The Guess What: Waiting for the Supreme Court's Admin Law Trilogy

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Introduction

Thanks to two disparate sets of facts – a son of Russian spies who maintains he is Canadian, and the CRTC's decision to let Canadians watch American Super Bowl ads during the live broadcast – the Supreme Court of Canada may soon simplify the rules around selecting and applying the standard of review for administrative decisions. In the meantime, followers of Canadian administrative law are left guessing as to what approach the Supreme Court may adopt.[1]

On May 10, 2018, the Supreme Court granted leave to appeal in *Vavilov* and to the companion CRTC cases of *Bell Canada* and *National Football League*.[2] In a rare moment of transparency on these types of announcements, the Court gave some explanation as to why it exercised its discretion to grant leave to appeal by inviting parties to make submissions on the nature and scope of the law of judicial review of administrative orders and decisions as outlined in *Dunsmuir* one decade prior.[3] Over three hearing days in December 2018, a full panel heard oral argument from 8 parties, 27 interveners, and 2 Court-appointed *amici curiae* (McGill law professor Daniel Jutras and Montreal lawyer Audrey Boctor). As of the date of writing, the Court's decision on 'the Trilogy' remains on reserve.

Administrative law scholar Paul Daly referenced this current state of limbo affecting administrative law and the standard of review in his 2019 year-in-review paper entitled *Waiting*

[1] **The final version of this article was completed on December 10, 2019**, to be presented at the Manitoba Bar Association's Mid-Winter Conference on January 24, 2020. The article's title was inspired by The Guess Who, the legendary Canadian rock band formed in Winnipeg in the 1960s, who went on to international fame.

[2] *Vavilov v. Canada (Citizenship and Immigration)*, 2017 FCA 132, leave to appeal to SCC granted (37748) [*Vavilov*]; *Bell Canada v. Canada (Attorney General)*; *National Football League, et al. v. Attorney General of Canada*, 2017 FCA 249; leave to appeal to SCC granted (37896 and 37897) [*Bell Canada*/*NFL*].

[3] See e.g. *Minister of Citizenship and Immigration v. Alexander Vavilov*, 2018 CanLII 40807 (SCC); and see News Releases - Judgments in Appeals and Leave Applications, online: < https://scc-csc.lexum.com/scc-csc/news/en/item/6047/index.do?q=37897>.

for Godot, named after the Samuel Beckett play in which the eponymous character never arrives. For the two characters in Beckett's play, life goes on, just as it does for lawyers practising administrative law and clients considering their chances of success when administrative decisions are challenged in court.

As Daly writes, the issue of selecting the standard of review and how courts apply that standard likely takes up more than its fair share of commentary in Canadian administrative law. Yet, the appeals heard before the Supreme Court also highlight the importance of the law of standard of review. Ultimately, courts and commentators alike remain vexed with the broader issue of the tension between legislative supremacy (legislatures affording vast decision-maker powers to the executive branch), and the Rule of Law (the role of courts in overseeing that administrative decision-making is accountable).[4] The controversies that led to these court challenges also provide reminders of both the broad range of processes underlying administrative decision-making, and the serious effects that these decisions have on individuals and organizations across Canada and internationally.

Overview of the Trilogy cases on appeal: *Vavilov* and *Bell Canada; NFL*

Alexander Foley was born in Toronto in 1994. Until he was 16, he believed he and his family were Canadian. In July 2010, while his family was living in Boston, armed FBI agents entered their home and arrested his parents on charges of being agents with the Russian spy agency, SVR. Alexander and his brother Timothy travelled to Russia for the first time and adopted their new surname, Vavilov. They then attempted to return home.

On August 15, 2014 the Registrar of Citizenship cancelled Alexander's Canadian citizenship. It did so by applying section 3.2(a) of the *Citizenship Act*, which excludes the children of foreign diplomats or employees from the right to citizenship.[5] The Registrar's decision was in turn based

[4] See *Dunsmuir*, at para. 27; see also Daniel Jutras and Audrey Boctor, Factum of the Amici Curiae, at para. 3 (the "twin pillars on which *Dunsmuir* rested [are] the rule of law and appropriate respect for legislative choices about our structure of governance") [Amici Factum].
[5] *Vavilov*, at para. 5 and 91; see SOR/93-246, s. 26(3); *Citizenship Act*, RSC 1985, c. C-29, s. 3.2(a).

on an internal report of an analyst dated June 24, 2014 which found that his parents were not Canadian and that they did not lawfully enter Canada.[6] The root of the decision—an internal report drafted by an analyst with no legal training—was not lost on Vavilov's lawyers, who commented on this in their factum, as described below.

Vavilov initially lost his application for judicial review at the Federal Court, which found that the Registrar's decision to cancel his citizenship was reasonable. The Federal Court also found that it was reasonable for the Registrar to accept the findings contained in the analyst's report.[7] On the issue of statutory interpretation, namely whether individuals living under assumed identity are included under section 3.2(a) of the *Act*, the Federal Court applied the correctness standard and found that the Registrar made no error in this regard.

The appeal to the Federal Court of Appeal turned on the issue of statutory interpretation. Stratas and Webb JJ.A., writing for a 2-1 majority (Gleason J.A. in dissent), set aside the lower court's judgment and quashed the underlying decision of the Registrar of Citizenship to cancel Vavilov's citizenship.

In selecting the standard of review for a question of statutory interpretation, the majority relied on the Supreme Court of Canada decision in *Edmonton East* which states that the reasonableness standard presumptively applies where an administrative decision maker applies its home statute.[8] The FCA also observed that where the reasonableness standard has a significant impact on the individual (and in the immigration context in particular), the court will apply a more 'exacting' reasonableness standard.[9] However, the majority also found that "the standard of review debate in this case is not of great practical import" because the Registrar's decision did not mention statutory interpretation, and the underlying analyst's report only briefly referenced the topic.[10] As a result, the majority could afford little deference and found that it could not determine

[6] *Vavilov v. Canada (Citizenship and Immigration)*, 2015 FC 960, at para. 27 (*Vavilov* FC); see also Respondent's Memorandum of Argument on Appeal at paras 5-6.
[7] *Vavilov* (FC), at para. 28.
[8] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*., 2016 SCC 47.
[9] *Vavilov*, at paras. 36-37.
[10] *Vavilov*, at para. 34.

whether statutory interpretation was considered.[11] (After the FCA released its decision, Alexander's older brother Timothy challenged the Registrar of Citizenship's decision to cancel his citizenship. Following Alexander's success at the FCA, Timothy's application for judicial review was granted and the matter was remitted for reconsideration by a different decision-maker.[12])

While Vavilov had argued that his procedural fairness rights were breached because he was not given proper notice of the case to meet, the majority disagreed, and found that a letter from the Registrar's Case Management Branch sufficiently laid out the legal test and the facts required to substantiate that test. On appeal to the SCC, his argument about the alleged breach of his procedural fairness rights was raised only in the alternative.

In the companion *Bell Canada* and *NFL* cases heard together with *Vavilov* on appeal to the SCC, the Federal Court of Appeal was asked to review the Canadian Radio-television and Telecommunications Commission's ("CRTC") decision to allow American Super Bowl ads to play in Canada during the live broadcast of the game. Following public consultations with affected parties, including Bell Canada and the NFL, the CRTC did so by issuing a Final Order pursuant to paragraph 9(1)(h) of the *Broadcasting Act* and a Final Decision explaining this Order to exclude the Super Bowl from its simultaneous substitution regulatory regime (known as the *Sim Sub Regulations*).[13]

The Federal Court of Appeal considered two issues on the reasonableness standard: whether the CRTC's Final Order was within its jurisdiction; and whether the CRTC could determine that its Order was not retrospective and did not interfere with vested rights. The Court also asked whether it was correct for the CRTC to decide that its Order did not conflict with the *Copyright Act* and/or international trade law.[14] The Attorney General was successful on all three issues and the Court found no reviewable errors with the CRTC's Final Order. Although neither Bell

[11] *Vavilov*, at para. 39.
[12] *Vavilov v. Canada (Citizenship and Immigration)*, 2018 FC 450.
[13] *Bell Canada/NFL* (FCA), at paras. 5-7.
[14] *Bell Canada/NFL* (FCA), at para. 8.

Canada nor the NFL raised a freedom of expression argument before the Federal Court of Appeal, they did advance this *Charter* argument before the Supreme Court.

As in *Vavilov*, the first question before the Federal Court of Appeal's analysis turned on statutory interpretation. Because the CRTC was interpreting the *Broadcasting Act*, one of its home statutes, it was owed deference on this interpretation issue. Bell Canada and the NFL argued that the Commission could not single out a specific program like the Super Bowl for the Order that it made because the wording of paragraph 9(1)(h)—which refers to "programming services"—does not apply to a single show, but rather to a station or channel. The Court found that it was reasonable for the CRTC to interpret that "programming services" could include a single show.[15]

In light of the issues raised in these appeals, scholars including Paul Daly do not have high expectations for the eventual decision based on the standard of review Trilogy:

> Speaking personally, I have long since got over my initial excitement about the Trilogy. To begin with, the range of issues in play in the Trilogy is quite narrow. Both *Bell Canada* and *Vavilov* turn on issues of statutory interpretation (and, relatedly, the extent to which the decision-maker adequately justified its interpretation);[16] in *Bell Canada* there is a statutory provision giving an appeal on questions of law or jurisdiction. There is a *Charter* issue in Bell Canada but not one liable to lead to a rethink of the Court's jurisprudence on the Charter in an administrative law setting. Procedural fairness was mentioned in the Federal Court of Appeal in *Vavilov* but has not been put in issue in the cases. In both of these areas, there have been judicial and academic calls for reform, but these important issues are unlikely to garner much attention in the Trilogy (albeit that the amici suggest a change to the approach to the *Charter* in administrative law cases). It seems clear to me that there are different factions on the Court – broadly those who believe in deference on questions of law and those who don't, with the relative importance different judges are willing to afford to context something of a wild card – but it is not at all obvious how these can be reconciled to each other.

This skepticism may be well placed. In general, the facta on appeal in the *Vavilov* and *Bell Canada; NFL* cases propose either a simplification of the *Dunsmuir* framework or only slight

[15] *Bell Canada/NFL* (FCA), at para. 28.

[16] Note that the Attorney General of Ontario argued that for questions of statutory interpretation, courts should move away from the reasonableness/correctness paradigm and instead ask if the tribunal's interpretation arrives at a logical result based on established principles of statutory interpretation: see AG Ontario Factum, at paras. 2-4.

modifications to selecting and applying the appropriate standard.

The current law on the standard of review and proposals for change

While *Dunsmuir* simplified the law of standards of review by collapsing the former standards of "patent unreasonableness" and "reasonableness *simplicter*" into the single reasonableness standard, and by providing a framework to select the appropriate standard, case law and commentary since 2008 demonstrate that confusion around selection and application continue. This may be best exemplified by the 5-4 decision in *Edmonton East* in which the Supreme Court majority and minority decisions focused on different approaches under *Dunsmuir*, selected different standards of review, and arrived at different conclusions flowing from the application of those respective standards.

If there is no settled law on which standard is appropriate, the majority in *Edmonton East* (delivered by Karakatsanis J. with Abella, Cromwell, Wagner and Gascon JJ.) wrote that the court should then ask if the decision involves the administrative decision maker interpreting its home statute. If so, the reasonableness standard is presumed to apply. According to the majority in *Edmonton East*, the presumption is rebutted only if the question falls into one of four categories which call for the correctness standard. Those categories are:

a. constitutional questions regarding the division of powers,
b. questions that are of both central importance to the legal system as a whole and outside the decision maker's area of expertise,
c. true questions of jurisdiction or *vires*, and
d. issues of competing jurisdiction between tribunals.

In contrast, the minority in *Edmonton East* (delivered by Côté and Brown J.J., with McLachlin C.J. and Moldaver J.) cautioned against over-reliance on the above categories to identify questions that warrant the correctness standard. Further, the minority maintained that context must play a key role in the court's analysis whenever a court selects the standard of review.[17]

[17] *Edmonton East*, at para. 70.

Canada (Canadian Human Rights Commission) v. Canada (Attorney General) is the most recent Supreme Court case citing *Edmonton East* with a thorough standard of review analysis.[18] The underlying decisions were that the Canadian Human Rights Tribunal had dismissed complaints that Indian and Northern Affairs Canada breached section 5 of the *Canadian Human Rights Act* ("*CHRA*") in the provision of services. The Tribunal found that the complaints related solely to a registration regime under the *Indian Act* and were not services contemplated by the *CHRA*.

In *Canadian Human Rights Commission*, the majority (delivered by Gascon J. with McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner JJ.) also preferred the categorical approach to rebut the presumption that the Tribunal was owed deference in applying its home statute, and stated that the "contextual approach should be applied sparingly".[19]

In contrast, the minority (Coté and Rowe JJ.) placed greater emphasis on the contextual factors and would have applied the correctness standard to review the Tribunal's decisions. In particular, they "disagree with the proposition that the contextual approach plays merely a subordinate role in the standard of review analysis".[20] In applying this more stringent standard, Coté and Rowe JJ. found that the Tribunal's decisions were correct. Here, applying different standards did not produce different outcomes.

As the Federal Court of Appeal stated in both *Vavilov* and *Bell Canada/NFL*, the interpretation of a home statute calls for a deferential approach. Justice Stratas has observed that this proposition was once controversial, later became settled law, and has again become the subject of dispute through decisions like *Edmonton East*.[21] The factums on appeal to the SCC present diverging views of whether this presumption is appropriate. For a critical take, see Vavilov's factum at paras. 62-63, where he argued that not all decision-makers are equal:

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[18]2018 SCC 31, at paras. 72-3 [*Canadian Human Rights Commission*].
[19] *Canadian Human Rights Commission*, at para. 46.
[20] Canadian Human Rights Commission, at para. 78. Note that in concurring reasons Brown J. expressed support for the category of "true questions of jurisdiction" remaining part of the *Dunsmuir* framework.
[21] Stratas, David, The Canadian Law of Judicial Review: Some Doctrine and Cases (September 18, 2018), online: < http://dx.doi.org/10.2139/ssrn.2924049>, at p. 41.

> This appeal demonstrates the mixed results produced by the presumption that the standard of review is reasonableness whenever any decision-maker interprets its "home statute." This presumption has sometimes been referred to as the "Paul Weiler Syndrome" for its unspoken premise that every administrative decision-maker is as expert as the Harvard law professor and former chair of the Ontario Labour Relations Board, though that is clearly not the case.[22]
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> More particularly, it is neither useful nor convincing to ask the parties and the reviewing court to presume that a minor civil servant without legal training like the Registrar has the same expertise as, for instance, a member of the Specific Claims Tribunal who is a superior court judge sitting on a body devoted to adjudicating specialized disputes.[23] It is no more satisfactory to presume that even though the Registrar answers to the Minister when making her decisions after which he defends them in court, she is nevertheless entitled to the same deference as an expert tribunal whose members have security of tenure and operate independently from either party.

In contrast, the Canadian Council of Administrative Tribunals (CCAT) took the focus away from any individual decision-maker and argued that expertise is inherent in the tribunal itself:

> The principle of broad deference to tribunals has sometimes been attacked on the basis that some tribunals' members are said not to possess sufficient expertise to warrant deference. These attacks are misguided. As a majority of this Court held in *Edmonton East*, expertise "inheres in a tribunal itself as an institution."[24] The expertise of the members is presumed or assumed.[25] This expertise stems not just from specialization. It also arises from the fact that tribunals train members through comprehensive programs, encourage a collegial sharing of expertise among members, and develop policies and practices that respond to the needs of those who use the tribunals and that reflect the mandates provided to them by statute. This expertise is then reflected in the jurisprudence created by the tribunals.

Although the above may not contemplate the "minor civil servant" whose report led to the revocation of Vavilov's citizenship, the broad deferential approach proposed by the CCAT

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[22] Robertson, Hon. Joseph, "Administrative Deference: The Canadian Doctrine That Continues to Disappoint" (April 18, 2018), online: <https://ssrn.com/abstract=3165083>.
[23] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, para. 33.
[24] *Edmonton East*, at para. 33.
[25] *Edmonton East*, at para. 33; *Alberta Teachers*, at para. 1.

continues to hold weight in the other facta submitted to the Court.[26] The CCAT, for its part, went further than other interveners in arguing that the deferential standard must apply where administrative tribunals decide questions of law,[27] and that the tribunal's decision should be upheld so long as its "reasoning is clear taking into account the entire context of the decision."[28] The CCAT argued that doing so respects legislative intention and would reduce the number, length, and cost of judicial reviews. Further, the Council's view was that allowing courts to substitute their own decisions invites unnecessary applications for judicial review, questions the legitimacy of administrative tribunals, and frustrates legislative intent.[29]

The *amici* factum frames the default to the reasonableness standard at an institutional level where "respect for legislative intent leads to a default rule of deference", and not as "contest of expertise" between courts and the executive.[30] Broadly, the *amici* argued for a continued and clarified *Dunsmuir* framework. They proposed that the default rule toward reasonableness should only diverge based on clear legislative intent, or through four derogations mandated by the rule of law and constitutional principles. Those derogations are nearly the same as three of the four categories in the *Dunsmuir* framework, with one exception: they would eliminate the "questions of true jurisdiction" category and would introduce derogation where there is "persistent discord leading to legal incoherence" based on the rule of law principles of predictability, finality and coherence.[31]

The Minister of Citizenship and Immigration (*Vavilov*), and the Attorney General of Canada (*Bell Canada/NFL*) also specifically argued that the "questions of true jurisdiction" correctness category should be eliminated.[32] The Attorney General in particular noted that since *Dunsmuir*, no Supreme Court decision has applied this category[33]–referring to the search for such questions

[26] See e.g. AG Canada Factum, at paras. 36, 40, 45; Minster of Citizenship Factum, at para. 48, Advocates for the Rule of Law Factum, at para. 5; Telus Factum, at para. 2.
[27] CCAT Factum, at para. 28.
[28] CCAT Factum, at para. 33.
[29] CCAT Factum, at para. 20.
[30] Amici Factum, at para. 7.
[31] Amici Factum, at para. 86.
[32] AG Canada Factum, at paras. 34.
[33] *CHRC v Canada (A.G.)*, 2018 SCC 31, at para. 33.

as "hopeless" and akin to "chasing a mirage".[34] In its factum, Bell Canada argued that questions of true jurisdiction must be included as a category importing the correctness standard and that this category applied in the case at bar.[35] (Neither Bell Canada nor the NFL proposed in-depth changes nor alternative frameworks to *Dunsmuir*.)

The Minister of Citizenship also argued that deference ought to be the rule unless a legislative provision imposes a particular standard.[36] Its call for simplifying and clarifying the *Dunsmuir* framework would eliminate the contextual factors because it is "the allocation of the authority itself that justifies deference".[37] The "margins of appreciation" analysis in the application should also be eliminated, the Minister argued, because there is only one level of deference, not a potentially infinite array as introduced by concepts like varying intensities of review, narrow or wide margins of appreciation, or an exacting or less exacting standard.[38] This is not the only way in which the Minister proposed a simplification of the Dunsmuir framework.

The Minister also proposed an exception to deferential review only where the reasonableness standard cannot resolve the tension between the rule of law and the democratic principle allowing legislatures to vest decision-making power in administrative bodies.[39] The main examples are constitutional questions (in particular the constitutional validity of statutes), over which courts have authority to make final decisions. The Minister submitted that no standard of review should apply on procedural fairness or natural justice issues because these are concerned with process as opposed to the substance of the action or decision.[40] Regarding procedural fairness, Vavilov proposed that procedural fairness questions attract the correctness standard based on the Supreme Court's decision in *Mission Institution v. Khela.*[41] The *amici*, meanwhile, proposed that *Baker* (not the reasonableness/correctness paradigm) ought to apply when courts examine whether or not a process was fair.[42]

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[34] AG Canada Factum, at para. 35.
[35] Bell Canada Factum, at paras. 36, 48.
[36] Minister of Citizenship Factum, at paras. 47-48.
[37] Minister of Citizenship Factum, at para. 52.
[38] Minister of Citizenship Factum, at para. 54.
[39] Minister of Citizenship Factum, at para. 64.
[40] Minister of Citizenship Factum, at para. 66, Vavilov Factum, at para. 51.
[41] 2014 SCC 24, at para. 79
[42] Amici Factum, at paras. 112-114.

In contrast to the Minister's simplified approach, Vavilov proposed a framework where "discretionary decisions are to be reviewed for reasonableness and questions of law are to be reviewed for correctness"[43] with the following considerations:

a. discretionary decisions to be reviewed for reasonableness will generally include matters of policy, decisions made pursuant to a body's authority to control its own process, or findings of fact;
b. mixed questions of fact and law will not be reviewed for correctness unless they are affected by an extricable error of law;
c. on questions of law, a decision-maker's interpretations of the purpose and policy of its own statute will continue to deserve respect, but the courts will test for compliance with that purpose and not simply defer to any interpretation that the statutory language can reasonably bear.

This framework did not find much support among other parties or interveners. Like the Minister of Citizenship, the Attorney General of Saskatchewan argued for a simpler and clarified approach in light of the access to justice problems facing its rural populations in particular who have difficulty obtaining advice on how and whether to challenge administrative decisions.

Saskatchewan argued that the contextual approach (preferred by the minority reasons in *Edmonton East* and *Canadian Human Rights Commission*) should be rejected largely because of its practical effect of complicating legal argument and increasing costs for litigants.[44] It argued for more simplification—going further than the Appellant Minister of Citizenship and the Attorney General of Canada—that both "true questions of jurisdiction" and "questions of central importance to the legal system" should be eliminated as categories that attract the correctness standard.

[43] Vavilov Factum, at para. 59.
[44] AG of Saskatchewan Factum, at paras. 16-27. The Attorney General of Manitoba did not provide a factum in this case.

Similar to the Minister of Citizenship, Saskatchewan argued that "margins of appreciation" should not play a role in the application of the reasonableness standard. The reasoning here is that there is only one deferential standard and not multiple levels of deference under that single standard. Echoing the *amici* and the Minister of Citizenship, Saskatchewan commented that the review of procedural fairness issues exist outside the correctness/reasonableness framework and should be decided based on whether they are fair given the statutory context.

Looking ahead – what we anticipate and hope for from the Trilogy decision

None of the arguments raised on appeal to the SCC on the *Vavilov* and *Bell Canada; NFL* proposed a complete overhaul of the *Dunsmuir* framework. Despite numerous calls for clarity in this area of law, the suggested changes are mostly minor and do not address the underlying tension between how different Judges view the balance to be struck between the courts' role in reviewing administration action and the ability of legislatures to provide the executive branch with extensive decision-making power. In Daly's view: "Eliminating a category here and there and adding another set of cases in which the courts can authoritatively resolve questions of law will not eliminate deep-seated disagreement, which will inevitably continue to manifest itself (one way or another) in the selection and application of the standard of review".[45]

The fact that the SCC has already taken over a year to decide the Trilogy may suggest that underlying disagreements were or are firmly entrenched. Many facta pushed for a move away from reliance on contextual factors and towards a simplified approach, and/or reliance on categories. However, the Court has one less member who was favourable to the categorical approach espoused by the majority in *Edmonton East* and *Canadian Human Rights Commission*. Gascon J. retired on September 16, 2019. At the same time, Richard Wagner—who was also in the majority and 'categorical camp' in those cases—has assumed the role of Chief Justice. With the retirement of former Chief Justice McLachlin, will the new Chief Justice be able to persuade his colleagues to pronounce on the law of standard of review in an unanimous manner, or will the Court splinter off into bickering factions, or will the dicta fall somewhere between?

[45] Daly Year in Review, at p. 5.

Apart from the selection of which standard applies, equally vexing questions remain about the application of the reasonableness standard. At least two different approaches exist: one, where the court begins with the written decision and analyzes whether it is justified, transparency and intelligible, and whether the decision is within a range of reasonable outcomes. The other approach is to focus on outcome, sometimes with the court going so far as to conduct its own analysis and comparing how far the tribunal's decision deviated.[46] Because most of the arguments before the court focused on selecting the standard, it is not clear what guidance the Court will offer regarding application of reasonableness review.

The *amici* provided some helpful commentary on what reasonableness review should involve. First, where reasons are present, the court should focus on whether there are flaws in that reasoning as opposed to undertaking its own analysis of the issue originally heard before the tribunal or administrative actor. In the rare cases where reasons are not present—nor required—the *amici* argued that deference is more difficult but not impossible. However, the court may have to conduct its own analysis of the facts and law in order to compare the tribunal's decision or order with its own. The *amici* also stated that: "If providing reasons for a decision can orient courts into a truly deferential approach to review, it may be that administrative actors themselves bear some practical responsibility for ensuring that this occurs."[47]

The *amici*'s suggested approach accords with the majority's reasoning in *Canadian Human Rights Commission*. There, the Court summarized the Canadian Human Rights Tribunal's decisions, its approach and conclusions, and concluded that the decisions were justified, transparent and intelligible, and fell within the range of reasonable outcomes.[48]

When the Trilogy decision finally arrives, we can only hope for clarity on the roles and responsibilities for courts and administration actors alike in the interest of providing practical advice to clients engaged in judicial review. The cases that animated this latest rethink of the standards of review are so different: a young man desperately trying to hold on to his Canadian

[46] *Dionne v. Commission scolaire des Patriotes*, 2014 SCC 33 at paras. 39, 43; for contrast see *Canada (Attorney General) v. Igloo Vikski Inc*., 2016 SCC 38 at paras. 30-50.
[47] Amici Factum, at para. 123.
[48] *Canadian Human Rights Commission*, at para. 56.

citizenship; commercial entities subject to a regulatory ruling on Superbowl advertising. This speaks to the enormous breadth of the administrative state and the significant pressure that the Supreme Court faces in trying to formulate a standards of review test that will satisfy such disparate interests. The Guess What will end; the Guess Who rock on.

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