***Vavilov* Hits the Road**

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# Introduction

Courts around Canada are beginning to apply the judicial review [framework](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3519681) set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*.[[1]](#footnote-1) Obviously, it is too early to draw any conclusions. Nonetheless, even at this early stage in the life of *Vavilovian* judicial review, there have been some interesting decisions. Elsewhere in this supplement, you can read my comprehensive and critical analysis of the framework. In this addition—to be read in conjunction with my analysis of the *Vavilov* framework—I discuss some preliminary issues (Part I), the selection of the standard of review (Part II), the application of the reasonableness standard (Part III), and remedial discretion (Part IV).

# Preliminary Issues

An issue that emerged early in 2020 is whether cases argued before *Vavilov* was handed down should be reargued before being disposed of. *Vavilov*, as the Supreme Court made clear, is the “big bang” and now provides the starting point for any administrative law analysis.[[2]](#footnote-2) Sometimes, it will be quite obvious that the *Vavilov* framework changes nothing[[3]](#footnote-3) or changes something so clearly that further argument would be pointless.[[4]](#footnote-4) If there is doubt, prudence argues in favour of allowing the parties to make submissions on the consequences of *Vavilov*. And courts have mostly been prudent.

Several months into the roll-out of the *Vavilov* framework, however, with some cases argued prior to *Vavilov* still being decided, it is jarring to see matters decided without further submissions on the effect of *Vavilov*.[[5]](#footnote-5) Given the increasing body of case law (discussed further below in Part III) suggestive of a more demanding standard of reasonableness, parties really should be allowed to make additional submissions on how *Vavilovian* reasonableness review should be applied in their case.[[6]](#footnote-6) This point applies with more force to applicants than respondents. Applicants might be prejudiced by a failure to apply an exacting reasonableness standard, whereas respondents are unlikely to reframe their arguments in response to *Vavilov* (and, of course, cannot rewrite their decisions). Accordingly, where a judge is going to strike a decision down anyway, as in *Yavari v Canada (Public Safety and Emergency Preparedness)*,[[7]](#footnote-7) there is comparatively little unfairness. But my view is that the better course of action is to request submissions on reasonableness review for any outstanding matter where the oral and written submissions pre-date *Vavilov*.

Consider, moreover, the decision of the Ontario Divisional Court in [*Zhou v Cherishome Living*](http://canlii.ca/t/j4vgh).[[8]](#footnote-8) This was an appeal from the Landlord and Tenant Board under s. 210 of the provincial *Residential Tenancies Act*. Appeals are available on questions of law only. The panel concluded that it was “not appropriate”[[9]](#footnote-9) to request additional submissions on the consequences of *Vavilov*. Yet the effect of the panel’s application of *Vavilov* was that one of the issues raised by the tenants—who were self represented—was one of mixed fact and law and thus “not appealable.”[[10]](#footnote-10) But it was made clear in *Vavilov* that appeal clauses that do not cover all of the issues in dispute do not preclude unhappy appellants from bringing judicial review proceedings in respect of the other issues.[[11]](#footnote-11) Post-*Vavilov*, the appellants could have commenced judicial review proceedings in parallel to their appeal (indeed, unless and until there is further clarification of this point, I think wise counsel will generally advise clients to do so). That is not to say that a court would ultimately have allowed a judicial review application to proceed (not least because the litigation between the parties has been ongoing for many years), just that it would have been more prudent at least to ask the appellants if they had something to say.[[12]](#footnote-12)

# Selecting the Standard of Review

## **Correctness Categories**

There have been a couple of divergent opinions on the scopeof the correctness categories. The first post-*Vavilov* decision, *Peter v Public Health Appeal Board of Alberta*,[[13]](#footnote-13) embraced correctness review on constitutional issues. By contrast, in [*Syndicat des employé(e)s de l’école Vanguard ltée (CSN) c Mercier*](http://canlii.ca/t/j4sld), St-Pierre J applied the reasonableness standard even in the face of an argument based on the quasi-constitutional Quebec *Charter*.[[14]](#footnote-14) This is, obviously, an area to watch, though I think St-Pierre J’s position is more persuasive given the narrow conceptual basis provided for the correctness categories in *Vavilov*.[[15]](#footnote-15) St-Pierre J applied correctness in *Régie de l’assurance maladie du Québec c Morin*,[[16]](#footnote-16) but this was an uncontroversial example of overlapping jurisdiction, which is a category of quite limited scope.[[17]](#footnote-17)

Of course, direct challenges to the constitutionality of statutes or similarly general norms will continue to attract correctness review,[[18]](#footnote-18) as will decisions touching on the borderline between provincial and federal regulation,[[19]](#footnote-19) but like it or not, the *Doré* framework[[20]](#footnote-20) survived *Vavilov* and has perhaps emerged even stronger. In *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, Masuhara J relied on the expertise of the decision-maker to justify the application of the *Doré* framework.[[21]](#footnote-21) Post-*Vavilov*, expertise is not relevant to the selection of the standard of review, but this means the argument for deference is *a fortiori*: *Vavilov* teaches that deference applies in all *scenarios* unless the rule of law (or legislative intent) requires otherwise, which, given the narrow conceptual basis provided for it, will be exceedingly rare.

The category most apt to be expanded after *Vavilov* is surely the ‘questions of central importance to the legal system’ category. But the narrow rule of law basis for the correctness categories does not provide a solid foundation for such arguments. In *Bank of Montreal v Li*,[[22]](#footnote-22) for example, the issue was whether an employee who had signed a release on conclusion of her employment could nonetheless make an unjust dismissal claim. An adjudicator held she could and, on judicial review, the company sought to persuade the courts to apply correctness review on the basis that the issue of whether an individual can waive a statutory entitlement is a general one requiring definitive judicial resolution. De Montigny JA was not persuaded, concluding that the waiver issue would not have systemic or constitutional implications and noting that “framing an issue in a general or abstract sense is not sufficient to make it a question of central importance to the legal system as a whole.”[[23]](#footnote-23) The question of privilege in *College of Physicians and Surgeons v SJO*, was summarily held to be subject to correctness review,[[24]](#footnote-24) but as [Mark Mancini notes](https://doubleaspect.blog/2020/03/19/the-nero-post-two-niche-issues-in-judicial-review-post-vavilov/), there is ample precedent in support of this conclusion and it does not suggest that this category has widened post-*Vavilov*. A more curious decision is *Low v Nova Scotia Police Complaints Commissioner*,[[25]](#footnote-25) in which the common law doctrine of discoverability was held to apply in the context of police complaints, on what looked quite like a correctness basis.[[26]](#footnote-26) However, the decision did not take into consideration paras 111-114 of *Vavilov*, where the issue of statutory or common law constraints on administrative decision-makers is authoritatively addressed.

In *Bureau de la sécurité privée c Tribunal administratif du Québec*, St-Pierre J was asked to identify a new correctness category but demurred on the basis that this was a task for the Court of Appeal or Supreme Court;[[27]](#footnote-27) I tend to think, however, that it would be perfectly appropriate for a first-instance judge to do this, albeit that here it seems the argument for the applicant was not particularly strong.

## **Standard of Review of Regulations**

One question left unresolved by *Vavilov* was the standard of review applicable to regulations. On the one hand, the question of whether a particular regulation is *intra vires* its parent statute might be said to require a final, definitive answer from the courts, engaging *Vavilov’s* rule-of-law justification for correctness review. On the other hand, reasonableness is the presumptive standard of review. The most obvious justification for correctness review of regulations—that they relate to jurisdiction—was eliminated by *Vavilov*[[28]](#footnote-28) and, as Loparco J observed in *Morris v Law Society of Alberta (Trust Safety Committee)*, the Supreme Court spoke explicitly to the issue of jurisdiction or *vires* in *Vavilov*:

[T]he Supreme Court concluded that the question of whether or not a delegated decision-maker should “be free to determine the scope of its own authority [can] be addressed adequately by applying the framework for conducting reasonableness review.” The Court specifically endorsed the use of reasonableness review standard 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”: [*Vavilov*] at para 66, citing ***Green v Law Society of Manitoba***, 2017 SCC 20, [2017] 1 SCR 360; ***West Fraser Mills Ltd v British Columbia (Workers’ Compensation Appeal Tribunal)***, 2018 SCC 22, [2018] 1 SCR 635.[[29]](#footnote-29)

Notably, Loparco J applied the reasonableness standard even though the rule at issue touched upon matters relating to solicitor-client privilege (which are subject to correctness review), reasoning that the relevant issue was whether the Law Society had the authority to enact the rule.[[30]](#footnote-30) However, she arguably muddied the waters[[31]](#footnote-31) by reviewing the reasonableness of the Trust Safety Committee’s determination of the reasonableness of the rule (rather than directly assessing the reasonableness of the rule). She therefore created a double-deference problem[[32]](#footnote-32) and did not engage in the robust reasonableness review that *Vavilov* envisages when compliance with a decision-maker’s governing statutory scheme is in issue.

There has been disagreement on the issue of whether arbitration decisions are subject to the appellate review framework post *Vavilov* or, as was the case previously, subject to the judicial review framework.[[33]](#footnote-33) In *Buffalo Point First Nation v Cottage Owners Association*[[34]](#footnote-34) and *Allstate Insurance Company v Her Majesty the Queen*,[[35]](#footnote-35) the courts took the view that *Sattva* has been superseded by *Vavilov*. But in *Cove Contracting Ltd v Condominium Corporation No 012 5598 (Ravine Park)*, it was held that *Sattva* continues to bind.[[36]](#footnote-36) Subject, obviously, to the details of the statutory provision in a given jurisdiction, I think the better view must be that the use of the word “appeal” in relation to arbitration decisions now carries with it the appellate review framework (correctness on extricable questions of law, palpable and overriding error for the rest). Hainey J doubted this view in *Ontario First Nations (2008) Limited Partnership v Ontario Lottery And Gaming Corporation*, reasoning that the legislative intent branch of the *Vavilov* framework did not apply because the right of appeal was found in an agreement between the parties, not in the provincial arbitration statute.[[37]](#footnote-37) To my eye, this distinction is far too fine. It is true that s 45 of Ontario’s *Arbitration Act* does not explicitly provide for appeals, but it does draw distinctions between the treatment of questions of law[[38]](#footnote-38) and questions of fact and questions of mixed fact and law.[[39]](#footnote-39) The natural reading, in light of *Vavilov*, is that the legislature has proceeded on the basis that the courts will apply the appellate review framework. Whilst no standard of review is specified in the legislation, I do not think this is necessary to engage the legislative intent branch of *Vavilov* where the statute provides for an appeal (it is necessary where the statute purports to set out grounds of review: see the discussion of patent unreasonableness below).

## **Statutory Appeals**

In terms of correctness review on statutory appeals (under the *Housen v Nikolaisen* framework), the following comment from Swinton J is notable:

While the Court will ultimately review the interpretation of the Act on a standard of correctness, respect for the specialized function of the Board still remains important. One of the important messages in *Vavilov* is the need for the courts to respect the institutional design chosen by the Legislature when it has established an administrative tribunal (at para. 36). In the present case, the Court would be greatly assisted with its interpretive task if it had the assistance of the Board’s interpretation respecting the words of the Act, the general scheme of the Act and the policy objectives behind the provision.[[40]](#footnote-40)

As I suggested in my [paper on the](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3519681) *Vavilov* [framework](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3519681), if judges continue to consider and give weight to administrative interpretations of law on statutory appeals, deference might not be dead just yet. That said, in *Municipal Property Assessment Corporation v Zarichansky*,[[41]](#footnote-41) Favreau J did not consider in detail the Ontario Assessment Board’s rationale for taking a pro-ratepayer view in situations where MPAC (which assesses properties in Ontario for the purposes of calculating municipal property taxes) has failed to discharge its burden of proof. Rather, Favreau J insisted (on correctness review) that the Board was bound by the terms of its governing statute: my cursory review of the Board’s jurisprudence suggests, however, that it had provided a reasoned basis for its approach; there is little consideration by Favreau J of whether his approach will create difficulties for the Board, MPAC, and ratepayers in future cases.

One other way in which deference might persist on statutory appeals post-*Vavilov* is in the classification of matters falling within a decision-maker’s expertise as factual questions or mixed questions of fact and law.[[42]](#footnote-42) As Watson JA rightly insisted in *Canadian Natural Resources Limited v Elizabeth Métis Settlement*, a question of law must be extricable in order to be subject to correctness review: “It must go to the defining elements of the relevant legal test and not merely to how the tribunal assesses the evidence before applying the test.”[[43]](#footnote-43) Relatedly, in *Yee v Chartered Professional Accountants of Alberta*, Slatter JA observed that “i) the standard of practice the profession expects in any particular case, and ii) whether, on the facts, the professional subject to discipline has met that standard” are questions of mixed fact and law calling for deferential review.[[44]](#footnote-44) If so, the scope for appellate oversight of professional disciplinary decisions will be quite limited and the change wrought by *Vavilov* not especially dramatic (albeit that in *Yee* the appeal was allowed!). It is also worth mentioning the possibility that a right of appeal might be restricted by legislation to a consideration of the reasonableness of a decision, that is, the legislature might specify a standard of review in respect of particular decisions.[[45]](#footnote-45)

## **Procedural Fairness**

One issue that may crop up from time to time is the scope of procedural fairness. Procedural fairness issues are, of course, not subject to the *Vavilov* framework. Nonetheless, judges will have to make judgment calls about whether particular issues go to the “merits” (attracting the *Vavilov* framework)[[46]](#footnote-46) to procedure.[[47]](#footnote-47) In *Hildebrand v Penticton (City)*, Weatherhill J applied the *Vavilov* framework to a decision not to grant an adjournment.[[48]](#footnote-48) It is debatable whether this was a matter going to the “merits” of the underlying decision, to which *Vavilov* clearly applies, or related to procedure, in which case *Vavilov* would not apply. There will be future cases presenting similar difficulties of classification.[[49]](#footnote-49)

# Reasonableness Review

## **Reasonableness as a Deferential Standard**

*Vavilov* teaches that judicial review should be neither a line-by-line treasure hunt for error[[50]](#footnote-50) nor an effort to redo the work of the administrative decision-maker.[[51]](#footnote-51) Reasons for administrative decisions should be read fairly, with due attention to the decision-making context and the arguments made before the decision-maker.[[52]](#footnote-52) Departures from prior decisions are entirely possible, as long as adequate justification is provided.[[53]](#footnote-53) And the Quebec Court of Appeal has signalled, in excellent reasons by Moore JA, that it is on the look-out for unfaithful applications of reasonableness review, so-called disguised correctness review.[[54]](#footnote-54)

## **Supplementation, Justification, and Responsiveness**

My view is that the methodology of *Vavilovian* reasonableness review is inherently deferential. But it is certainly arguable that *Vavilov* has, in respect to supplementation, justification, and responsiveness, set a slightly higher bar for decision-makers than the pre-*Vavilov* regime. This was certainly Gauthier JA’s conclusion in the important decision in *Farrier c Canada (Procureur général)*.[[55]](#footnote-55) Quashing as unreasonable a one-page decision from the Parole Board which failed to engage with the applicant’s arguments, she commented:

Before *Vavilov* I would probably have found, as did the Federal Court, that, in light of the presumption that the decision-maker considered all of the arguments and the case law before it and after having read the record, the decision was reasonable. The absence of reasons dealing with the first two issues before the Appeal Division was not at the time sufficient to set aside the decision. It was implicit that the Appeal Division did not accept that the Board’s interpretation of the [Act](https://www.canlii.org/en/ca/laws/stat/sc-1992-c-20/latest/sc-1992-c-20.html) was erroneous, particularly considering [subsection 143(1)](https://www.canlii.org/en/ca/laws/stat/sc-1992-c-20/latest/sc-1992-c-20.html#sec143subsec1_smooth) of the [Act](https://www.canlii.org/en/ca/laws/stat/sc-1992-c-20/latest/sc-1992-c-20.html). Under the circumstances, the administrative decision-maker was presumed to have rejected Mr. Farrier’s arguments regarding any prejudice caused by the lack of a recording regardless of whether the [Act](https://www.canlii.org/en/ca/laws/stat/sc-1992-c-20/latest/sc-1992-c-20.html) provides for such a recording or whether there was simply a breach of the Manual. Such a finding was one of the possible outcomes given the Supreme Court’s decision in *CUPE*, even if that decision was not cited by the Appeal Division.[[56]](#footnote-56)

In the absence of any internal policies, previous Parole Board jurisprudence or other explanations for not addressing the applicant’s arguments, the conclusion that the decision was unreasonable was irresistible.[[57]](#footnote-57) Courts post *Vavilov* might not be able or willing to “infer” that an argument or evidence was considered in the absence of reasons dealing with the argument or evidence.[[58]](#footnote-58) Testing the limits of “coherence and justification” is not a wise strategy, as Rennie JA put it in *Langevin v Air Canada*,[[59]](#footnote-59) where the Canada Industrial Relations Board had reverted to a “conclusory, boiler-plate statement” in respect of a point in dispute: but there, luckily for the Board, a response to the point would have been “of little assistance,”[[60]](#footnote-60) and so the decision was upheld.[[61]](#footnote-61) In *Osun v Canada (Citizenship and Immigration)*, a boilerplate comment to the effect that the decision-maker had given a piece of evidence “careful consideration” was insufficient, as the decision lacked an “assessment” of the evidence.[[62]](#footnote-62) Moreover, judicial re-writing of defective decisions has been definitively ruled out: see *Hasani v Canada (Citizenship and Immigration)*.[[63]](#footnote-63)

There have already been some robust applications of reasonableness review, justified by reference to the emphasis in *Vavilov* on responsiveness. For example, in *Langlais c Collège des médecins du Québec*, it was unreasonable for the Collège to fail to address the regulatory provision which a doctor invoked to support his application for recognition as a specialist in internal medicine (necessary because, in 2012, the Collège had introduced more stringent standards in this regard).[[64]](#footnote-64)

Similarly, in *Patel v Canada (Citizenship and Immigration)*, Diner J noted that *Vavilov* requires “basic responsiveness” to the evidence presented (and found it lacking here),[[65]](#footnote-65) in *Samra v Canada (Citizenship and Immigration)*, Favel J found a decision unreasonable because it “lacked analysis”: “the officer’s decision is merely a recitation of the evidence before him followed by a conclusion”[[66]](#footnote-66) and in *Li v Canada (Citizenship and Immigration)*, Fuhrer J struck down a sparsely reasoned study permit decision issued by a line officer who failed to “engage” with the applicant’s evidence.[[67]](#footnote-67) These Federal Court cases all addressed decisions made by line decision-makers processing hundreds of thousands of applications.[[68]](#footnote-68) In *Rodriguez Martinez v Canada (Citizenship and Immigration)*,[[69]](#footnote-69) McHaffie J explained that while institutional constraints “must inform the assessment of reasonableness,”[[70]](#footnote-70) a decision-maker—even a line decision-maker—must nonetheless respond to the evidence.[[71]](#footnote-71) Given the emphasis on responsiveness in *Vavilov*, and this line of cases, the analysis in *Tarnow v NWT Legal Aid Commission*[[72]](#footnote-72) came as a surprise. Here, a decision not to allocate work to counsel on a legal aid panel who had worked for the Commission in the previous calendar year was considered to be reasonable in view of the “multiple factors” the Commission had to balance.[[73]](#footnote-73) But the fact that work had so recently been assigned to the applicant called, I think, for specific justification.[[74]](#footnote-74)

The decision of the Ontario Court of Appeal in *Romania v Boros*[[75]](#footnote-75) warrants a special mention as it was issued in the context of extradition proceedings, where the executive has typically been given a wide margin of appreciation.[[76]](#footnote-76) Although the Minister had provided a lengthy, 20-page letter ordering the surrender of the applicant to Romania, he did not provide an adequate justification for an eight-year delay in seeking the extradition. The applicant had been convicted in absentia in 2000; there was a dispute about the state of knowledge of the Romanian authorities and, in particular, whether they knew in 1998 that the applicant was in, or soon to arrive in, Canada, long before making the extradition request in 2008. That the “combined Canadian delay of nearly 8 years is not addressed beyond an implicit general claim that these matters take a long time” meant the decision was not “adequate.”[[77]](#footnote-77) Strikingly, although the Supreme Court held in *Sriskandarajah v United States of America*[[78]](#footnote-78) that procedural fairness does not require extradition authorities to seek out evidence which may be helpful to an applicant, the Ontario Court of Appeal held in light of *Vavilov* that it was “incumbent upon the Minister to make inquiries” about the point at which the Romanian authorities knew or ought to have known that the applicant was in Canada.[[79]](#footnote-79) As in *Vavilov*, both procedure and substance were considered together, holistically, to justify the conclusion that the decision should be struck down:

The delay between [1998] and the issuance of the summons on November 15, 2016 – more than 18 years – has not been properly investigated, nor properly explained. In the circumstances, the surrender order cannot stand. On the existing record, we are unable to determine whether the decision to order Ms. Boros’s surrender was reasonable. More information is required before we can properly conduct this analysis.[[80]](#footnote-80)

*Sriskandarajah* was not mentioned, but it is entirely possible that it has simply been superseded by the blurring of the line between procedure and substance effected by the emphasis in *Vavilov* on responsiveness.

Note also Phelan J’s comments in *Ennis v Canada (AG)*, in which he quashed a decision of the Canadian Human Rights Commission not to refer Ennis’s complaint for a tribunal hearing in the face of an investigator’s report recommending a hearing:

The Supreme Court’s analytical framework for reasonableness review reflects much of the work of this Court in this area. Therefore, this Court’s decisions relevant to the issues here are relevant and binding authority and have not been altered by *Vavilov* except to emphasise that reasonableness review is to be a vigorous review.[[81]](#footnote-81)

There have also been a number of Federal Court cases in which decisions were struck down for unreasonableness because the decision-maker failed to grapple with relevant factors as established by prior judicial jurisprudence.[[82]](#footnote-82) Note that the unreasonableness here resulted from failures to seriously consider the factors at all: it might, in principle, be permissible for decision-makers to deviate from judicial decisions, but obviously they bear a justificatory burden when they do so.[[83]](#footnote-83) Consistency with prior judicial jurisprudence will, by contrast, indicate that a decision is reasonable.[[84]](#footnote-84)

Moreover, as Diner J sagely noted in *Ortiz v Canada (Citizenship and Immigration)*, whereas under *Dunsmuir* reviewing courts began with the outcome and then looked back at the reasons, *Vavilov* instructs them “to start with the reasons, and assess whether they justify the outcome.”[[85]](#footnote-85) In light of the decisions emphasizing the importance of responsiveness, I think it is too early to say categorically that “*Vavilov* does not constitute a significant change in the law of judicial review with respect to the review of the reasons of administrative tribunals.”[[86]](#footnote-86)

## **Reasonableness Review in the Absence of Reasons**

Different considerations might apply, however, in the context of judicial review of legislative-type decisions for which contemporaneous reasons were not provided. In *Vavilov* the Supreme Court left the door open to focusing on the outcome of a decision-making process in situations where reasons are not provided.[[87]](#footnote-87) Accordingly, in *1120732 BC Ltd v Whistler (Resort Municipality)*, Tysoe JA held that the enactment of a municipal by-law was reasonable on the basis that there were “at least three ways in which the Municipality’s council could have reasonably concluded” it had the necessary statutory authority.[[88]](#footnote-88) This seems to me to be an accurate application of *Vavilov* but one which is jarring to read given the stark contrast it creates with the post-*Vavilov* jurisprudence that emphasizes the importance of responsiveness and justification. Moreover, the application of reasonableness review in a context where municipalities already benefit from a broad and purposive approach to the interpretation of their jurisdiction has the potential to give these bodies a significant degree of regulatory authority, exercisable without detailed reasons.[[89]](#footnote-89) Of course, it will not invariably be the case that reasons or reasoning are entirely absent in cases involving municipal by-laws; if so, the judicial review will look quite conventional.[[90]](#footnote-90)

## **Palpable and Overriding Error**

On the general issue of whether *Vavilovian* reasonableness review is more or less robust than the palpable and overriding error standard applicable to mixed questions of fact and law in statutory appeals, see *Al-Ghamdi v College of Physicians and Surgeons of Alberta*, where the Court explained, at the outset, the wide scope of the issues subject to the palpable and overriding error standard:

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.[[91]](#footnote-91)

Although the College had “improperly relied” on some evidence and overemphasized the importance of a human rights complaint made by the appellant, “those errors were not sufficient to undermine the overall finding of professional misconduct.”[[92]](#footnote-92) Consider whether these would have been considered to be problematic on reasonableness review (and, if so, whether the appellant would find it odd that a statutory appeal mechanism would be less favourable to him than an application for judicial review). In *Mayer v The Superintendent Of Motor Vehicles*, Forth J was quite clear that “sufficiency of reasons is not a stand-alone basis for interfering with a decision on appeal” and observed, moreover, that a right of appeal does not necessarily require an “exacting review”:[[93]](#footnote-93) “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.”[[94]](#footnote-94) She held that there was sufficient information in the record to justify the impugned decision.[[95]](#footnote-95)

There is, albeit in the context of a judicial review application, a neat example of a palpable and overriding error in *Syndicat des métallos, section locale 9449 c Glencore Canada Corporation*,[[96]](#footnote-96) namely, a failure to consider the proper comparators on a salary scale: this failure completely undermined the labour arbitrator’s decision.[[97]](#footnote-97)

## **Statutory Interpretation**

I emphasized in my commentary on *Vavilov* that there were important tensions in the majority reasons, for instance, in respect to **statutory interpretation**. Consider *Canadian National Railway Company v Richardson International Limited*.[[98]](#footnote-98) The standard of review here was correctness, as the matter came before the Federal Court of Appeal as a statutory appeal from a decision of the Canadian Transportation Agency relating to railways. But Nadon JA also commented, in *obiter*, that he would have struck the decision down for unreasonableness in any event, “because it failed to consider both context and the legislative scheme as a whole”.[[99]](#footnote-99) Citing paragraph 118 of *Vavilov*—but not the more equivocal language of paragraphs 119 and 122—Nadon JA commented that the Agency’s failure to “observe the fundamental principles of statutory interpretation”[[100]](#footnote-100) was “fatal to its decision.”[[101]](#footnote-101) This might be thought to betray a favouritism for an interventionist standard of reasonableness review on issues of statutory interpretation (although, to be fair, Nadon JA remitted the matter to the Agency and took pains not to “rule out the possibility that the Agency might come to an interpretation that differs from the one it arrived at in the present matter”).[[102]](#footnote-102) A more moderate approach was taken by Boone J in *Salmonid Association of Eastern Newfoundland v Her Majesty the Queen in Right of Newfoundland and Labrador*, where the key flaw was that the Minister “did not explain his reasons for his adoption of an interpretation that he was aware was one of two valid but opposite readings”[[103]](#footnote-103) and by Barnes J in *Glaxosmithkline Biologicals SA v Canada (Health)*, noting that the Minister had failed to have regard to the obligation to interpret Canadian law implementing the *Canada Europe Trade Agreement* in conformity with the Agreement.[[104]](#footnote-104)

Nadon JA’s *obiter* comments certainly underscore how some portions of *Vavilov* are liable to become battlegrounds between different factions of judges, those who favour more intrusive review on questions of law in one camp, their more deferential colleagues in the other.[[105]](#footnote-105)

## **Patent Unreasonableness**

Out in British Columbia it looks like the Court of Appeal will soon have to weigh in on the implications of *Vavilov* for the province’s **patent unreasonableness** standard. In *College of New Caledonia v Faculty Association of the College of New Caledonia*,[[106]](#footnote-106) the petitioner argued that the articulation of “robust” reasonableness review in *Vavilov* should inform the application of patent unreasonableness in British Columbia. Francis J was unimpressed (and went on to uphold the decision):

I agree with counsel for the Board that *Vavilov* has not changed the law with respect to the meaning of patent unreasonableness under [s. 58](https://www.canlii.org/en/bc/laws/stat/sbc-2004-c-45/latest/sbc-2004-c-45.html#sec58_smooth) of the [*ATA*](https://www.canlii.org/en/bc/laws/stat/sbc-2004-c-45/latest/sbc-2004-c-45.html)*,* just as *Dunsmuir v New Brunswick,* [2008 SCC 65](https://www.canlii.org/en/ca/scc/doc/2008/2008scc65/2008scc65.html) did not affect the meaning of the statutory standard of review (see *Pacific Newspaper Group Inc. v Communications, Energy and Paperworkers Union of Canada, Local2000*, [2014 BCCA 496](https://www.canlii.org/en/bc/bcca/doc/2014/2014bcca496/2014bcca496.html) at para. [44](https://www.canlii.org/en/bc/bcca/doc/2014/2014bcca496/2014bcca496.html#par44))*.* There is simply nothing in the *Vavilov* decision that would lead me to conclude that the decision modifies the patent unreasonableness standard in any way.[[107]](#footnote-107)

But in *Guevara v Louie*,[[108]](#footnote-108) Sewell J took the opposite view (and went on to strike down the decision):

In *Canada (Minister of Citizenship and Immigration) v Vavilov* [2019 SCC 65](https://www.canlii.org/en/ca/scc/doc/2019/2019scc65/2019scc65.html) [*Vavilov*], the Court emphasized that it is the duty of a reviewing court to determine whether the decision-maker’s reasons meaningfully account for the central issue and concerns raised by the parties. While these comments were made in the context of a review on a reasonableness standard, it is my view that they also apply to a review of reasons on the standard of patent unreasonableness. What constitutes a patently unreasonable decision may be “understood in the context of the common law jurisprudence” regarding judicial review generally “and will necessarily continue to be calibrated according to general principles of administrative law:” *Canada (Minister of Citizenship and Immigration) v Khosa*, [2009 SCC 12 (S.C.C.)](https://www.canlii.org/en/ca/scc/doc/2009/2009scc12/2009scc12.html) at para [19](https://www.canlii.org/en/ca/scc/doc/2009/2009scc12/2009scc12.html#par19) (at para. 48).

I am sympathetic to Sewell J’s view. The patent unreasonableness standard in British Columbia essentially sets out grounds of review for abuse of discretion. These grounds can be supplemented—indeed, on the logic of *Khosa*, *must* be supplemented—by the common law of judicial review. The distinction between grounds and standards was reasserted in *Vavilov*, leaving the door very much open to *Vavilovian* reasonableness review informing the meaning of patent unreasonableness in British Columbia. Over to you, Court of Appeal.[[109]](#footnote-109)

In Ontario, meanwhile, the reference to patent unreasonableness in the *Human Rights Code*[[110]](#footnote-110) continues to be taken to require the application of the reasonableness standard (consider *Intercounty Tennis Association v Human Rights Tribunal of Ontario*).[[111]](#footnote-111) Inasmuch as the statute makes reference to a common law concept (patent unreasonableness) which has been assimilated by the courts to another common law concept (reasonableness) this conclusion seems to me to be irresistible. Unlike in British Columbia, the legislature has not attempted to specify the content of patent unreasonableness but rather signalled its willingness to rely on judicial development of patent unreasonableness. The judges have considered since *Dunsmuir* that the goals of patent unreasonableness can be achieved through the application of the reasonableness standard and, as such, the assimilation of patent unreasonableness to reasonableness does no violence to legislative intent or, to put the point in *Vavilovian* terms, the legislature’s institutional design choices.

In *Ponoka Right to Farm Society v Ponoka (County)*,[[112]](#footnote-112) Neilson J considered s 539 of the *Municipal Government Act*,[[113]](#footnote-113) which provides: “No bylaw or resolution may be challenged on the ground that it is unreasonable.” Following the analysis in *Koebisch v Rocky View County*,[[114]](#footnote-114) Neilson J held that this amounted to a legislative direction to apply the patent unreasonableness standard.[[115]](#footnote-115) Section 539 raises quite the conundrum. The idea that it requires the application of the common law patent unreasonableness standard runs into the objection that patent unreasonableness has now been assimilated to reasonableness as a matter of common law. Inasmuch as there is any legislative intent, it points as much to the reasonableness standard as it does to the patent unreasonableness standard. Of course, this suggests that s 539’s bar to reasonableness review is meaningless. But I would not be too quick to jump to this conclusion. As the majority explained in *Vavilov*,[[116]](#footnote-116) some statutory language “contemplates that the decision-maker is to have greater flexibility in interpreting the meaning of such language.” Section 539 can, accordingly, be understood to provide “greater flexibility” to municipalities. It is not necessary to breathe new life into the patent unreasonableness standard. My approach to s 539 also avoids a potential constitutional objection:[[117]](#footnote-117) robust reasonableness review might be part of the constitutional core minimum of judicial review; if so, s 539 might be unconstitutional. Of course, the majority in *Vavilov* is not at all clear on what’s entrenched and what’s not entrenched, and s 539 is not a complete ouster (as it leaves correctness review in place). However, allowing legislatures to oust reasonableness review would surely be constitutionally dubious at best in view of the importance accorded to “robust” reasonableness review in *Vavilov*.

# Remedies

Judges do not seem to have jumped on the suggestion that they might refuse to remit a matter consequent on a finding of unlawfulness where it is “evident” that a “particular outcome is inevitable.”[[118]](#footnote-118) In *Canadian Broadcasting Corporation v Ferrier*,[[119]](#footnote-119) for example, Sharpe JA remitted to the decision-maker the question of the applicability of the open court principle to police board hearings (here, a preliminary hearing on whether the time period for reporting alleged police misconduct should be extended). Sharpe JA remitted the question even though much of his analysis was conducted on a standard of correctness,[[120]](#footnote-120) he had little doubt that a recent Ontario Court of Appeal decision[[121]](#footnote-121) on the application of the open court principle to police board hearings was dispositive,[[122]](#footnote-122) and the judicial review proceedings had already slowed down a process which was moving quite slowly.[[123]](#footnote-123) On balance, Sharpe JA concluded, the decision-maker “should be permitted to take another look at the matter with the benefit” of the recent decision in *Langenfeld*.[[124]](#footnote-124) I think Sharpe JA was quite right to remit the matter, especially because the issues in *Ferrier* and *Langenfeld* arose in different contexts.[[125]](#footnote-125)

1. 2019 SCC 65. [↑](#footnote-ref-1)
2. *Lamoureux c Cour du Québec*, 2020 QCCS 619 at paras 5-11. [↑](#footnote-ref-2)
3. See e.g. *Centre intégré de santé et de services sociaux des Laurentides c Roy*, 2020 QCCS 230 at para 45; *Syndicat de l’enseignement de Champlain c Commission scolaire Marie-Victorin*, 2020 QCCA 135 at para 31; *Beals v Nova Scotia (AG)*, 2020 NSSC 60 at paras 18-19. [↑](#footnote-ref-3)
4. See e.g. [*Canadian National Railway Company v Richardson International Limited*](http://canlii.ca/t/j503b), 2020 FCA 20 at paras 41-44. [↑](#footnote-ref-4)
5. See e.g. *Macfarlane v Canada (AG)*, 2020 FC 489. [↑](#footnote-ref-5)
6. As in *British Columbia (Assistant Water Manager) v Chisholm*, 2020 BCSC 545 at para 29. [↑](#footnote-ref-6)
7. 2020 FC 469. [↑](#footnote-ref-7)
8. 2020 ONSC 500. [↑](#footnote-ref-8)
9. At para 32. [↑](#footnote-ref-9)
10. At para 68. [↑](#footnote-ref-10)
11. *Vavilov* at para 52. [↑](#footnote-ref-11)
12. See also *Van de Sype v Saskatchewan Government Insurance*, 2020 SKCA 18, where this problem does not seem to have been identified. [↑](#footnote-ref-12)
13. 2019 ABQB 989. [↑](#footnote-ref-13)
14. [2020 QCCS 95](http://canlii.ca/t/j4sld) at paras 17-19. [↑](#footnote-ref-14)
15. See similarly *Coldwater First Nation v Canada (AG)*, 2020 FCA 34 at para 27; *Borradaile v British Columbia (Superintendent of Motor Vehicles)*, 2020 BCSC 363 at para 34; *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561 at paras 28-31. [↑](#footnote-ref-15)
16. 2020 QCCS 294 at paras 9-11. [↑](#footnote-ref-16)
17. See e.g. *Heffernan v Saskatchewan Police Commission*, 2020 SKQB 65 at paras 25-27. [↑](#footnote-ref-17)
18. As in *Canada Union of Correctional Officers v Canada (AG)*, 2019 FCA 212 at para 21. [↑](#footnote-ref-18)
19. As in *Canada (AG) v Northern Inter-Tribal Health Authority Inc*, 2020 FCA 63 at paras 12-13. [↑](#footnote-ref-19)
20. *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395. [↑](#footnote-ref-20)
21. 2020 BCSC 561 at para 30. [↑](#footnote-ref-21)
22. 2020 FCA 22. [↑](#footnote-ref-22)
23. At para 28. See similarly *Beach Place Ventures Ltd v British Columbia (Employment Standards Tribunal)*, 2020 BCSC 327 at paras 32-34. [↑](#footnote-ref-23)
24. 2020 ONSC 1047 at para 10. [↑](#footnote-ref-24)
25. 2020 NSSC 113. [↑](#footnote-ref-25)
26. At paras 46-51. [↑](#footnote-ref-26)
27. 2020 QCCS 571 at para 14. [↑](#footnote-ref-27)
28. *1120732 BC Ltd v Whistler (Resort Municipality)*, 2020 BCCA 101 at para 39; *GSR Capital Group Inc v The City of White Rock*, 2020 BCSC 489 at para 71. [↑](#footnote-ref-28)
29. 2020 ABQB 137 at para 40 (emphasis in original). See similarly *Portnov v Canada (AG)*, 2019 FC 1648 at para 23. [↑](#footnote-ref-29)
30. At para 45. [↑](#footnote-ref-30)
31. At para 57. [↑](#footnote-ref-31)
32. Paul Daly, “Is Deference Constitutional (in Canada)?” (12 October 2017), online (blog): *Administrative Law Matters* <<https://www.administrativelawmatters.com/blog/2017/10/12/is-deference-constitutional-in-canada/>> [↑](#footnote-ref-32)
33. *Per* *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, [2014] 2 SCR 633. [↑](#footnote-ref-33)
34. 2020 MBQB 20 at para 56. [↑](#footnote-ref-34)
35. 2020 ONSC 830 at para 19. [↑](#footnote-ref-35)
36. 2020 ABQB 106 at para 13. [↑](#footnote-ref-36)
37. 2020 ONSC 1516 at paras 61-75. [↑](#footnote-ref-37)
38. SO 1991, c 17, ss 45(1) and (2). [↑](#footnote-ref-38)
39. SO 1991, c 17, s 45(3). [↑](#footnote-ref-39)
40. *Planet Energy (Ontario) Corp v Ontario Energy Board*, 2020 ONSC 598 at para 31. Seealso *Edmonton (City of) v Ten 201 Jasper Avenue Ltd*, 2020 ABCA 60. [↑](#footnote-ref-40)
41. 2020 ONSC 1124. [↑](#footnote-ref-41)
42. See e.g. *1085372 Ontario Limited v City of Toronto*, 2020 ONSC 1136; *Donaldson c Autorité des marchés financiers*, 2020 QCCA 401. [↑](#footnote-ref-42)
43. 2020 ABCA 148 at para 32. [↑](#footnote-ref-43)
44. 2020 ABCA 98 at para 30. [↑](#footnote-ref-44)
45. See e.g. *Ahmadzai (Re)*, 2020 ONCA 169 at para 12; *Nguyen (Re)*, 2020 ONCA 247 at para 28 (appeals from a Criminal Code Review Board to the Court of Appeal). [↑](#footnote-ref-45)
46. See *Vavilov* at para 23. [↑](#footnote-ref-46)
47. And to be determined consistent with the framework set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. [↑](#footnote-ref-47)
48. 2020 BCSC 353 at paras 29-30. [↑](#footnote-ref-48)
49. See further Paul Daly, “Investigating Process, Substance and Procedural Fairness” (2 October 2014), online (blog): *Administrative Law Matters* <<https://www.administrativelawmatters.com/blog/2014/10/02/investigating-process-substance-and-procedural-fairness/>> [↑](#footnote-ref-49)
50. See e.g. *Radzevicius v Workplace Safety and Insurance Appeals Tribunal*[, 2020 ONSC 319](http://canlii.ca/t/j4trd) at paras 35-39; *Mudjatik Thyssen Mining Joint Venture v Billette*, 2020 FC 255 at paras 59-77; *Bashir v Canada (AG)*, 2020 FC 278 at para 29. [↑](#footnote-ref-50)
51. See e.g. *Bombardier Aéronautique inc c Commission des normes de l’équité, de la santé et de la sécurité au travail*, 2020 QCCA 315 at paras 30-46; *Yassin v Canada (AG)*, 2020 FC 237 at paras 42-43; *Mohammed v Canada (Citizenship and Immigration)*, 2020 FC 234, *passim*; *Huang v Canada (Citizenship and Immigration)*, 2020 FC 241 at para 27; *Singh v Canada (Citizenship and Immigration)*, 2020 FC 328, *passim*; *Theivendram v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 419 at para 40. [↑](#footnote-ref-51)
52. See e.g. *Calgary (City) v Sunridge Mall Holdings Inc*, 2020 ABQB 148; *Saleh v Canada (Citizenship and Immigration)*, 2020 FC 457 at para 15. [↑](#footnote-ref-52)
53. See e.g. *Canada (Public Safety and Emergency Preparedness) v Shen*, 2020 FC 405; *Canada (AG) v Honey Fashions Ltd.*, 2020 FCA 64. [↑](#footnote-ref-53)
54. *Syndicat de l’enseignement de Champlain c Commission scolaire Marie-Victorin*[, 2020 QCCA 135](http://canlii.ca/t/j4z9v) at paras 41, 65. See also *Syndicat des métallos, section locale 9449 c Glencore Canada Corporation*, 2020 QCCA 407 at paras 33-34. [↑](#footnote-ref-54)
55. 2020 FCA 25. [↑](#footnote-ref-55)
56. At para 12. See similarly *Walker v Canada (AG)*, 2020 FCA 44 at para 10. [↑](#footnote-ref-56)
57. *Vavilov* at para 94. See also *Haddad Pour v The National Dental Examining Board of Canada*, 2020 ONSC 555 at paras 37-40. [↑](#footnote-ref-57)
58. *Mattar v The National Dental Examining Board of Canada*, 2020 ONSC 403 at paras 51-52; *Walker v Canada (AG)*, 2020 FCA 44 at para 10. [↑](#footnote-ref-58)
59. 2020 FCA 48 at para 18. [↑](#footnote-ref-59)
60. At para 19. [↑](#footnote-ref-60)
61. See also the very relaxed approach—too relaxed, in my view—taken in *ImagineAbility Inc v City of Winnipeg*, 2020 MBCA 39 at para 45. [↑](#footnote-ref-61)
62. 2020 FC 295 at para 26. [↑](#footnote-ref-62)
63. 2020 FC 125 at paras 67-68. [↑](#footnote-ref-63)
64. 2020 QCCA 134 at paras 39-44. See also *Alexander v Canada (Citizenship and Immigration)*, 2020 FC 313 (failure to respond to a mass of evidence was unreasonable); *Alsaloussi v Canada (AG)*, 2020 FC 364 (failure to grapple with contradictory evidence, in a context where the decision to bar the applicant from passport services for three years had significant consequences for the individual concerned); *Pryce v Canada (Citizenship and Immigration)*, 2020 FC 377 (in which a question has been certified to the Federal Court of Appeal) [↑](#footnote-ref-64)
65. 2020 FC 77 at para 17. [↑](#footnote-ref-65)
66. 2020 FC 157 at para 22. [↑](#footnote-ref-66)
67. 2020 FC 279 at para 13. [↑](#footnote-ref-67)
68. See also *Low v Nova Scotia Police Complaints Commissioner*, 2020 NSSC 113 at para 58; *AB v Canada (Citizenship and Immigration)*, 2020 FC 203 at para 53. [↑](#footnote-ref-68)
69. 2020 FC 293. [↑](#footnote-ref-69)
70. At para 13. [↑](#footnote-ref-70)
71. At paras 15-17. [↑](#footnote-ref-71)
72. 2020 NWTSC 13. [↑](#footnote-ref-72)
73. At para 50. [↑](#footnote-ref-73)
74. See e.g. *Canada (AG) v Honey Fashions Ltd.*, 2020 FCA 64 at para 38,De Montigny JA. [↑](#footnote-ref-74)
75. 2020 ONCA 216. [↑](#footnote-ref-75)
76. See e.g. *Lake v Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 SCR 761. [↑](#footnote-ref-76)
77. At para 29. [↑](#footnote-ref-77)
78. 2012 SCC 70, [2012] 3 SCR 609. [↑](#footnote-ref-78)
79. At para 29. [↑](#footnote-ref-79)
80. At para 30. [↑](#footnote-ref-80)
81. 2020 FC 43 at para 20. See also *Begum v Canada (Citizenship and Immigration)*, 2020 FC 162 (ministerial refusal to approve a provincially nominated visa application); *Salmonid Association of Eastern Newfoundland v Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 34 at para 64 (unjustifiable departure from previous decisions). [↑](#footnote-ref-81)
82. *Mora Alcca v Canada (Citizenship and Immigration)*, 2020 FC 236 at para 18; *Demirtas v Canada (Citizenship and Immigration)*, 2020 FC 302 at para 30; *Chikadze v Canada (Citizenship and Immigration)*, 2020 FC 306 at para 22; *Lopez Bidart v Canada (Citizenship and Immigration)*, 2020 FC 307 at para 30; *Haile v Canada (Citizenship and Immigration)*, 2020 FC 375 at paras 25-26. [↑](#footnote-ref-82)
83. *Canada (Public Safety and Emergency Preparedness) v Taino*, 2020 FC 427 at para 80. [↑](#footnote-ref-83)
84. *Cousineau c Commission de protection du territoire agricole du Québec*, 2020 QCCS 900. [↑](#footnote-ref-84)
85. 2020 FC 188 at para 22. [↑](#footnote-ref-85)
86. *Radzevicius v Workplace Safety and Insurance Appeals Tribunal*[, 2020 ONSC 319](http://canlii.ca/t/j4trd) at para 57, Swinton J. See also *Hildebrand v Penticton (City)*, 2020 BCSC 353 at para 26. [↑](#footnote-ref-86)
87. *Vavilov* at paras 136-138. [↑](#footnote-ref-87)
88. 2020 BCCA 101 at para 88. [↑](#footnote-ref-88)
89. Contrast the relatively intensive review undertaken in *Minster Enterprises Ltd v City of Richmond*, 2020 BCSC 455, especially at paras 114-118, where Crerar J rejected the suggestion that the City’s policies could expand the meaning of a by-law relating to building construction; and in *Canadian Natural Resources Limited v Elizabeth Métis Settlement*, 2020 ABQB 210. [↑](#footnote-ref-89)
90. See e.g. *GSR Capital Group Inc v The City of White Rock*, 2020 BCSC 489 at paras 107-114 and 139. [↑](#footnote-ref-90)
91. 2020 ABCA 71 at para 11. [↑](#footnote-ref-91)
92. At para 51. [↑](#footnote-ref-92)
93. 2020 BCSC 474 at para 47. [↑](#footnote-ref-93)
94. At para 50. [↑](#footnote-ref-94)
95. At para 53. [↑](#footnote-ref-95)
96. 2020 QCCA 407 at paras 43-44. [↑](#footnote-ref-96)
97. See also *Sipekne’katik v Alton Natural Gas Storage LP*, 2020 NSSC 111, especially at para 152, for an appeal where failure to engage with a duty to consult issue amounted to a palpable and overriding error. [↑](#footnote-ref-97)
98. 2020 FCA 20. [↑](#footnote-ref-98)
99. At para 46. [↑](#footnote-ref-99)
100. At para 48. [↑](#footnote-ref-100)
101. At para 49. [↑](#footnote-ref-101)
102. At para 54. [↑](#footnote-ref-102)
103. 2020 NLSC 34 at para 74. [↑](#footnote-ref-103)
104. 2020 FC 397 at paras 34-35. [↑](#footnote-ref-104)
105. For a similar approach, almost demanding panoptic qualities on the part of an administrative decision-maker, see *Beals v Nova Scotia (AG)*, 2020 NSSC 60 at para 32: “the legislature and applicants … are entitled to presume that the person making a decision about an application under [legislation] knows the occasion and necessity for the enactment, the circumstances existing at the time it was passed, the mischief to be remedied, and the object to be attained, without that information necessarily appearing in the record.” [↑](#footnote-ref-105)
106. 2020 BCSC 384. [↑](#footnote-ref-106)
107. At para 33. [↑](#footnote-ref-107)
108. 2020 BCSC 380. [↑](#footnote-ref-108)
109. See also the detailed discussion of this issue in Paul Daly, “Canada’s Bi-Polar Administrative Law: Time for Fusion” (2014) 40:1 Queen’s LJ 213. [↑](#footnote-ref-109)
110. RSO 1990, c h-19, s 45.8. [↑](#footnote-ref-110)
111. 2020 ONSC 1632 at paras 30-38. [↑](#footnote-ref-111)
112. 2020 ABQB 273. [↑](#footnote-ref-112)
113. RSA 2000, c M-26. [↑](#footnote-ref-113)
114. 2019 ABQB 508. [↑](#footnote-ref-114)
115. At para 13. [↑](#footnote-ref-115)
116. *Vavilov* at para 110. [↑](#footnote-ref-116)
117. See David Mullan, “Judicial Scrutiny of Administrative Decision Making: Principled Simplification or Continuing Angst?” (2020) 50 Advocates’ Quarterly 42. [↑](#footnote-ref-117)
118. *Vavilov* at para 142. [↑](#footnote-ref-118)
119. 2019 ONCA 1025. [↑](#footnote-ref-119)
120. At para 37. [↑](#footnote-ref-120)
121. *Langenfeld v Toronto Police Services Board*, 2019 ONCA 716. [↑](#footnote-ref-121)
122. At para 58. [↑](#footnote-ref-122)
123. At para 79. [↑](#footnote-ref-123)
124. At para 80. [↑](#footnote-ref-124)
125. See also *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 at para 661; *Alberta Union of Provincial Employees v Alberta Health Services*, 2020 ABCA 4 at para 59; *Langlais c Collège des médecins du Québec*, 2020 QCCA 134 at paras 64-65; *Mbula-Kolela v Canada (Citizenship and Immigration)*, 2020 FC 260 at paras 18-20; *Rodriguez Martinez v Canada (Citizenship and Immigration)*, 2020 FC 293 at paras 18-20; *McKenzie c Ambroise*, 2020 CF 340 at paras 31-37; *Salmonid Association of Eastern Newfoundland v Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 34 at paras 112-114; *Romania v Boros*, 2020 ONCA 216 at paras 31-32; *United Steel v Georgia-Pacific LP*, 2020 ONSC 1560 at paras 70-74). But see *Guevara v Louie*, 2020 BCSC 380 at paras 85-87; *Yu v City of Richmond*, 2020 BCSC 454 at para 38; and see also *Coquitlam (City) v British Columbia (Assessor of Area #10 – North Fraser Region)*, 2020 BCSC 440 (though this was a statutory appeal so arguably the *Vavilov* principles on discretion do not apply). [↑](#footnote-ref-125)