The Canadian Law of Judicial Review: Some Doctrine and Cases

January 12, 2021

David Stratas, Federal Court of Appeal

The Canadian Law of Judicial Review: Some Doctrine and Cases

Table of contents

Preface

Many consider the Canadian law of judicial review to be difficult and confusing.

On the one hand, some cases are decided on the basis of what appear to be technical objections where detailed rules and precise precedents are applied. On the other hand, some cases are decided on concepts like reasonableness and fairness, concepts that to the uninitiated are loose and vague.

In many areas of law, even the difficult ones, the law underfoot is fairly stable and reliable. But the Canadian law of judicial review doesn't seem that way.

With good reason, former Chief Justice McLachlin of the Supreme Court of Canada once described administrative law as "a barbed and occluded

Preface

thicket" where we find "only confusion": "Administrative Law is Not for Sissies: Finding a Path through the Thicket" (2016) 29 Can. J. Admin. L. & Prac. 127.

In a conference paper presented at the biennial public law conference at Cambridge, U.K. in September, 2016, Chief Justice Elias of the New Zealand Supreme Court described the area as "untidy and tentative" and queried whether "the search for better doctrine is ultimately doomed."

Canada's experience in developing administrative law doctrine provides fodder for this view. In a recent article, I wrote:

> **Our administrative law is a never-ending construction site where one crew builds structures and then a later crew tears them down to build anew, seemingly without an overall plan. Roughly forty**

Preface

> **years ago, the Supreme Court told us to categorize decisions as judicial, quasi-judicial or administrative. Then, largely comprised of different members, the Court told us to follow a "pragmatic and functional" test. Then, with further changes in its composition, it added another category of review, reasonableness, to join patent unreasonableness and correctness. Then, with more turnover of judges, it told us to follow the principles and methodology in *Dunsmuir*. Now it appears that we may be on the brink of another revision: as we shall see, the Supreme Court—mysteriously—is often not deciding cases in accordance with the principles in *Dunsmuir* and other cases decided under it.**

While in her article Chief Justice McLachlin acknowledges the difficulties in this area, she emphasizes nevertheless that "if the rule of law is to prevail, a way [through the thicket] must be found." She is so right.

Preface

Administrative law governs the relationship between the judicial branch and the executive branch. The law of judicial review tells us when the judicial branch can interfere with decisions of the executive branch—an issue central to democratic governance, good government and our fundamental constitutional orderings.

This issue should not be allowed to turn on judges' personal proclivities, idiosyncratic senses of what in a policy sense seems to them to be fair, ideological visions or freestanding opinions about what is just, appropriate and right.

Instead, this issue must turn on ideas and concepts worked out binding upon judges—namely, doctrine or responsible, incremental extensions of legal doctrine achieved through accepted pathways of legal reasoning.

Preface

Under the constitutional principle of the rule of law, litigants deserve equal application of law and equal treatment under that law. To the extent possible, judges should be giving similar rulings to similarly situated people. The only way that can be done is through reliance on ideas and concepts binding upon them, a body of doctrine.

Administrative law cases are often controversial. One need only look to recent events in the United States to find examples where judges have struck down executive orders much to the outrage of their makers and followers.

If decisions are made because of an individual judge's sense of fairness or justice, the appearance, if not the reality, is that the decision sprung from personal or political beliefs of an unelected person. Such a decision is less worthy of respect. Worse, the law will shift, sometimes radically so,

Preface

based on the changing composition of a particular court's complement. Over time, respect for the judicial branch will fall.

If, on the other hand, the decision is made from settled doctrine developed over time by many, shaped by the experience of many cases in many different circumstances, the likelihood of respect for the decision is high. The reputation of the judicial branch remains strong, rooted in the seeming stability of doctrine, not the whim of individual lawyers who happen to hold a judicial commission.

We live in an era where increasingly administrative law—the area of law resting at the core of our democracy—does not rest at the core of the curriculum of many law schools. In some, it is taught by sessional lecturers rather than full-time, tenured faculty specialists. These days, in some administrative law courses, students do not read the important

Preface

cases. Rather, they are given descriptions of the law by others. Under that approach, what they can never get is a sense of the entire fabric of the area as seen by the judges, the concepts that govern the area and how all the moving parts in it fit together.

Worse, the widespread availability online of every administrative law decision released anywhere, large and small, right and wrong poses a new challenge.

What is a leading decision? What is not? Back in the day of published law reports, knowledgeable editors, skilled in the area, could pick out the cases that matter. These days, however, most lawyers work online, not from the law reports, encounter the flood of cases and somehow have to separate the wheat from the chaff. Alas, most don't have criteria in mind to do that.

Preface

Where can they turn for help? Lately, there have been few new, up-to-date texts on administrative law, perhaps reflecting its currently unsettled nature. Who dares write about a landscape that is shifting so much?

Some loose-leaf services are very helpful in terms of acquainting us with particular decisions on particular matters, though even they have trouble keeping up with the flood of cases. Those sorts of services also sometimes encourage us to think of administrative law as a bunch of particular rules that govern particular topics. But, extremely useful as they are, through no fault of their own they often do not give us a vision of the underlying concepts from which the rules emanate. These concepts, when understood, show us how rules interrelate and inform each other.

The result? Written and oral submissions of less and less value in this area are filed with the courts. Courts, given less help, either fail to be

Preface

acquainted with the doctrine or have to discover it themselves. In an era of insufficient court resources, the latter is a real challenge.

So what can be done?

For years now, I have been giving presentations at conferences on administrative law. Many PowerPoint presentations have been developed. These rest in my computer directory accessible only by me. Rather than keeping them private, I thought that to promote access to justice I would combine them and make them more widely available to those who want to know more about the Canadian law of judicial review and the doctrine concerning it. The law should be accessible to all: other judges, counsel, academics, law students, parties and self-represented litigants. Online publication and availability for free encourages this. Hence this document and the location where I have posted it.

Preface

Many of us are becoming more international in our perspectives, and those, particularly in Westminster jurisdictions, who are curious about Canadian administrative law can get some idea of what is happening here, react to it, and write about it, improving us and improving them. The search for a way through what Chief Justice McLachlin rightly calls a "thicket"—a task that many jurisdictions are facing up to—is best shared.

This document can be used in two ways.

First, to get a sense of how the whole area fits together, the document can be read from beginning to end in one short sitting. This gives an overall picture of the area, with connections and themes underlying the whole area made apparent. This facilitates thinking about the underlying doctrine. Thinking can only help develop it.

Preface

Second, to drill into particular areas, key cases are listed, with hypertext links to their full text. The cases themselves drive home the concepts that underpin this area.

At particular places, tentative comments of a normative nature are made. The doctrine is not in a state of perfection. It is also not immutable. It must grow and adapt with new problems arising in changing times. As I said in *Paradis Honey Ltd. v. Canada*, 2015 FCA 89 at para. 116, "[w]hile our Constitution is a "living tree capable of growth and expansion within its natural limits" (see *Edwards v. Canada (Attorney General)*, [1929] UKPC 86, [1930] A.C. 124), the common law – and particularly public law – is not a petrified forest." If this document assists in furthering the development of the doctrine, even in a direction I don't particularly like, then the effort to create it will have been worthwhile.

Preface

An earlier version of this publication decried the Supreme Court's approach to review of the substance of administrative decision-making under *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 and post-*Dunsmuir* cases. Two disturbing trends became evident in these cases: (1) the relaxation of the requirement that administrators' decisions have explanations either explicitly given or discernable from the record; and (2) the insistence that the intensity of review does not vary according to the context of the case, including the content of the governing statute, the nature of the issue being decided, and the nature of the decision-maker. The former was best exemplified by *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; the latter by *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 and *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29.

Preface

In these cases—whether it be the attenuation of explanatory requirements or the insistence that context does not matter—no coherent justification was given. Rather, propositions were simply asserted rather than deduced from established first principle.

As a result, a revolt arose against these cases. Explanatory requirements developed through the backdoor: *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227; *Wall v. Office of the Independent Police Review Director*, 2014 ONCA 884 at paras. 57-59; *Canada v. Kabul Farms Inc.*, 2016 FCA 143; *Bonnybrook Park Industrial Development Co. Ltd. v. Canada (National Revenue)*, 2018 FCA 136 (dissent). And the Federal Court of Appeal, in particular, continued to vary the intensity of review according to the context, "tip-toeing" around *Edmonton East (Capilano)*: see this admission in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para. 24 and for an example, see *Gitxaala Nation v. Canada*, 2016 FCA 187.

Preface

The Supreme Court is at the top of the judicial hierarchy and so the normal rule is that its precedents must be followed: Hon. M. Rowe and L. Katz, "A Practical Guide to *Stare Decisis*" (2020), 41 Windsor Rev. of Leg and Soc Issues 1. But there is a "realpolitik" to the operation of the law of precedent. The Supreme Court depends on lower court judges to interpret, apply and enforce the precedents it makes.

Lower court judges swear an oath to obey the law, but the law is not exclusively stated by the Supreme Court. Other sources of law include the Constitution of Canada, which is the supreme law, ranking higher than law made by the Supreme Court. It is not necessarily insubordinate for courts to be reluctant or less enthusiastic on occasion to interpret, apply and enforce Supreme Court precedents when they offend the Constitution or principles in them, suffer from illogical reasoning, or smack of freestyling policy-making outside of the legitimate judicial role.

Preface

Sometimes it is necessary and appropriate to do this: see Richard M. Re, "Narrowing Supreme Court Precedent from Below" (2016), 104 Geo. L.J. 921; *Canada (Attorney General) v. Utah*, 2020 FCA 224 at para. 28.

The lower courts properly reacted to *Dunsmuir* and its progency, became increasingly reluctant to follow them to the letter, and ultimately their reluctance was vindicated: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. *Vavilov* restores a requirement that administrative decisions be explained. It also introduces a contextual approach to the review of the substance of administrative decision-making. A contextual approach has worked very well in the area of review for procedural unfairness: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. It ought to work well in the area of substantive review.

Preface

Early indications are that the *Vavilov* reform has been positive. The Supreme Court deserves our thanks for *Vavilov*. By all reports, lawyers and judges alike are finding *Vavilov* workable. My personal experience is that less argument is devoted to debates about the intensity of review. Rather, more is devoted to the key issue: whether the particular administrative decision passes muster. And results are being achieved that are consistent with our understandings of our constitutional arrangements, Parliamentary supremacy, and the rule of law.

A reading of this document, heavily amended to reflect *Vavilov*, shows that Canadian administrative law is starting to be more coherent.

Your contributions of case law, articles, comments and input will improve this document and are most welcome.

-- David Stratas

Ordering concepts

There are four ordering concepts that are best kept front of mind:

- **There is a binding hierarchy of law**
- **Administrative decision-makers need legal authorization to act or to exercise powers**
- **Courts also have their limits**
- **Judicial reviews have three stages or three analytical steps**

Ordering concepts: The binding hierarchy of law

- **Law has a hierarchy. That hierarchy must be kept front of mind and obeyed at every step in the judicial review analysis.**
- **As explained later, courts cannot ignore the hierarchy. They must work within it.**
- **Think of the hierarchy as a card game: items higher in the hierarchy trump lower items according to the rules of the game. For instance, if an order in council purports to deal with something a statute does not allow it to do or if the order in council conflicts with the statute, it is invalid.**

Ordering concepts: The binding hierarchy of law

- **Probably the best Supreme Court authority for the binding hierarchy of law is *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52. See also *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29 at para. 117. Other good discussions appear in *Canada (Attorney General) v. Utah*, 2020 FCA 224 at para. 28 and *Sturgeon Lake Cree National v. Hamelin*, 2018 FCA 131 at para. 54.**
- **In *Ocean Port*, common law (judge-made) notions of independence and security of tenure might have applied to invalidate decisions of the administrator, but statutory law permitted the administrator to be set up in the way it was: somewhat dependent and no tenure. And no constitutional provision was available to invalidate the statutory law.**
- ***Ocean Port* shows that constitutional provisions trump statutory provisions which trump judge-made common law.**

Ordering concepts: The binding hierarchy of law

The current hierarchy…

(1) *The Constitution*. Defined by section 52(2) of the *Constitution Act, 1982*. There are also unwritten principles: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217

Ordering concepts: The binding hierarchy of law

(2) *Statutes*. Courts interpret them in accordance with special rules in legislation (*e.g.*, interpretation acts), the principles in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601 (text, context and purpose are to be considered, thought text may predominate in certain situations), and at least in some circumstances such as ambiguity, the Constitution and international treaties. Over time, the role of the Constitution and international law has fluctuated as a result of differing approaches in the SCC.

Ordering concepts: The binding hierarchy of law

(3) ***Subordinate legislation*****. Regulations, rules, etc. made by governmental officials (including, sometimes, administrative bodies) under the authority of statutes. Courts interpret these in the same way as statutes except that the purposes of their authorizing statutes and the provisions that authorize their making play a big role.**

- **Provisions of statutes take precedence over the rules of court: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 82**

Ordering concepts: The binding hierarchy of law

- **Note that the Crown prerogative (another source of administrative power) belongs at this place in the hierarchy. Crown prerogative is "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": A.V. Dicey, *Law of the Constitution*, 10th ed. (1959) at page 424. It is subject to statute or subordinate legislation.**
- **Administrative decisions under a prerogative power are reviewable subject to the preliminary objection of "justiciability" : *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4**

Ordering concepts: The binding hierarchy of law

(4) *Subordinate instruments*. Orders, such as orders in council, and other legal instruments (commissions, warrants) made under the authority of statutes, subordinate legislation or the prerogative. Courts interpret these in the same way as statutes and subordinate legislation except that the purposes of their authorizing legislation and the provisions that authorize their making play a big role.

Ordering concepts: The binding hierarchy of law

A qualification to the comments above on interpretation:

- **Administrative decision-makers may have interpretive insights into statutes, subordinate legislation and subordinate instruments that courts do not have, particularly where expertise and specialization factor into the analysis. As explained below, these insights may be deserving of respect by courts. See *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123 at para. 14; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245 at paras. 42-55.**

Ordering concepts: The binding hierarchy of law

(5) ***Case law from courts*. Courts sit in their own hierarchy. As to the binding nature of SCC authority including *obiter*, see *R. v. Henry*, [2005] 3 S.C.R. 609. As to what lower courts sometimes do to higher authority, see Richard M. Re, "Narrowing Supreme Court Precedent from Below" 104 Georgetown LJ 921.**

Ordering concepts: The binding hierarchy of law

(6) ***Administrative decision-makers' jurisprudence*. Within an administrative body, individuals and panels don't bind each other but decisions have persuasive effect: *IWA v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 at pp. 327-28 and 333; *Tremblay v. Quebec (Commission des affairs sociales)*, [1992] 1 S.C.R. 952 at p. 974; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 at pp. 798-799. Administrators that are be subject to the jurisdiction of tribunals (*e.g.*, the CBSA is subject to the CITT) are bound by the tribunal's decisions but have some leeway to ask that the tribunal depart from its earlier jurisprudence. See generally *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 257.**

Ordering concepts: The binding hierarchy of law

Items that are not part of the binding hierarchy of law: international law and administrative policies

- ***International law*. See generally *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras. 76-92; *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164 at paras. 24-31; *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 at paras. 55-57.**
- **Domestic law of the sort described above—not international law—forms the law of the land. The only exception is where domestic law expressly incorporates international law by reference: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 137; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 at pp. 172-73.**

Ordering concepts: The binding hierarchy of law

- **International law can be an interpretive aid. However, if there are multiple possible interpretations of a legislative provision, we should avoid interpretations that would put Canada in breach of its international obligations: *Ordon Estate*, above at para. 137. This canon of construction is based on a presumption that our domestic law conforms to international law: *R. v. Hape*, 2007 SCC 26, at para. 53. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 69-71 for an example. Absent ambiguity, which is usually the case, domestic legislative provisions "must be followed even if they are contrary to international law": *Daniels v. White*, [1968] S.C.R. 517 at p. 541.**
- **Administrative law discussion of these issues: *Gitxaala Nation v. Canada*, 2015 FCA 73.**

Ordering concepts: The binding hierarchy of law

- ***Administrative policies*. An administrative policy is not law for the purposes of the hierarchy of laws: *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at para. 32. Administrators who treat it as such and consider themselves bound to it are fettering their discretion and making an unreasonable decision: *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198; *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299.**
- **In some circumstances, a decision to make an administrative policy can be reviewable if it affects the legal rights or practical interests of a challenger: *Thamotharem*, *above.***

Ordering concepts: The need for administrators to have legal authorization

Administrative decision-makers need legal authorization to act or to exercise powers:

(1) Administrative decision-makers need authorization to act or to exercise powers: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513 at para. 16. Authorization can be by statute, subordinate legislation, or subordinate instruments. An administrator must not exercise a subject-matter jurisdiction it does not have: *Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 300 at para. 16.

(2) Powers can be express, or implied/necessarily incidental to the express powers: see *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394.)

Ordering concepts: Limitations on courts

Limitations on courts:

- **Some legislative limitations can go to the subject-matter jurisdiction of a court and its ability to proceed. If one is present in a case, the court must raise and consider the limitation whether or not counsel have raised it.**
- **Courts must act only according to law and cannot take on subject-matters outside the legal boundaries set for them; courts, like all others, are subject to laws that must be followed: *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at pp. 805-806; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 71-72; *Ref. re Remuneration of Judges of Prov. Court of PEI*, [1997] 3 S.C.R. 3 at para. 10.**

Ordering concepts: Limitations on courts

- **This larger principle is rooted deeply in our history and constitutional arrangements. Over a quarter of a millennium ago, the idea was established that courts cannot act in any case until they are satisfied that some law or legal basis allows them to act and no law stands in the way: see, *e.g.*, *Green v. Rutherford* (1750),1 Ves. Sen. 462 at page 471; *Penn v. Lord Baltimore* (1750), 1 Ves. Sen. 444 at page 446; *A.G. v. Lord Hotham* (1827), 3 Russ. 415; *Thompson v. Sheil* (1840), 3 Ir. Eq. R. 135. This idea emanates from the foundational principle of Parliamentary supremacy, one won centuries ago at the cost of much bloodshed and one explicitly enshrined in our Constitution: see discussion in *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151 at para. 26.**

Ordering concepts: Limitations on courts

- **Accordingly, even where the parties have agreed that a court has subject-matter jurisdiction or the issue has not been raised by the parties, the Court must still satisfy itself it has subject-matter jurisdiction: *Re McKittrick Properties Ltd.* (1926), 59 O.L.R. 199 (C.A.); *Manie v. Ford (Town)* (1918), 14 O.W.N. 83 (H.C.), aff'd (1918), 15 O.W.N. 27 (C.A.). The Court should not assume or presume it has jurisdiction: *Brooke v. Toronto Belt Line Railway Company* (1891), 21 O.R. 401 at para. 25. See *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at paras. 8-10 and authorities cited therein; *High-Crest Enterprises Limited v. Canada*, 2017 FCA 88 at para. 84.**
- **Statutory courts whose jurisdiction or powers are constrained by legislation have to concern themselves with this (see, *e.g.*, *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54).**

Ordering concepts: Limitations on courts

- **But courts of inherent jurisdiction must also obey legislative limitations on their jurisdiction and powers. The hierarchy of laws, above, dictates that absent constitutional or *vires* objections all courts, statutory and otherwise, must obey legislative provisions.**
- **Privative clauses (legislative clauses that forbid review by courts) call for special explanation. As legislative provisions, one would expect that these would be binding under the hierarchy of law, discussed above. However, these are always read as not foreclosing judicial review: *Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120 at p. 127; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at p. 1090; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220 at pp. 237-38.**

Ordering concepts: Limitations on courts

- **Courts have a duty to enforce the constitutional principle of the rule of law: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 22-25. No administrative body can be immune from review: *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220. To put it differently, all wielders of public power must be reviewable and accountable to the law: see discussion in *Slansky v. Canada (Attorney General)*, 2013 FCA 199 at paras. 313-314 (dissent); see the discussion and authorities on this principle in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 78. Thus, privative clauses are not given full effect—they do not actually bar review.**
- **This is best seen as an instance where under the hierarchy of laws, above, constitutional imperatives oust or modify legislative terms.**

Ordering concepts: Limitations on courts

- **On these points, see the fulsome discussion in *C.N.R. v. Emerson Milling*, 2017 FCA 79 at paras. 6-13.**
- **This case is also useful concerning provisions that restrict appeals to "questions of law" and "questions of jurisdiction." Such provisions are common. The meaning of "questions of law" and "questions of jurisdiction" is explored.**

Ordering concepts: Limitations on courts

Another limitation on reviewing courts:

- **Throughout judicial review, the relative roles of administrative decision-makers and reviewing courts must be kept front of mind. Administrative decision-makers are the merits-deciders, the entity authorized by the legislator to apply the law to the facts. Reviewing courts are just that, courts that review whether the administrative decision can be left to stand.**
- **Except in limited circumstances, courts do not delve in the merits with a view to determining the merits. See *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras. 14-19; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263; *R v Somerset County Council, ex parte Fewings* [1995] 1 All E.R. 513 at 515.**

Ordering concepts: The three stages of judicial review

Judicial review has three stages

Think of judicial review as having three conceptual boxes, each with a distinct analytical approach. Know what your issue is. Know the box it belongs in.

Ordering concepts: The three stages of judicial review

The conceptual boxes:

(1) Preliminary objections to the judicial review being heard; procedural matters

(2) The merits of the judicial review: review of the substance of the decision, review of the procedural fairness of the decision

(3) Remedies

***Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139 at paras. 28-30**

(1) Preliminary objections and procedural concerns

- **There are a forest of issues and cases concerning preliminary objections and procedural concerns – the following is only a representative list. Those that that arguably go to subject-matter jurisdiction are marked with an asterisk**
- **Restrictions on subject-matter jurisdiction can stem from the constitution, statutes and subordinate legislation and instruments (the hierarchy discussed above)**

(1) Preliminary objections and procedural concerns

Examples (issues that might go to subject-matter jurisdiction are marked with an asterisk):

- **Limitation periods?* For example, the 30 day (extendable) deadline for starting a judicial review under ss. 18.1(2) of the *Federal Courts Act*; can be extended (see, e.g., *Canada (Attorney General) v. Larkman*, 2012 FCA 204)**
- **Direct standing to bring application:* Most jurisdictions' legislation grant standing only to those "directly affected" by a "decision, order or matter" (ss. 18.1(2) of the *Federal Courts Act*): *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307 ("the decisions must have affected its legal rights, imposed legal obligations upon it, or prejudicially affected it in some way"); *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116.**

(1) Preliminary objections and procedural concerns

- **Public interest standing: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524 (whether the case raises a serious justiciable issue; whether the party bringing the case has a real stake in the proceedings or is engaged with the issues that it raises; and whether the proposed suit is, in all of the circumstances and in light of a number of considerations, a reasonable and effective means to bring the case to court)**

(1) Preliminary objections and procedural concerns

- **Is there a "decision" for the purposes of judicial review? Recommendations of inquiries that may affect a person's interests may qualify as decisions: *Saulnier v. Quebec Police Commission*, [1976] 1 S.C.R. 572; *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440.**
- **In Federal Courts system, is there a "federal board, commission or other tribunal"? See *Anisman v. Canada (Border Services Agency)*, 2010 FCA 52.**

(1) Preliminary objections and procedural concerns

- **Must a judicial review in the Federal Courts system be brought before an action is brought in a provincial superior court? Is an action without a judicial review a collateral attack against a federal administrative decision? See *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 S.C.R. 585.**
- **To the extent that administrative decision-making can be challenged in either jurisdiction, should one jurisdiction stay its proceedings in favour of another? See *Reza v. Canada*, [1994] 2 S.C.R. 394 and *Strickland v. Canada (Attorney General)*, [2015] 2 S.C.R. 713**

(1) Preliminary objections and procedural concerns

- **"Private" things are not reviewable.* The public-private distinction: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26; *Air Canada v. Toronto Port Authority*, 2011 FCA 347; *Setia v. Appleby College*, 2013 ONCA 753; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165; *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504 and *Dunsmuir v. New Brunswick*, 2008 SCC 9 (whether a decision is one under a private contract or is a public decision)**

(1) Preliminary objections and procedural concerns

- **Prematurity; adequate alternative forum (doctrine of exhaustion): see, *e.g.*, *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61; *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541; *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17 (not reversed by SCC on this point); *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139 at paras. 56-69; *Gitxaala Nation v. Canada*, 2016 FCA 187 (multi-faceted administrative regimes must be completed before JR can be brought); *St. Anne Nackawic Pulp & Paper v. CPU*, [1986] 1 S.C.R. 704 and related cases (arbitration under collective bargaining regimes cannot normally be bypassed)**

(1) Preliminary objections and procedural concerns

- **If an administrative decision-maker has the express or implied power to decide questions of law it can decide constitutional issues: *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504. Recourse must first be had to that decision-maker before proceeding to court, absent urgent circumstances. The fact that administrative decision-makers cannot issue declarations of invalidity but can only disregard invalid laws is no reason to bypass the decision-maker and proceed directly to Court. See generally *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16.**

(1) Preliminary objections and procedural concerns

- **Admissibility of new issues on review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61**
- **Admissibility of new constitutional issues on judicial review: *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16 at paras. 38-40; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245; *Erasmo v. Canada (Attorney General)*, 2015 FCA 129 at paras. 33-37**

(1) Preliminary objections and procedural concerns

- **Constitutional question requirement:* section 57 of the *Federal Courts Act* (notice needed before tribunal and all levels of court); *Guindon v. Canada*, 2015 SCC 41**
- **Hypothetical declarations: see, *e.g.*, *Solosky v. The Queen*, [1980] 1 S.C.R. 821;**
- **Mootness: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196 (dismissal of appeal on a preliminary basis for mootness)**
- **Competing legislative regime(s) ousting court's jurisdiction:* *e.g.*, *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250;**

(1) Preliminary objections and procedural concerns

- **Justiciability: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441; *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.); *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4; *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40, 2003 SCC 39 (decisions by Parliament to enact a statute)**
- **Sufficiency of notice of application: Each jurisdiction will have its own rules but for one approach, see *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250**

(1) Preliminary objections and procedural concerns

- **The effect of discontinuance and when a discontinued proceeding can be resurrected or a new proceeding brought: *Philipos v. Canada (Attorney General)*, 2016 FCA 79; *Philipos v. Canada (Attorney General)*, 2017 FCA 117.**
- **Certificates under section 39 of the Canada Evidence Act (asserting secrecy over Cabinet confidences): *Babcock v. Canada (Attorney General)*, 2002 SCC 57; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 and authorities cited therein. Sometimes negative inferences can be drawn: *Tsleil*, above at paras. 53-54 and authorities therein.**

(1) Preliminary objections and procedural concerns

- **Standing for tribunal to participate and scope of participation: *e.g.*, *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44**
- **Intervention: Each jurisdiction will have its own rules. In FC system, see *Sport Maska Inc. v. Bauer Hockey Corp*., 2016 FCA 4; *Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120; *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164. Interveners are not applicants and vice versa: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 102**

(1) Preliminary objections and procedural concerns

- **Who should be a respondent: Rule 303; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236**
- **Tribunal has decided the matter (is *functus officio*): *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848; *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499; *El-Helou v. Courts Administration Service*, 2016 FCA 273**

(1) Preliminary objections and procedural concerns

- **Content of the record (admissibility of affidavits): generally uniform approaches across Canada but see *e.g.*, *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22; *Keeprite Workers' Independent Union v. Keeprite Products Ltd.*, (1980), 29 O.R. (2d) 513 (C.A.); *Delios v. Canada (Attorney General)*, 2015 FCA 117 at paras. 41-53; *Bernard v. Canada Revenue Agency*, 2015 FCA 263; *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123; *142445 Ontario Ltd. v. I.B.E.W., Local 636*, 251 O.A.C. 62 (Div. Ct.); *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 at paras. 35-54; *Hartwig v. The Commission of Inquiry into Matters Relating to the Death of Neil Stonechild*, 2007 SKCA 74.**

(1) Preliminary objections and procedural concerns

- **Comprehensive discussion of admissibility, the "background information exception to admissibility, and the extent to which the "information" offered can be argumentative in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116.**
- **Comprehensive discussion of admissibility, and in particular the admissibility of evidence (other than that before the administrative decision-maker) necessary to establish a ground of review, the limits of Rule 317, how to get relevant evidence: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128**
- **Summonsing witnesses to get evidence: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 and Rule 41**
- **Conversion of all or part of the judicial review into an action (e.g. to allowe for discovery): *Association des crabiers acadiens Inc. v. Canada (A.G.)*, 2009 FCA 357 (CanLII), 402 N.R. 123.**

(1) Preliminary objections and procedural concerns

- **Exclusion of evidence: irrelevant, improper opinion, legal argument, speculative, bootstrapping evidence from the tribunal, improper post decision evidence, privileged material: *Hanna v. Ontario (A.G.)*, 2010 ONSC 4058 (Div. Ct.); *Sierra Club Canada v. Ontario (Natural Resources & Transportation)*, 2011 ONSC 4655; *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299; *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809**
- **Summonses to gather evidence of administrative purpose: *Consortium Developments (Clearwater Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3**

(1) Preliminary objections and procedural concerns

- **Sealing the record or documents in it (*e.g.*, confidential material in patent matters); closed hearings: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41**
- **Requests for material from a tribunal (Rule 317) and flexibility in ordering confidentiality and other protective measures: *Lukács v. Canada* (Transportation Agency), 2016 FCA 103 (for Federal Courts' regime but adaptable elsewhere); *Bernard v. Public Service Alliance of Canada*, 2017 FCA 35; *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268**

(1) Preliminary objections and procedural concerns

- **When should a motion (e.g., a mootness motion, a motion to dismiss for prematurity or a motion for a ruling on the admissibility of evidence) be heard? Should a motions judge do it, or should it be left for the panel/trial judge? See *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268*; Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196; *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128.**
- **Advance costs (ordered on interlocutory basis): *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71**

(1) Preliminary objections and procedural concerns

- **Court decisions to delay the hearing of the judicial review distinguished from court decisions to stay administrative decisions below; criteria for the former: *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312; *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc.*, 2012 ONCA 756**
- **Stays of administrative decisions below: *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311**
- **Where a moving party has not persuaded the court that a stay of the administrative decision below is warranted but it is suffering significant prejudice, the "consolation prize" of an expedited hearing can be ordered.**

(2) The merits of the judicial review

- **Review of the substantive merits of the decision, *i.e.,* substantive review**
- **Review of procedural fairness of the decision, *i.e.,* procedural review**

(2) Substantive review

Four important opening observations:

(1) The stuff set out in *Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 and later cases is administrative law review of the substance of administrative decision-making. This is different from appellate review (*Housen v. Nikolaisen*, 2002 SCC 33).

(2) Substantive review

(2) The two are different for good reason:

- ***Administrative law review*. The judiciary reviews the executive. Separation of powers considerations and the tension between Parliamentary supremacy and the court's obligation to enforce the rule of law underlie this.**

- ***Appellate review*. Higher levels of the judiciary review lower levels of the judiciary. Considerations other than the separation of powers – such as judicial economy and the privileged position of trial courts to find facts – can bear upon this.**

(2) Substantive review

(3) Why should we care about the standard of review?

- **Standard of review: the point at which courts can interfere**
- **Standard of review: the point at which courts can interfere It is the expression of the demarcation between the executive and the judiciary, *i.e.*, the threshold when the latter can interfere with decisions of the former. See preface. This is basic to judicial review.**
- **Three glaring examples of judicial reviews where the SCC ignored this basic issue are: *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68**

(2) Substantive review

(4) Appellate courts reviewing first instance judicial review courts' decisions on preliminary objections and remedies? As these are decisions of the first instance court, not the administrative decision-maker, the appellate standards of review (*Housen*) apply: see *Apotex v. Minister of Health*, 2018 FCA 147 at paras. 57-61; *Budlakoti*, above at paras. 37-39 (preliminary issues); *Canada v. Long Plain First Nation*, 2015 FCA 177 at paras. 87-91 (remedies).

(2) Substantive review: methodology

The key case concerning substantive review of administrators' decisions is *Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 .

In this area, it strives to:

- **create simplicity and stability;**
- **set out clear operational rules that are grounded in fundamental concepts that are widely accepted by most.**

(2) Substantive review: What *Vavilov* says

- **Discusses the criticisms of *Dunsmuir v. New Brunswick*, 2008 SCC 9 and Supreme Court cases following it.**
- **Sets out the operational rules to be followed.**
- **Offers rationales why it has adopted those rules, sometimes with reference to other cases in the Supreme Court and elsewhere.**
- **Scatters the operational rules throughout the reasons, with discussions and rationales interspersed throughout.**

(2) Substantive review: This presentation

- **Extracts and presents the operational rules all together without the discussions and rationales: the aim is to show how simple the new regime actually is.**
- **Does not rehash the criticisms of the *Dunsmuir* jurisprudence: they are now irrelevant.**

(2) Substantive review: Operational rules

(1) Is there a legislated standard of review? There are two types:

(a) an explicit standard of review in the legislation: see, *e.g.*, B.C.'s *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 58-59; if so, just follow the legislation; and

(b) an "appeal", with or without leave, given in the legislation; if so, the appellate standard of review applies. More on the appellate standard of review later…

(at paras. 34-35)

(2) Substantive review: Operational rules

(2) If there is no legislated standard of review, then the court is to engage in reasonableness review (at para. 23).

Three exceptions to this (at para. 53):

- **Constitutional questions;**
- **"General questions of law of central importance to the legal system as a whole"; and**
- **Questions regarding jurisdictional boundaries between administrators.**

For these, the court is to engage in correctness review.

(2) Substantive review: Operational rules

Constitutional questions (*Vavilov* at para. 55):

- **Constitutional validity of legislation (the legislative division of powers and the Charter). See, *e.g.*, infringement of Charter rights: *Stadler v. Director, St Boniface/ St Vital,* 2020 MBCA 46.**
- **The scope and existence of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*.**

(2) Substantive review: Operational rules

Constitutional questions (*Vavilov* at para. 55):

- **Other constitutional issues. (For example, whether a fee was an unconstitutional indirect tax and not a regulatory charge: *Ladco Company Limited v. The City of Winnipeg*, 2020 MBQB 101; see also *Canada (AG) v. Northern Inter-Tribal Health Authority Inc.*, 2020 FCA 63 at paras. 12-13.)**
- **These seldom arise.**

(2) Substantive review: Operational rules

"General questions of law of central importance to the legal system as a whole":

- **They are questions that "require uniform and consistent answers" as a result of "their impact on the administration of justice as a whole": *Dunsmuir*, para. 60.**
- **The questions are more than just "important" or "significant to the parties".**
- **These seldom arise; S.C.C. has recognized this exception in just three cases: *Saguenay* (the state's duty of religious neutrality); *Univ. of Calgary* (the limits to solicitor and client privilege); *Chagnon* (the scope of Parliamentary privilege). All three involve constitutional or quasi-constitutional interests.**

(*Vavilov* at paras. 58-61)

(2) Substantive review: Operational rules

"General questions of law of central importance to the legal system as a whole":

- **Early indications courts are unwilling to expand this narrow category: *Beach Place Ventures Ltd. v British Columbia (Employment Standards Tribunal)*, 2020 BCSC 327 at paras. 32-34; *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 at paras. 21-23; *Syndicat canadien de la fonction publique, section locale 1108*, 2020 QCCA 857 at paras. 26-35**

(2) Substantive review: Operational rules

Questions regarding jurisdictional boundaries between administrators:

- **These seldom arise (*Vavilov* at paras. 63-64)**

Overall, reasonableness will often be the standard of review.

(2) Substantive review: Operational rules

Are there other exceptions taking us to correctness review? Only if:

- **there is "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)".**
- **"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".**

(*Vavilov* at paras. 69-70)

The overall tone: great reluctance to recognize other exceptions taking us to correctness review.

(2) Substantive review: Operational rules

• One possible exception that takes us to correctness review may be where both administrators and courts interpret the same statutory provision: *e.g.*, portions of the *Copyright Act*.

• Under *Dunsmuir*, this was a recognized area for correctness review: see *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57.

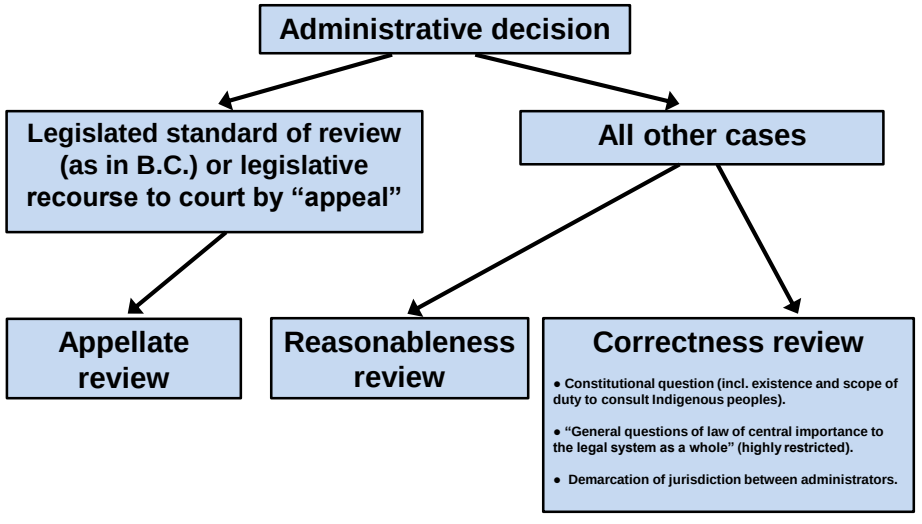
• *Vavilov* is surprisingly silent on the issue.

• FCA discusses this at length in *Entertainment Software Assoc. v. Society Composers*, 2020 FCA 100 at paras. 14-20 and leaves the issue open for a future case.

(2) Substantive review: Operational rules

- **These are all the operational rules!**
- **The operational rules take us to one of three types of review: appellate review, correctness review or reasonableness review.**

(2) Substantive review: Operational rules



(2) Substantive review: Types of review

- **Correctness review: its meaning is obvious; no further explanation need be given.**
- **Appellate review: for some first-instance judges in Canada, this will be a new task.**
- **Reasonableness review: for the first time, the Supreme Court discusses in detail what this is.**
- **Thus, this presentation will now examine appellate review and reasonableness review in some detail.**

(2) Substantive review: Appellate review

(Reminder: for statutory appeals)

- **Questions of law (*e.g.*, legislative interpretation): correctness review.**
- **Questions of mixed law and fact: (1) correctness review if there is an "extricable" legal question or issue of principle; (2) otherwise review for palpable and overriding error.**
- **Questions of fact: review for palpable and overriding error.**

Housen v. Nikolaisen, 2002 SCC 33; _H.L. v. Canada (Attorney General)_, 2005 SCC 25.

(For a post-*Vavilov* example of appellate review of a tribunal in a statutory appeal, see _Bell Canada v. Canada (Attorney General)_, 2019 SCC 66.)

(2) Substantive review: Appellate review

Palpable and overriding error is a tough test: see *e.g.* *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, citing *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46:

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

(2) Substantive review: Appellate review

The different ramifications of "palpable and overriding error" (see the full discussion in *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157):

- **Elaboration on meaning of "overriding": can be multiple errors taken together (*Mahjoub*, para. 65).**
- **Non-mention in reasons doesn't mean ignored; the first-instance decision-maker is presumed to have considered everything (*Mahjoub*, paras. 66-67; see also *Housen* para. 46).**
- **How we construe reasons; use of the record (*Mahjoub*, para. 68).**

(2) Substantive review: Appellate review

- **Allowance for drafting quirks; good reasons synthesize and leave trivia out (*Mahjoub*, para. 69; *South Yukon*, para. 50)**
- **So-called "discretions" are questions of mixed fact and law unless an extricable question of principle is found – the standard is palpable and overriding error (*Mahjoub*, paras. 72-74).**
- **Meaning of "extricable": whether "infected or tainted" by some misunderstanding of the law or legal principle (*Mahjoub*, para. 74; *Housen* at para. 35).**

(2) Substantive review: Appellate review

A brief word about correctness under appellate review…

- **Correctness means you can second-guess the administrative decision-maker as much as you like; no deference.**
- **But it is still worth taking the reasons of the administrative decision-maker seriously because it can explain how the statute works: see *Planet Energy (Ontario) Corp. v. Ontario Energy Board*, 2020 ONSC 598 at para. 31.**

(2) Substantive review: Reasonableness review

The concept of reasonableness review:

- **Reasonableness review often leads to deference to administrative decision-making.**
- **It's all about the overall acceptability of the decision. More on acceptability in a moment.**
- **Examine two things: the reasoning process leading to the outcome and the outcome itself (para. 83).**
- **The reasoning process may be in written reasons. Any written reasons should be viewed in light of the record. Where there are no reasons or gaps in reasons, the record before the administrator may shed light on the reasoning process. (see paras. 91, 97).**

(2) Substantive review: Reasonableness review

In doing reasonableness review, adopt the right approach:

- **The legislature has chosen to make the administrators the merits-deciders. Thus, the reviewing courts are restricted to review. Reviewing courts must respect that choice.**
- **Do not do "disguised correctness": "[D]o not make [your] own yardstick and then use that yardstick to measure what the administrator did": *Vavilov* at para. 83, citing *Delios v. Canada (Attorney General)*, 2015 FCA 117. See also *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34 at para. 28 (in the context of the adequacy of consultation with Indigenous peoples); *Girouard v. Canada (Attorney General)*, 2020 FCA 129 at para. 42.**

(2) Substantive review: Reasonableness review

Adopt the right approach (cont'd):

- **Start with the reasons of the administrator. "[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).**
- **Don't embark on a "line-by-line treasure hunt for error" (para. 102, citing *Irving Paper* at para. 54). Rather, search for "sufficiently serious shortcomings", things that are "more than merely superficial or peripheral to the merits of the decision" or flaws that are "sufficiently central or significant" (para. 100).**

(2) Substantive review: Reasonableness review

Adopt the right approach (cont'd):

- **Be tolerant. The reasons need not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" (*Vavilov*, para. 91).**
- **Be open-minded. Not all decision-makers are lawyers; do not insist on the same legal techniques a judge would use (*Vavilov*, para. 92).**
- **Be attentive to expertise and experience: a decision that may seem strange may, with the help of the administrator's reliance on expertise or experience, not be strange at all (*Vavilov*, para. 93).**
- **Understand that there may be a history to the case (*e.g.*, previous cases) or an unwritten background that may explain why the administrator did what it did (*Vavilov*, para. 91). See discussion in *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123 at paras. 14-15.**

(2) Substantive review: Reasonableness review

More on acceptability:

- **Two features of an acceptable decision:**

  (1) It is based on an internally coherent and rational chain of analysis (para. 102). The analysis (*i.e.*, the reasons or justification for the decision) can be in written reasons or can be inferred, supplemented or surmised from the record before the decision-maker (paras. 91 and 97).

(2) Substantive review: Reasonableness review

(2) It is justified in relation to the facts and law that constrain the decision maker (*Vavilov*, paras. 85 and 101). The constraints vary according to the context and "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov* at para. 90).

Let's look at these two things in more detail…

(2) Substantive review: Reasonableness review

(1) Internally coherent and rational chain of analysis:

- **Rational and logical analysis on critical points (*Vavilov*, para. 102).**
- **The presence of a line of analysis that could reasonably lead the decision-maker from the evidence to its conclusion (*Vavilov*, paras. 102-103).**
- **Understandable analysis on critical points (*Vavilov*, para. 103).**
- **No logical fallacies on critical points: *e.g.*, circular reasoning, false dilemmas, unfounded generalizations or an absurd premise; the decision must "add up" (*Vavilov*, para. 104).**

(2) Substantive review: Reasonableness review

(1) Internally coherent and rational analysis (cont'd):

- **Other sorts of flaws (identified in F.C.A. case law):**

  -- Offensive fact-finding: findings that are the equivalent of 1+1=3, controversial assumptions made without evidence, contradictory findings, findings without evidence, a finding completely at odds with the evidentiary record (see discussion in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 72.

  -- Inexplicable or unexplained jumps in reasoning and the record before the decision-maker does not shed light on the matter: *Taman v. Canada (Attorney General)*, 2017 FCA 1.

  -- Attention paid *exclusively* to policy statements and other extraneous materials for the purpose of exercising one's discretion (sometimes called "fettering discretion": *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299.

(2) Substantive review: Reasonableness review

(1) Internally coherent and rational analysis (cont'd):

- **Other possible things found in F.C.A. case law:**

  -- Exercises of discretion that are so disproportionate on the facts and the law that they can only be regarded as being the product of arbitrariness or personal spite/motive, or disregard of the statutory objective (*e.g.* "sledgehammer being used to hit a fly"; or situations similar to *Roncarelli v. Duplessis*, [1959] S.C.R. 121).

(2) Substantive review: Reasonableness review

(2) The decision is justified in relation to the facts and law that constrain the decision maker (*Vavilov*, paras. 85 and 101).

- **Consider "the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov* at para. 90) and ask whether the decision was within that space or was a permissible solution.**
- **In doing this, don't do disguised correctness! (see *Vavilov*, para. 83).**
- **"The limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" vary according to the context.**

(2) Substantive review: Reasonableness review

- **The Supreme Court offers assistance on whether a decision is justified:**
  - **-- It identifies some contextual factors that affect the space within which a decision-maker may act. It calls these "constraints".**
  - **-- It provides certain *indicia* that a decision is unreasonable. These are very similar to many of the "badges of unreasonableness" identified by some courts under *Dunsmuir:* see *e.g.*, *Delios v. Canada (Attorney General)*, 2015 FCA 117 at para. 27; *Re:Sound v. Canadian Association of Broadcasters*, 2017 FCA 138 at paras. 59-60; *Canada (Minister of Transport, Infrastructure and Communities) v. Jagjit Singh Farwaha*, 2014 FCA 56 at para. 100.**

(2) Substantive review: Reasonableness review

- **-- During its discussion of these, it also tells us in so many words that the presence of a badge can be explained away by the administrator —perhaps invoking a rationale based on statutory interpretation, policy appreciation or knowledge gained from specialization. See, *e.g.*, the reasoning of the majority in *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38.**

(2) Substantive review: Reasonableness review

Governing legislation affects the permissible space or constrains the administrator:

- ***Vavilov*** **emphasizes the centrality of legislation as a constraint on administrative decision-making. So the first step in reasonableness review is to identify the precise issue before the administrative decision-maker and the decision-maker's legal power to decide it: see, *e.g.*, *Canada (Attorney General) v. Boogaard*, 2015 FCA 150 at para. 36.**
- **Legislation sets boundaries on administrators' powers (see, *e.g.*, *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, or imposes specific requirements such as recipes that must be followed (see, *e.g.*, *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 and *Farwaha*, at paras. 93-97); these constrain what is acceptable (*Vavilov*, para. 108).**

(2) Substantive review: Reasonableness review

Governing legislation affects the permissible space or constrains the administrator (cont'd):

- **Compare narrow, constraining language in a statute (*e.g.*, "Dog licences shall only be issued on Tuesday") vs. very broad language (*e.g.*, "Dog licences may be issued in the public interest") (*Vavilov*, para. 110).**
- **Where administrative decision-makers act under broad statutory wording that is capable of an array of meanings, they are relatively less constrained in the statutory interpretations they reach, all other things being equal: *Vavilov* at para. 110; and in this Court, see, *e.g.*, *Entertainment Software Assoc.* at para. 31; *Heffel*; *Boogaard* at para. 42, *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245 at para. 69 and *Canadian National Railway Company v. Richardson International Limited*, 2015 FCA 180 at para. 30.**

(2) Substantive review: Reasonableness review

Governing legislation affects the permissible space or constrains the administrator (cont'd):

- **Similarly, administrative decision-makers are relatively less constrained by provisions that vest them with a broad scope of discretion: *Vavilov* at para. 108; *Catalyst Paper*, 2012 SCC 2; *Katz Group*, 2013 SCC 64; and in this Court, see, *e.g.*, *Entertainment Software Assoc.* at para. 32; *Heffel*; *Forest Ethics*.**
- **Clear limiting language in statutes can constrain: *Canada (Public Safety and Emergency Preparedness) v. Huang*, 2014 FCA 228; *Williams Lake Indian Band*, 2018 SCC 4 at paras. 33-34; *Entertainment Software Assoc.* at para. 33.**
- **Some legislation prescribes little in the way of constraining criteria (*e.g.*, highly discretionary funding decisions – see, e.g., *Canadian Arab Federation v. Canada (Citizenship and Immigration)*, 2015 FCA 168) or contains broad wording (*Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82 at paras. 33-34).**

(2) Substantive review: Reasonableness review

Governing legislation affects the permissible space or constrains the administrator (cont'd):

- **Some decisions authorized by statute, by their nature and scope, are less constrained: see, *e.g.*, *Canada (Attorney General) v. Boogaard*, 2015 FCA 150 (a discretionary decision to promote one employee over another); *Re:Sound v. Canadian Association of Broadcasters*, 2017 FCA 138 (economic regulation); *Bergeron v. Canada (Attorney General)*, 2015 FCA 160 at paras. 45-47 (resource allocation, primarily on the basis of policy).**
- **Some decisions draw on matters known to the executive that are not well-known to the reviewing court: see, *e.g.*, *Paradis Honey* at para. 136; *Gitxaala Nation v. Canada*, 2016 FCA 187 at para. 149; *Hupacasath First Nation v. Canada (Attorney General)*, 2015 FCA 4 at para. 66; *Rotherham Metropolitan Borough Council v. Secretary of State for Business Innovation and Skills*, 2015 UKSC 6.**

(2) Substantive review: Reasonableness review

Governing legislation affects the permissible space or constrains the administrator (cont'd):

- **Sometimes the question the legislation requires the administrator to consider may be "fuzzy," filled with subjective appreciations of fact or policy appreciation so the permissible space is broader. In some cases, the question is so policy-laden that the permissible space is extremely broad: *Paradis Honey Ltd. v. Canada*, 2015 FCA 89 at para. 137; *Re:Sound v. Canadian Association of Broadcasters*, 2017 FCA 138 at para. 50; *Gitxaala Nation v. Canada*, 2016 FCA 187 at para. 149.**
- **Complex, multifaceted and sensitive weighings by administrative decision-makers of information, impressions and indications using criteria that may shift and be weighed differently from time to time depending upon changing and evolving circumstances, all other things being equal, are relatively unconstrained and are harder to set aside: *Vavilov* at paras. 129-132; and in this Court, see, *e.g.*, *Entertainment Software Assoc.* at para. 29; *Boogaard* at paras. 47, 51-52; *Re:Sound* at para. 50.**

(2) Substantive review: Reasonableness review

Governing legislation affects the permissible space or constrains the administrator (cont'd):

- **Some legislation requires a decision-maker to draw on special skills and expertise that a reviewing court does not have and, thus, is less constrained: see *Vavilov* at paras. 31, 92-93 and 119; see also, in this Court, *e.g.*, *Entertainment Software Assoc.* at para. 30; *Re:Sound v. Canadian Association of Broadcasters*, 2017 FCA 138 at para. 50 (an appreciation of matters of economic policy); *Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82 at paras. 36-37 (knowledge of "national heritage" and "significance" of art).**

(2) Substantive review: Reasonableness review

Governing legislation affects the permissible space or constrains the administrator (cont'd):

- **Sometimes the question the legislation requires the administrator to determine a "public interest" matter based on wide considerations of policy and public interest, assessed on polycentric, subjective or indistinct criteria and shaped by the administrative decision-makers' view of economics, cultural considerations and the broader public interest—decisions that are sometimes characterized as quintessentially executive in nature. These are very much unconstrained: *Vavilov* at para. 110; and in this Court see, *e.g.*, *Entertainment Software Assoc.* at para. 28; *Gitxaala Nation (2016)* at para. 150, *Emerson Milling Inc.*, 2017 FCA 79 at paras. 72-73 and *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224 at paras. 18-19.**

(2) Substantive review: Reasonableness review

Governing legislation affects the permissible space or constrains the administrator (cont'd):

- **Sometimes the legislation requires the administrator to make a legal determination akin to the legal determinations courts make, governed by law and legal authorities, not policy. These are constrained by the law and legal authorities. See *Vavilov* at paras. 108-100; and in this Court, see, *e.g.*, *Entertainment Software Assoc.* at para. 34; *Kabul Farms Inc.*, 2016 FCA 143 at paras. 24-25, *Walchuk v. Canada (Justice)*, 2015 FCA 85 and *Globalive Wireless Management Corp.*, 2011 FCA 194.**

(2) Substantive review: Reasonableness review

Governing legislation affects the permissible space or constrains the administrator (cont'd):

- **At para. 108, *Vavilov* emphasizes that statutory purposes can constrain such that the pursuit of unauthorized purposes can render a decision unacceptable or indefensible: *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Padfield et al. v. Minister of Agriculture, Fisheries & Food et al.*, [1968] A.C. 997; *CUPE v. (Ontario) Minister of Labour*, [2003] 1 S.C.R. 539; *Re Multi-Malls* (1977), 14 O.R. (2d) 49 (C.A.); *Re Doctors Hospital* (1976), 12 O.R. (2d) 164 (Div. Ct.).**
- **Legislative interpretations must be explained and justified (*Vavilov,* para. 109); but the extent of justification depends on the context.**

(2) Substantive review: Reasonableness review

The common law can affect the permissible space or constrain the administrator:

- **Example: "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": *Vavilov,* para. 111 citing *Dunsmuir*, at para. 74.**
- **Statutory phrases may have been interpreted by courts and those interpretations must "generally" be followed: *Vavilov,* para. 111, citing *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56; see also *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75.**

(2) Substantive review: Reasonableness review

The common law can affect the permissible space or constrain the administrator (cont'd):

- **Settled case law that must be applied can constrain the range of acceptability and defensibility open to the tribunal: *Nova Scotia (Environment) v. Tynes*, 2020 NSSC 123 at paras. 64, 78)**
- ***Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at paras. 33-34; *Entertainment Software Assoc.* at para. 33; *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34 at paras. 37-59 (consultation with Indigenous peoples); *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at paras. 37-50; *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75; *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56 at paras. 93-97; *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at para. 14.**

(2) Substantive review: Reasonableness review

The common law can affect the permissible space or constrain the administrator (cont'd):

- **But it is open to an administrator to explain why a different interpretation in its administrative context should be reached (*Vavilov*, para. 112).**
- **Equitable and common law principles can be adapted and explained and this can be reasonable (*Vavilov*, para. 113, citing *Nor-Man*); similarly, the failure to adapt a principle could render a decision unreasonable (*Vavilov*, para. 113).**

(2) Substantive review: Reasonableness review

International law can affect the permissible space or constrain the administrator:

- **Legislation is presumed to operate in conformity with international obligations: *Vavilov*, para. 114, citing *Hape* and *Appulonappa*; treaties and conventions can inform whether the exercise of an administrative power was reasonable (*Baker* at paras. 69-71).**

But don't misuse international law!

- **Domestic law prevails; international law has only a limited role in statutory interpretation: see *Entertainment Software Assoc.* at paras. 69-92; *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 at paras. 55-57.**

(2) Substantive review: Reasonableness review

Evidence before the decision-maker can affect the permissible space or constrain the administrator:

- **Fact-finding is the preserve of the decision-maker and reviewing courts are forbidden from re-weighing (*Vavilov*, para. 125).**
- **But a reasonable decision must be justified by the facts (*Vavilov*, para. 126); absent some permissible notion of "notice" akin to judicial notice, the administrator cannot make findings unsupported by evidence or reach solutions not supported by the evidence.**
- **A decision will be unreasonable if it does not address the critical factual dispute that lies at the core of the decision: see *Chaffey v. Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 56; *Li v. Canada (Citizenship and Immigration)*, 2020 FC 279 at para. 13**

(2) Substantive review: Reasonableness review

Evidence before the decision-maker can affect the permissible space or constrain the administrator:

- **Only in "exceptional circumstances" will a reviewing court set aside findings of fact: *Girouard v. Canada (Attorney General)*, 2020 FCA 129 at para. 48.**
- **Note that "evidence" can include unsworn evidence (for many, informality is permissible under their legislation).**

(2) Substantive review: Reasonableness review

Evidence before the decision-maker can affect the permissible space or constrain the administrator:

- **Administrative decision-makers applying fact-driven criteria of a non-legal or less-legal nature are relatively less constrained and so, as a practical matter, their decisions are harder to set aside under the reasonableness standard: *Vavilov* at paras. 108-110; and in this Court, see, *e.g.*, *Entertainment Software Assoc.* at para. 27; *Re:Sound* at para. 49; *Gitxaala Nation* at para. 149; *Boogaard* at paras. 46, 51-52; *Paradis Honey Ltd.* at para. 137; *Delios* at para. 21 and *Farwaha* at paras. 90-99.**

(2) Substantive review: Reasonableness review

The submissions of the parties:

- **"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." (*Vavilov*, para. 127).**
- **But an administrator cannot be expected to respond to every argument or "to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Vavilov*, para. 128).**

(2) Substantive review: Reasonableness review

The submissions of the parties (cont'd):

- **The concern is 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" (*Vavilov*, at para. 128).**
- **Examples: *Farrier v. Canada (Attorney General)*, 2020 FCA 25; *Chaffey v. Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 56 at para. 50**

(2) Substantive review: Reasonableness review

Administrative precedents can affect the permissible space / constrain:

- **"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." (*Vavilov*, para. 131).**
- **A rationally defensible application of a previously announced, unchallenged policy is a sign of reasonableness: *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, [2012] 2 F.C.R. 312 at para. 87.**

(2) Substantive review: Reasonableness review

- **F.C.A. examples where consistency with prior administrative decisions has been taken to be a sign of reasonableness: *Re:Sound v. Canadian Association of Broadcasters*, 2017 FCA 138; and see e.g., *HBC Imports (Zellers Inc.) v. Canada (Border Services Agency)*, 2013 FCA 167 at paras. 38-39; *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59; *Baragar v. Canada (Attorney General)*, 2016 FCA 75 at para. 20; *Jolivet v. Canada (Correctional Service)*, 2014 FCA 1 at para. 4.**
- **"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." (*Vavilov*, para. 132).**

(2) Substantive review: Reasonableness review

Impact of the decision on the individual (*Vavilov*, para. 133):

- **"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."**
- **See *Vavilov* at paras. 133-135; and in this Court, see, *e.g.*, *Entertainment Software Assoc.* at para. 36; *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34 at para. 62 (consultation with Indigenous peoples); *Farwaha* at paras. 91-92; *Boogaard* at para. 49; *Walchuk* at para. 33; *Sharif* at para. 11; *Erasmo*; *Kabul Farms* at paras. 24-26.**

(2) Substantive review: Reasonableness review

In light of the foregoing, administrative reasons play a bigger role:

- **Much more significant than before: we are to review both the outcome reached and the chain of reasoning that the administrator took to get there.**
- **An outcome may potentially be reasonable but the decision may nevertheless be quashed because of an unacceptably faulty analysis or missing analysis on a key point.**
- **Where reasons read in light of the record "contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis," the court should not "ordinarily…fashion its own reasons in order to buttress the administrative decision" (*Vavilov*, at para. 96) .**

(2) Substantive review: Reasonableness review

But not all administrative decision-makers have an obligation to give reasons.

- **For some, procedural fairness, as determined by *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, means that the decision-maker does not have to give reasons.**
- **Institutionally, some are not suited to give reasons, such as municipal councils passing by-laws; the reasons of a council may not be explicit though it may be ascertainable from the circumstances.**

(2) Substantive review: Reasonableness review

For these decision-makers, what is to be done?

- **"…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" (*Vavilov*, at para. 138).**
- **"This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape" (*Vavilov*, at para. 138).**
- ***Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, a case repeatedly relied upon in *Vavilov*, is probably a good model of how to do it.**

(2) Substantive review: Reasonableness review

The special problem of administrators' interpretations of legislation:

- **The reviewing court is not to conduct its own analysis and then measure the administrative interpretation against it; that is "disguised correctness" (*Vavilov*, para. 116). See comments in *Delios*, *Heffel* and *Schmidt*.**
- **Administrators must follow the "text, context and purpose" approach to interpretation that courts follow (*Vavilov*, at para. 118) and must do it authentically, not in a result-oriented way (*Vavilov*, para. 121).**
- **But their reasons on this don't necessarily have to be formal and follow a certain form.**

(2) Substantive review: Reasonableness review

The special problem of administrators' interpretations of legislation (cont'd):

- **Because of their expertise or experience, they may have special insight on aspects of this, particularly purpose (*Vavilov*, para. 119).**
- **Minor omissions and mistakes do not matter (*Vavilov*, para. 122).**
- **Sometimes the administrator's interpretation can be discerned from the record (*Vavilov*, para. 123).**

(2) Substantive review: Reasonableness review

Reviewing administrators' interpretations of legislation without engaging in disguised correctness.

- ***Bancroft v. Nova Scotia (Lands and Forests)*, 2020 NSSC 175 recognizes the difficulty of avoiding disguised correctness**
- **A possible approach: *Hillier v. Canada (Attorney General)*, 2019 FCA 4 – The court looks at text, context and purpose to get the lay of the land, but not to reach conclusions. The focus remains on what the administrator did, as shown by its reasons.**

(2) Substantive review: Reasonableness review

Statutory interpretation plays a big role in judicial review (especially since the standard of review is correctness in statutory appeals).

A review of the basic principles is apposite:

- **Key cases: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54: examine the text, context and purpose of the legislation.**
- **Watch out for result-oriented interpretations and interpretations based on invented purposes rather than purposes genuinely advanced by the legislation: see, *e.g.*, *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252; *Canada v. Cheema*, 2018 FCA 45; *Hillier v. Canada (Attorney General)*, 2019 FCA 44.**

(2) Substantive review: Reasonableness review

- **Key is to identify the genuine purposes behind the particular legislative provision in issue: *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 and *R. v. Rafilovich*, 2019 SCC 51 (in my view the majority is correct in each case); see also incisive commentaries by Mark Mancini here, here and here.**
- **Legislative history can be examined as part of the context, but with caution. For an example of its use by a reviewing court when assessing the reasonableness of an administrator's legislative interpretation, see *Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82 at para. 39.**

(2) Substantive review: The role of earlier jurisprudence

- **Start with *Vavilov*. Earlier jurisprudence on the standard of review that does not accord with it should be changed. This seems to be the import of para. 143:**

  > **"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."**

- **There is no grandparenting of earlier cases; the grandparenting permitted by *Dunsmuir*, para. 62 has been abolished.**
- **As a result, some standards of review worked out under *Dunsmuir* and before *Dunsmuir* may now change. See, for example, the new, post-*Vavilov* standard of review to be applied in trademarks cases: *The Clorox Company of Canada, Ltd. v. Chloretec S.E.C.*, 2020 FCA 76**

(2) Substantive review: Appellate review

- **At present, *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 governs: the appeal court "steps into the shoes of the first-instance court, assesses whether the court chose the proper standard of review, and then checks to see if the court applied that standard of review properly.**
- **Effectively a re-do of everything the first-instance court did.**
- **Leave has been granted in a case that may reconsider this: *Northern Regional Health Authority v. Horrocks* (SCC No. 37878)**
- **Contrast *Minister for Immigration and Border Protection v SZVWF,* [2018] HCA 30 (consistent with *Agraira*) with *R (AR) v Chief Constable of Greater Manchester Police,* [2018] UKSC 47 (against *Agraira*)**

(2) Substantive review: Writing it up

- **Remember that substantive review is the second stage in a judicial review. The second stage might not be reached. The case might die early because of a procedural flaw or preliminary objection: for a detailed list and cases, see D. Stratas, *The Canadian Law of Judicial Review: Some Doctrine and Cases* (online and updated from time to time).**
- **In some cases, the decision under review is so deeply flawed it cannot survive under any standard. Standard of review analysis may not be necessary.**

(2) Substantive review: Writing it up

- **Not much need be said when writing up the standard of review: so keep it short.**
- **Emulate the clarity and the tightness of the analysis in the first Supreme Court case after *Vavilov* / *Bell*: *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67 (*per* Rowe J.).**
- **Sometimes only one short paragraph is necessary. See *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66 at para. 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)."**

(2) Substantive review: Miscellaneous matters and other questions

- **Does *Vavilov* really change what many of us have been doing?**
- **The status of *Doré v. Barreau du Québec*, 2012 SCC 12 (see para. 57)? (See Mark Mancini here, who says it is on its deathbed.)**
- **What of *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36? How long will it last?**
- **What is the standard of review of procedural decisions made by administrators? There are four different ideas on this floating around in the F.C.A. and across the country: *Bergeron v. Canada (Attorney General)*, 2015 FCA 160 at paras. 67-71. By implication, *Vavilov* may have cast into doubt the dominant position, correctness standard.**

(2) Substantive review: Miscellaneous matters and other questions

- **How many "honey pots" have been set up that will attract "correctness flies"? In particular, does the new emphasis on the importance of justification (reasons) create a mechanism by which a correctness-oriented judge can interfere? In practice, will review end up being too strict and interference too easy?**
- ***Vavilov* also throws a spotlight on remedies (at paras. 139-142). What effect will this have?**
- **In later decisions, we might expect the Supreme Court to "talk the talk" when it comes to *Vavilov*. But can it be counted upon to "walk the talk"?**
- **What role will lower courts, particularly intermediate courts of appeal, play?**

(2) Substantive review: Miscellaneous matters and other questions

- **Will *Vavilov* last? Is the "never-ending construction site" now at an end?**

(2) Substantive review: Miscellaneous matters and other questions

On the last question, maybe YES. This is the first time that the law of substantive review in Canada, as articulated by the Supreme Court, accords with fundamental understandings:

- ✓ **Legislation matters. The law on the books must be obeyed. Respect for legislative intent is the "polar star" of judicial review (*Vavilov*, para. 33)**
- ✓ **The justification for judicial interference is the rule of law. The vision of the rule of law articulated in *Vavilov* is sound.**
- ✓ **There is a constitutional separation of powers. The more that executive action concerns matters outside of the ken of the courts, the more it should be left alone**
- ✓ **Given the variety of decision-makers and decisions, a contextual approach to review must be adopted**
- ✓ **The law must be as simple and workable as possible**

(2) The merits of the judicial review

Earlier, we said that there were two parts to analytical step (2) of the 4 analytical steps in a judicial review: namely, "the merits of the judicial review"

First was the review of the substantive merits of the decision.

Now we go to the review of the procedures followed by the administrator

(2) Procedural review

- **Examples: bias, procedural unfairness (unfair adjournments, failure to receive a submission or to hear a witness, unfair factual investigation leading up to the hearing, rights to counsel, rights to adduce evidence).**

(2) Procedural review

The most frequent grounds on which procedural cases die in judicial review courts:

(1) Later proceedings cured the procedural defect: *Hnatiuk v. The Society of Management Accountants of Manitoba*, 2013 MBCA 31

(2) There is a right to have the administrator reconsider the matter – any procedural defects can be cured through that process

(3) Waiver -- the applicant failed to object to the procedural defect below: *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116; *Re the Human Rights Tribunal and Atomic Energy Canada*, [1986] 1 F.C. 103 at 107, 110-11 (C.A.); *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59 at paras. 67-68

(2) Procedural review

The analytical steps for procedural review are:

- **What sort of obligations did the administrative decision-maker owe?**
  - **-- Is there any guidance from constitutional provisions, constitutional principles, legislation, subordinate legislation, subordinate instruments?**
  - **-- What do common law principles say?**
    - **-- Threshold issue: Did the administrative decision-maker owe any procedural fairness obligations?**
    - **-- Content issue: What level of procedural fairness?**
- **What is the standard of review? Deference or not?***

***As we will see, some query whether this step exists.**

(2) Procedural review

What sort of procedural fairness obligations?

- **First step: Are there any constitutional or quasi-constitutional documents, statutes, subordinate legislation or subordinate instruments (*e.g.*, bylaws) that speak to the existence or content of procedures that must or could be followed? If so and if relevant, they must be followed or considered in the analysis. If not, then the case law (common law) and legal texts developed in the case law govern.**
- **Sometimes, as a matter of interpretation, statutes, subordinate legislation or subordinate instruments do not bear directly on the existence or content of procedures. But nevertheless they can shed light on them.**

(2) Procedural review

Examples:

- ***Canadian Charter of Rights and Freedoms*, esp. ss. 7 and 11; *Canadian Bill of Rights*, S.C. 1960, c. 44, ss. 1(a) and 2(e); *Charter of Human Rights and Freedoms*, C.Q.L.R., c. C-12, ss. 23, 58 (*Québec*); *Alberta Bill of Rights*, R.S.A. 2000, c. A-14, ss. 1(a), 2(e); duty to consult Aboriginal Peoples (s. 35 of the Constitution Act, 1982) and for a recent summary of principles on this, see *Gitxaala Nation v. Canada*, 2016 FCA 187.**

(2) Procedural review

- ***Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3 (Alberta), *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (British Columbia), *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (Ontario), *Administrative Justice Act*, C.Q.L.R., c. J-3 (Québec)**

(2) Procedural review

Alongside constitutional or statutory provisions or standards (where not ousted), or in their absence, the common law applies. (See discussion of hierarchy of law, above.)

Threshold issue: Did the administrative decision-maker owe any procedural fairness obligations?

- **Some decision-makers do not: see generally *Canada (Minister of National Revenue) v. Coopers & Lybrand*, [1979] 1 S.C.R. 495, *Martineau v. Matsqui Inmate Disciplinary Board*, [1980] 1 S.C.R. 602, *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643**

(2) Procedural review

- **Examples where none owed: decisions to enact a statute (see, *e.g.*, *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40, 2003 SCC 39), (perhaps) extremely broad policy decisions, decisions that are not justiciable (see e.g. *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4) and decisions that are private, not public (see, *e.g.*, *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 91-133; *Air Canada v. Toronto Port Authority*, 2011 FCA 347; *Setia v. Appleby College*, 2013 ONCA 753.**
- **Most, if not all, of these cases will be filtered out in step one of the three-step analytical method for judicial reviews (see above)?**

(2) Procedural review

- **If procedural fairness obligations are owed, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 tells us what level of procedures are required, *i.e.*, what the duty of fairness is. At para. 22: "The duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected."**
- ***Baker* prescribes a contextual approach guided by factors.**

(2) Procedural review

The *Baker* factors (paras. 23-27) –

- **The nature of the decision being made and the process followed in making it.**
- **The nature of the statutory scheme and the terms of the statute pursuant to which the body operates.**
- **The importance of the decision to the individual or individuals affected.**
- **The legitimate expectations of the person challenging the decision.**
- **The administrator's usual practices.**

(2) Procedural review

Standard of review for reviewing courts examining procedural choices of administrative decision-makers:

- **SCC is all over the map, yet all its cases are on the books (none overruled): *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59 (Stratas J.A. concurrence). Good summary of discord in the Canadian position: Edward Clark, "Reasonably unified: the hidden convergence of standards of review in the wake of *Baker*" (2016 Cambridge conference)**

(2) Procedural review

- **On the standard of review for procedural fairness in the UK, lots of contradiction too: compare *Secretary of State for Justice v. James*, [2009] UKHL 22 *per* Lord Judge (majority) with *Osborn v. The Parole Board*, [2013] UKSC 61 *per* Lord Neuberger (majority). (In the latter, note the differing level of deference between majority and dissent and the use of *Farwaha*-like factors.)**

(2) Procedural review

SCC approaches:

- **Usually SCC says correctness review. This is the dominant approach: *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at para. 43 (relying upon *Dunsmuir*, but *Dunsmuir* said nothing about procedural review); *Moreau-Bérubé v. New Brunswick Judicial Council*, 2002 SCC 11 at para. 74; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at para. 79 (in a matter where liberty interest is at stake but note also para. 89 where deference was exercised)**

(2) Procedural review

- **Sometimes SCC says correctness review but in applying it gives the decision-maker a significant margin of appreciation. In other words, correctness and deference at the same time: *Mission Institution v. Khela*, 2014 SCC 24 at paras. 79 and 89.**
- **See also to similar effect, see the SCC's foundational procedural fairness case, *Nicholson v. Haldemand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311. There, the Supreme Court found that Nicholson was entitled to a hearing as a matter of procedural fairness (correctness review) but left the manner of hearing – oral or written – to the choice of the Board of Commissioners**

(2) Procedural review

- **Sometimes the SCC offers clear and outright statements of deference: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 27 (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); *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at pages 568-569; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at para. 231 ("[c]onsiderable deference is owed to procedural rulings made by a tribunal with the authority to control its own process"); *Bibeault v. McCaffrey*, [1984] 1 S.C.R. 176; *Deloitte & Touche LLP v. Ontario (Securities Commission)*, 2003 SCC 61, [2003] 2 S.C.R. 713.**

(2) Procedural review

- **Sometimes the SCC says there is no standard of review. On this view, the reviewing court just applies the *Baker* factors. Note that since the administrative decision-maker applies the *Baker* factors, the reviewing court is just doing correctness review of what the tribunal did. See *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 at para. 74; *London (City of) v. Ayerswood Development Corp.*, 167 OAC 120 (C.A.)**
- **In many situations, this position makes no sense. If the matter was raised before the administrative decision-maker, the reviewing court is in the business of reviewing the decision. Thus, standard of review must be considered. If it was not raised and the administrative decision-maker did not decide the issue, then in many situations, there is waiver of any procedural objection and so the matter does not arise.**

(2) Procedural review

What does *Dunsmuir* have to say about the standard of review on procedural matters?

- **Contrary to what is said in *Khosa*, nothing was said in *Dunsmuir***
- **But procedural decisions, like substantive decisions, are often fact-based and discretionary; procedural standards are either found in a body of common law applied by tribunals within specialized legislative regimes, or are prescribed by home statutes.**
- **On these sorts of things, *Dunsmuir* prescribed reasonableness as the standard: paras. 53-54.**

(2) Procedural review

Lower courts trying to make sense of it all… Several different approaches…

A good summary of these approaches is set out in *Bergeron v. Canada (Attorney General)*, 2015 FCA 160 at paras. 67-72. The dominant view in the FCA is that the standard of review is correctness, though this is definitely not unanimous.

(2) Procedural review

Rival positions in the jurisprudence:

- **Correctness, no matter what: *e.g.*, *Air Canada v. Greenglass*, 2014 FCA 288**
- **Just apply *Baker*, period. Standard of review doesn't come into it. (This is really correctness review.) *London (City) v. Ayerswood Development Corp. et al.* (2002), 167 O.A.C. 120 (C.A.).**
- **Apply the fairness standard in *Baker* correctly, giving the tribunal leeway: *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 at para. 42; *Wilson v. University of Calgary*, 2014 ABQB 190 at paras. 47*ff*.**
- **No, that's incoherent, that's like saying a car is stationary but moving: *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59 (Stratas J.A. concurrence). The approach in substantive review of flexible ranges of reasonableness, or "margins of appreciation" should be adopted: *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 245.**

(2) Procedural review

Advantages of the *Maritime Broadcasting* / *Forest Ethics* approach:

- **Discretionary, fact-based decisions of tribunals should be treated the same way, regardless of whether they bear the label "substantive" or "procedural".**
- **Distinctions between procedure and substance are sometimes difficult to make: so why a different approach to each? See, *e.g.*, the participatory rights considered in *Forest Ethics*, a mixture of substance and procedure. Is a tribunal that takes into account significant evidence not adduced by the parties making a substantive error or a procedural error? Binnie J. has astutely noted the confusing overlap between substance and procedure: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 at para. 103.**

(2) Procedural review

Advantages of the *Maritime Broadcasting* / *Forest Ethics* approach (cont'd):

- **The flexible ranges of reasonableness, or "margins of appreciation" that move in response to the *Farwaha* factors allow reviewing courts to be fussy about tribunal procedures when they should be, while allowing leeway in other cases where the tribunal has a special factual or policy appreciation of the matter.**

(2) Procedural review

- **Another possible supporter of flexible range reasonableness review in procedural matters: Bich J.A. in *Syndicat des travailleuses et travailleurs de ADF - CSN c. Syndicat des employés de Au Dragon forgé Inc.*, 2013 QCCA 793**
- **Professor Daly seems to support flexible reasonableness review for procedural matters: see various entries in his blog, *Administrative Law Matters* (e.g., here, here, here, here, here, here and here); see also P. Daly, Paul Daly, *Canada's Bi-Polar Administrative Law: Time for Fusion* (2014) 40(1) Queen's Law Journal 213**

(2) Procedural review

- **Big U.S. debate on the subject: Adrian Vermeule, "Deference and Due Process"(2016) Harvard L.R. 1890 (pro-deference) *vs.* Ronald R. Levin, "Administrative Procedure and Restraint" (online blog; rebuttal to Vermeule)**

(2) Procedural review

Specific issues in procedural review (some cases):

- **Good reference for specific cases: Brown & Evans looseleaf**
- **WARNING: outcomes in cases can differ from those in the precedents depending on the type of administrative decision-maker (e.g. wide policy applying body vs. an adjudicative body) and other factors.**
- **When does delay cause procedural unfairness? *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307**
- **Adequate notice: *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165**

(2) Procedural review

Specific issues in procedural review (some cases) (cont'd):

- **Disclosure of evidence and case to meet: *May v. Ferndale Institution*, [2005] 3 S.C.R. 809; *Radulesco v. Canadian Human Rights Commission*, [1984] 2 S.C.R. 407; *Irwin v Alberta Veterinary Medical Association*, 2015 ABCA 396; *2127423 Manitoba Ltd. o/a London Limos v. Unicity Taxi Ltd. et al.*, 2012 MBCA 75; *Kane v. Bd. of Governors of U.B.C.*, [1980] 1 S.C.R. 1105**
- **Oral hearings: *Khan v. University of Ottawa* (1997), 34 O.R. (3d) 535**

(2) Procedural review

Specific issues in procedural review (some cases) (cont'd):

- **Administrative decision-makers conferring with others (*e.g.*, those on other panels): *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952**

(2) Procedural review

Specific issues in procedural review (some cases) (cont'd):

- **Administrative decision-maker's consideration of material not in the record: *Canadian National Ry. Co. v. Bell Telephone Co. of Canada*, [1939] S.C.R. 308; *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 at paras. 48, 54; *Pfizer Co. Ltd. v. Deputy Minister of National Revenue*, [1977] 1 S.C.R. 456. (There appears to be a line between expert tribunals considering general matters of expertise within their field and considering specific information pertaining to the very matter in the case.)**

(2) Procedural review

Specific issues in procedural review (some cases) (cont'd):

- **Legal representation: *Tri-Link Consultants Inc v Saskatchewan Financial Services Commission*, 2012 SKCA 41; *Telfer v. The University of Western Ontario*, 2012 ONSC 1287; *Macdonald v. Institute of Chartered Accountants of British Columbia*, 2010 BCCA 492**
- **Cross-examination: *LeBlanc v. Workplace Health, Safety and Compensation Commission*, 2012 NBCA 49; *Innisfil Township v. Vespra Township*, [1981] 2 S.C.R. 145; *Council of the Saskatchewan Veterinary Medical Association v. Murray*, 2011 SKCA 1**

(2) Procedural review

Specific issues in procedural review (some cases) (cont'd):

- **The right to receive reasons / a reasoned decision (as opposed to so-called adequacy of reasons which, under *NL Nurses*, is now a substantive matter): *Fashoranti v. College of Physicians and Surgeons of Nova Scotia*, 2015 NSCA 25; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650; *Wall v. Office of the Independent Police Review Director*, 2014 ONCA 884; *Gray v. Director of the Ontario Disability Support Program* (2002), 59 O.R. (3d) 364**

(2) Procedural review

Specific issues in procedural review (some cases) (cont'd):

- **Independence and impartiality: *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781 (generally the constitution does not support independence standards for administrative decision-makers; for that matter, statutes can oust common law impartiality/independence standards)**

(2) Procedural review

Specific issues in procedural review (some cases) (cont'd):

● Actual or apparent bias in a particular case: *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at 372 ("The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, the test of "what would an informed person, viewing the matter realistically and practically—conclude?")

(3) Remedies

- ***Vavilov* addresses substantive review**
- **But it also goes out of its way to discuss remedies: it throws a special spotlight on remedies.**
- **It is telling us to pay more attention to remedies.**
- **We should do so whether counsel raise remedies or not: sometimes they have huge practical effect and can further efficiency of the legal process.**

(3) Remedies

- **All are discretionary**
- **Just note the problem in the reasons and decline to grant a remedy? Or grant a remedy?**
- ***Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 (the discretion to grant or not grant remedies in procedural cases); *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 (the discretion to grant or not grant remedies for substantive defects)**
- **These authorities reaffirmed in para. 142 of *Vavilov***

(3) Remedies

- **One example of discretion: *Vavilov* at para. 142. Will any practical use be served by the granting of the remedy? Will there be harm to the parties, third parties or the public? See *Community Panel of the Adams Lake Indian Band v. Adams Lake Band*, 2011 FCA 37 (no remedy); *Lemus v. Canada (Citizenship and Immigration)*, 2014 FCA 114 (quash and send back because reviewing court left in doubt re outcome and is not the merits-decider); *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299; *Robbins v. Canada (Attorney General)*, 2017 FCA 24; *Maple Lodge Farms v. Canada* (C.F.I.A.), 2017 FCA 45 (no practicality in quashing and sending back; there was no doubt the same result would inevitably follow); *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, at paras. 54 and 88; *Renaud v. Quebec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855 (no practicality in quashing and sending back; there was no doubt the same result would inevitably follow)**

(3) Remedies

- **The sort of disposition is rather exceptional: the reviewing court must be sure the administrative decision-maker could not reasonably reach a different result if the matter were sent back: see *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326 at p. 361. The administrator, not the reviewing court, is the merits-decider: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, at para. 23; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras. 16-19.**

(3) Remedies

- **Where the reasonableness standard has been applied, the discretion 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": *Vavilov* at para. 140.**

(3) Remedies

- **BUT the default or "normal" position is to quash the decision and "remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons: *Vavilov* at para. 141.**
- **In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: *Delta Air Lines*, at paras. 30-31; *Vavilov* at para. 141.**

(3) Remedies

- **Remedial discretions are 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": *Vavilov* at para. 140.**
- **See the discussion of the values that animate administrative law in *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17 at para. 30, rev'd on a different point, 2016 SCC 29.**

(3) Remedies

- **Possible expansion of the criteria governing remedial discretion? See *Vavilov* at para. 142:**

  "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."

- **Granting a remedy other than quashing and sending back is rather rare. These are "limited scenarios", *i.e.*, rather rarely arising (*Vavilov* at para. 142)**

(3) Remedies

- **Another factor in the exercise of remedial discretion is misconduct / "clean hands": *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2006 FCA 14: balance the need to maintain the integrity of judicial and administrative processes (*e.g.*, seriousness of misconduct, extent to which the misconduct undermines the proceedings, and the need to deter others from misconduct) against the public interest in ensuring the lawful conduct of government and the protect of fundamental rights (nature of unlawfulness, apparent strength of case, importance of affected rights, impact of allowing impugned decision to stand)**
- **See also *Homex Realty v. Wyoming*, [1980] 2 S.C.R. 1011 at 1035.**

(3) Remedies

Types:

- ***Certiorari***
- ***Mandamus* (mandatory order against tribunal)**
- **Prohibition**
- **Injunction**
- **Declaration**
- ***Procedendo***
- ***Quo warranto***
- **Final costs**

(3) Remedies: *Certiorari*

- **The usual remedy**
- **Quashing and remittal back to administrative decision-maker for redetermination**

(3) Remedies: *Certiorari*

- **Remit back to original decision-maker or a new one? The latter when there is a reasonable apprehension of bias or a concern that it will not be able to decide the case objectively (*e.g.*, because it has already taken a strong view of how the case should turn out).**
- **See, *e.g.*, *Cranston v. Canada* (1995), 192 N.R. 125, 106 F.T.R. 80 (the administrator had made perverse findings of fact).**

(3) Remedies: *Certiorari* in part or "severance"

- **An unusual remedy, sometimes appropriate where part of an order can stand alone. Be careful, because the administrative decision-maker might not have made the severed order. Often more prudent to remit the whole thing back. See *Canadian Pacific Ltd. v. B.M.W.E.*, (1989), 98 N.R. 133 (F.C.A.)**

(3) Remedies: *Mandamus*

- **The classic criteria: *Apotex Inc. v. Canada (Attorney General)*, [1994] 3 S.C.R. 1100, adopting *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742: there must be no discretion left in the administrative decision-maker and the administrator has a duty to act. Put another way, given the facts as found by the administrative decision-maker, it would be legally impossible for it to reach any other outcome: *Allman v. Amacon Property Management Services Inc.*, 2007 BCCA 302**

(3) Remedies: *Mandamus*

- **A new category? *Mandamus* for severe maladministration: *Pointon v. British Columbia (Superintendent of Motor Vehicles)*, 2002 BCCA 516; *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55; *D'Errico v. Canada (Attorney General)*, 2014 FCA 95; see also *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 148 *per* LeBel J. (dissenting, the rest of the Court not disagreeing on this point)**

(3) Remedies: Prohibition

- **Very rare these days**
- **Reflects circumstances where court is willing to entertain a judicial review during the course of an administrative proceeding: must strike at the root of the proceeding in circumstances of grave prejudice**

(3) Remedies: Damages?

- **Traditionally not available under judicial review: *Al-Mhamad v. Canada (Radio-Television and Telecommunications Commission)*, 2003 FCA 45**
- **But a plaintiff can bring an action for damages against an administrator and a judicial review against the same administrator and consolidate the two proceedings. See *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215 at paras 45-50.**
- **Might the law of damages against public authorities develop in a way that mirrors the law of judicial review? See *Paradis Honey Ltd. v. Canada*, 2015 FCA 89.**

(3) Remedies: Attaching terms to relief

- **Attaching terms is a discretionary matter subject to limits**
- **Discretion governed by "public law values" (such as rule of law, good administration, democracy, separation of powers)? See *Paradis Honey Ltd. v. Canada*, 2015 FCA 89 at para. 138; see also Prof. Paul Daly commenting on *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 (Online: http://www.administrativelawmatters.com/blog/2014/04/29/values-rights-and-remedies/)**

(3) Remedies: Attaching terms to relief

Limits on the discretion to attach terms:

- **Cannot invade the administrative decision-maker's role as "merits decider"**
- **Cannot make terms that conflict with the legislation that the administrative decision-maker must obey: see, *e.g.*, *Gitxaala Nation v. Canada*, 2016 FCA 187 at paras. 333-341. For example, in that case the Governor in Council (the administrative decision-maker) on redetermination would still have to follow section 53 of the *National Energy Board Act*, a section that applied to the original decision. The reviewing court could not make terms inconsistent with that.**

(3) Remedies: Attaching terms to relief

Examples:

- **Timing issues: "hurry up" orders**
- **"Advice" re what administrative decision-maker should consider when redetermining the matter: substantive issues and procedural issues**
- **Specific procedural directions**
- **Should a new person decide?**
- **Ordering "ongoing supervision" by SC: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62; *Canada (Attorney General) v. Jodhan*, 2012 FCA 161 at para. 150; *Canada v. Long Plain First Nation*, 2015 FCA 177 at paras. 145-156**

(3) Remedies: Final costs

- **Final costs: discretionary (but first see if permitted by statute – *e.g.*, an award of costs is precluded in proceedings under the *Immigration and Refugee Protection Act* unless there are "special reasons": Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22**

(3) Remedies

A last warning…

- **When ordering remedies, notwithstanding the breadth of any discretion, the reviewing court must obey any relevant statutory provisions on the books. For example, sometimes statutes specify procedures that the decision-maker must follow when making a decision (or a re-decision): *Gitxaala Nation v. Canada*, 2016 FCA 187**
- **For example, section 53 of the *National Energy Board Act*: the Governor in Council (the decision-maker) sometimes must refer a question back to the NEB before it can make a final decision. This would apply to re-determinations by the GIC ordered by the reviewing court.**

(3) Remedies

Overall, discretion pervades the granting of remedies, the imposition of terms, *etc.* – so what principles broadly govern the discretion?

- **"Courts inform their remedial discretion by examining the acceptability and defensibility of the decision, the circumstances surrounding it, its effects, and the public law values that would be furthered by the remedy in the particular practical circumstances of the case." (*Paradis Honey Ltd. v. Canada*, 2015 FCA 89 at para. 138.)**
- **A growing sense that "public law values" underlie our discretions: Prof. Paul Daly commenting on *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 (Online: http://www.administrativelawmatters.com/blog/2014/04/29/values-rights-and-remedies/); *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17 at para. 30; *Budlakoti* at para. 60.**

Appeals from judicial reviews

What rules apply to appellate courts considering the judgments of first-instance reviewing courts?

Appeals from judicial reviews: Standard of review

Reviewing what the first-instance reviewing court did on a preliminary judicial review issue?

- **The usual appellate standard of review: *Housen v. Nikolaisen*, 2002 SCC 33**
- **SCC has never ruled on this, but see *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139 at para. 37; *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17 at paras. 25-26, rev'd on another point, 2016 SCC 29; *Long Plain v. Canada*, 2015 FCA 177 at para. 88; *Apotex v. Minister of Health*, 2018 FCA 147 at paras. 57-61**
- **Normal appellate powers**

Appeals from judicial reviews: Standard of review

Reviewing what the provincial superior court did on substantive review (*Vavilov* and *Baker* stuff)?

- **A special standard of review called *Agraira* review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47.**
- **The appellate court assesses whether the first-instance reviewing court properly selected the standard of review; then the appellate court stands in the shoes of the first-instance reviewing court and assesses whether the latter applied it properly to the facts before it.**
- **Appellate court simply makes the decision the first-instance reviewing court should have made**

Appeals from judicial reviews: Standard of review

- **Effectively, this is *de novo* review (which encourages appeals; there is no rationale expressed for this in *Agraira*)**
- **Query whether *de novo* review does nothing but encourage litigation of points that are best regarded as well and capably settled by first-instance courts. The encouragement of unnecessary litigation is against the new litigation culture encouraged by the Supreme Court: *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87**
- **Many first-instance findings on judicial review are prompted by the judges' appreciation of the factual record before them. In every other area of law, appeal courts defer to those sorts of findings. What justifies a different approach here? (*Agraira* does not offer an explanation.)**

Appeals from judicial reviews: Standard of review

Reviewing the first-instance court's choice of remedy?

- **The usual appellate standard of review: *Housen v. Nikolaisen*, 2002 SCC 33. SCC has never ruled on this explicitly, but see *Canada v. Long Plain First Nation*, 2015 FCA 177 at para. 88-91; *Canada (Attorney General) v. Jodhan*, 2012 FCA 161 at para. 75**
- **Slightly more latitude to intervene (easier than palpable and overriding error) re remedial discretion and questions of mixed fact and law? See isolated comments in *Friends of the Oldman River v. Canada*, [1992] 1 S.C.R. 3 at para. 104; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at para. 43**

Appeals from judicial reviews: New remedies; new issues

Admissibility of new issues on appeal

- **Is it an issue that should have been raised before the administrative decision-maker? The Court has a discretion to hear the new issue, but the discretion should be exercised sparingly because the administrative decision-maker is a merits-decider: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61**

- **Note that if it is an issue that goes to the Court's subject-matter jurisdiction to proceed, it must be considered. The Court cannot agree to a jurisdiction it does not have: see above.**

Appeals from judicial reviews: New remedies; new issues

Admissibility of new issues on appeal:

- **Appellant seeks a new judicial review remedy that was not sought in the first instance reviewing court? See *Quan v. Cusson*, 2009 SCC 62; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19. Is there prejudice to other side? Is evidence required to make out the remedy? Has other side been deprived of an opportunity to adduce evidence on the issue?**

Other resources

- **For further reading:**
  - -- **anything by David Mullan (his Irwin Law text is excellent, though outdated); his Administrative Law chapter in the Canadian Encyclopedic Digest (not regularly updated) is a wonderful reference for older authority, especially on basic points; be sure that the older authorities cited remain good law.**
  - -- **Brown and Evans, *Judicial Review of Administrative Law in Canada* (looseleaf); Macaulay and Sprague, *Practice and Procedure Before Administrative Tribunals* (looseleaf)**

Other resources

-- **for recent developments, see Prof. Paul Daly's consistently valuable blog, *Administrative Law Matters*; see also Prof. Sirota's blog in which he sometimes comments on administrative law issues**

- **Prof. Daly has written many helpful articles on many important topics. Here is his collection on SSRN: https://papers.ssrn.com/sol3/results.cfm.**

- **Mark Mancini writes public law articles of consistently high standard, particularly on recent cases and particularly on statutory interpretation, on *Double Aspect* (blog).**