasons were by all accounts excellent – “amply demonstrating that he considered the text, context, purpose, as well as the practical implications of his interpretation” – and, while he failed to consider one aspect of the statutory context, the majority was of the view that it supported rather than undermined the final outcome. Even so, the language used by the majority in its discussion of the principles of statutory interpretation has given reviewing courts much latitude in deciding whether or not to intervene.

