Reasonableness reigns – except when the rule of law or legislators say otherwise

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Administrative law has been the subject of almost constant revision in Canada. A leading judge in the field once described administrative law as a “never-ending construction site where one crew builds structures and ... a later crew tears them down to build anew.” And, like every construction site, there have been complaints. Even the Chief Justice of Canada recently confessed that administrative law had grown into “a barbed and occluded thicket” where only confusion was found. Pleas for coherence were issued. Lawyers, judges, and academics all responded with suggestions – albeit different ones. Undeterred, the Supreme Court of Canada announced in 2018 that it was seeking submissions in three cases regarding “the nature and scope of judicial review.” The time had come to deconstruct – and rebuild – administrative law (again).

The candid nature of the announcement from the Supreme Court of Canada was a surprise to many observers. It did, however, fit with the historical record. As one respected academic had noted, “major recalibrations” in administrative law generally occurred every ten years or so. Those cases – CUPE, Bibeault, Southam, and Dunsmuir – will echo in the ears of lawyers, judges, and academics working in the area. But, with no real restatement of the law since 2008, an epilogue to Dunsmuir was due. And now we know its name: Vavilov. Released by the Supreme Court of Canada in late 2019, the decision in Vavilov

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3 See e.g. Stratas, supra note 1. With her leading judgment in Wilson v. Atomic Energy of Canada Ltd., 2016 SCC 29 [Wilson], Justice Abella may be credited for starting the conversation about “the way forward” in administrative law. At the time, Justice Abella confessed that the existing framework for determining the standard of review was a “labyrinth.” See Wilson, ibid. at para. 19.
9 Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 [Vavilov]. The decision in the companion appeal was released the same day. See Bell Canada v. Canada (Attorney General), 2019 SCC 66 [Bell]. Stewart McKelvey served as the solicitors for the Canadian Bar Association before the Supreme Court of Canada in Vavilov and Bell. Jonathan M. Coady, Q.C. and Justin L. Milne acted as counsel.
represents the next chapter in the history of administrative law in Canada. It does not, however, appear to be the last.

In *Vavilov*, the Supreme Court of Canada set out to clarify two main issues: (1) determining the applicable standard of review for administrative decisions; and (2) explaining how to review administrative decisions for reasonableness. And, upon review, the decision does deliver much needed clarity. This article will summarize the latest directions from the Supreme Court of Canada. However, the article will also conclude with a note of caution for legislators. For most Canadians, the legal system begins and ends with an administrative decision-maker and, after *Vavilov*, the words chosen by legislators will have new – and very real – consequences for persons affected by administrative decisions.

**Part I: Determining the standard of review**

The standard of review analysis now begins with a presumption that reasonableness is the applicable standard in all cases:

- Whenever a court reviews an administrative decision, the starting presumption is that the applicable standard is reasonableness.
- It is no longer necessary for courts to engage in a contextual inquiry to identify the appropriate standard of review.
- The relative expertise of the administrative decision-maker is no longer relevant to the determination of the standard of review.

This presumption of reasonableness review can be rebutted in two situations:

- First, it will be rebutted when the legislature has stated that a different standard is to be applied. This will occur when the legislature has explicitly prescribed the applicable standard of review.
  - It will also occur when the legislature has provided a statutory appeal mechanism. The applicable standard in such cases will be determined by identifying the nature of the question and applying the standards for appellate review (correctness and palpable and overriding error).

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10 *Vavilov*, supra note 9 at para. 2.
11 *Vavilov*, ibid. at para. 10.
12 *Vavilov*, ibid. at para. 10.
13 *Vavilov*, ibid. at para. 17.
14 *Vavilov*, ibid. at para. 46.
15 *Vavilov*, ibid. at paras. 17 and 35.
16 *Vavilov*, ibid. at paras. 17 and 37.
17 *Vavilov*, ibid. at para. 37.
Correctness will apply to questions of law, including matters of statutory interpretation. Palpable and overriding error will apply to questions of fact or questions of mixed fact and law.\textsuperscript{18}

- Second, it will be rebutted when the rule of law requires that the standard of correctness be applied.\textsuperscript{19} This will be the case for certain legal questions: (i) constitutional questions; (ii) general questions of law of central importance to the legal system as a whole; and (iii) questions related to the jurisdictional boundaries between two or more administrative bodies.\textsuperscript{20} Jurisdictional questions are no longer recognized as a distinct category of correctness review.\textsuperscript{21}

The general rule of reasonableness review, when coupled with these exceptions, is now the “comprehensive approach” to determining the applicable standard of review.\textsuperscript{22}

**Part II: Applying the standard of review**

Reasonableness review means that courts will now intervene in administrative matters only when it is “truly necessary … in order to safeguard the legality, rationality and fairness of the administrative process.”\textsuperscript{23}

- In cases where reasons are required, they will be the starting point for reasonableness review.\textsuperscript{24} Reasons are the primary mechanism by which decision-makers show that their decisions are reasonable.\textsuperscript{25}

- When reasons are not required, it will still be possible for the record and the surrounding context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason.\textsuperscript{26} In other words, there will be situations in which neither the record nor the larger context sheds light on the basis for the decision. Those outcomes are unreasonable.\textsuperscript{27}

There are two types of flaws that tend to render a decision unreasonable:

- First, a decision will be unreasonable when there is a failure of rationality within the reasoning process.\textsuperscript{28} To be reasonable, a decision must be based on an internally coherent reasoning that is both rational and logical. The reviewing court must be able to

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\textsuperscript{18} Vavilov, supra note 9 at para. 17.
\textsuperscript{19} Vavilov, ibid. at para. 17.
\textsuperscript{20} Vavilov, ibid. at paras. 17 and 55-64.
\textsuperscript{21} Vavilov, ibid. at para. 65.
\textsuperscript{22} Vavilov, ibid. at para. 17.
\textsuperscript{23} Vavilov, ibid. at para.13.
\textsuperscript{24} Vavilov, ibid. at para. 81.
\textsuperscript{25} Vavilov, ibid. at para. 81.
\textsuperscript{26} Vavilov, ibid. at para. 137.
\textsuperscript{27} Vavilov, ibid. at para. 138.
\textsuperscript{28} Vavilov, ibid. at para. 101.
trace the decision-maker’s reasoning without encountering any fatal flaws in its overarching logic.\textsuperscript{29}  

- Second, a decision will be unreasonable when it is untenable in light of the applicable factual and legal constraints.\textsuperscript{30}  What is reasonable in a given situation will always depend on the applicable context.\textsuperscript{31}  These contextual constraints dictate the limits of the space in which the decision-maker may operate and the outcomes it may reach.  They include: (i) the governing statutory scheme; (ii) relevant statutory or common law; (iii) the principles of statutory interpretation; (iv) the evidence; (v) the submissions; (vi) the past practices and decisions of the decision-maker; and (vii) the potential impact of the decision.\textsuperscript{32}  All of them may potentially be relevant.

Matters of statutory interpretation are not treated uniquely on judicial review and, like other questions of law, they will be evaluated on the reasonableness standard.\textsuperscript{33}  However, those who interpret the law – whether courts or administrative decision-makers – must do so in a manner that is consistent with the modern principle of statutory interpretation.\textsuperscript{34}  

In summary, when the reasonableness standard applies, a reviewing court does not undertake a \textit{de novo} analysis of the issue or ask itself what the correct decision would have been.\textsuperscript{35}  Rather, a reviewing court must take a “reasons first”\textsuperscript{36} approach that begins with an examination of how the administrative decision-maker reached its interpretation and considers whether it is defensible in light of the contextual constraints imposed by law.  For example, when the meaning of a statutory provision is in dispute, the underlying decision-maker will be expected to demonstrate in its reasons that it was alive to the essential elements of statutory interpretation (the text, context, and purpose of the provision).\textsuperscript{37}  Similarly, the evidentiary record before the decision-maker will also constrain the reasonableness of a decision and must be taken into account.\textsuperscript{38}  Finally, the reasons from an administrative decision-maker will be required to account for the main issues raised by the parties in a meaningful way.\textsuperscript{39}

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\item \textsuperscript{29}Vavilov, \textit{supra} note 9 at paras. 102-104.
\item \textsuperscript{30}Vavilov, \textit{ibid.} at para. 101.
\item \textsuperscript{31}As Professor Daly has observed, “context simply cannot be eliminated from judicial review.” See Daly, \textit{supra} note 6 at 548.
\item \textsuperscript{32}Vavilov, \textit{supra} note 9 at paras. 105-135.
\item \textsuperscript{33}Vavilov, \textit{ibid.} at para. 115.
\item \textsuperscript{34}Vavilov, \textit{ibid.} at para. 118.
\item \textsuperscript{35}Vavilov, \textit{ibid.} at para. 83.
\item \textsuperscript{36}Canada Post Corp. \textit{v.} Canadian Union of Postal Workers, 2019 SCC 67 at para. 27 [Canada Post]. See also Coady, \textit{supra} note 4 at 101-102.  For a leading account as to the potential for reasons to advance both restraint and respect within the administrative state, see Mary Liston, “Governments in Miniature: The Rule of Law in the Administrative State” in Colleen M. Flood \& Lorne Sossin, eds., \textit{Administrative Law in Context}, 2nd ed. (Toronto: Emond Montgomery, 2013) 39 at 76.
\item \textsuperscript{37}Vavilov, \textit{supra} note 9 at para. 116.  See also Canada Post, \textit{ibid.} at paras. 42 and 66.
\item \textsuperscript{38}Vavilov, \textit{ibid.} at para. 126.  See also Canada Post, \textit{ibid.} at para. 61.
\item \textsuperscript{39}Vavilov, \textit{ibid.} at para. 128.  See also Canada Post, \textit{ibid.} at para. 60.
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Caution for legislators

One of the most significant changes made in Vavilov was the legal effect given to statutory appeal provisions. Commonly found in a variety of statutes, these provisions often state that a question of law or jurisdiction can be appealed to the court. Historically, the Supreme Court of Canada treated these statutory appeals in the same manner as applications for judicial review. The principles of standard of review applied. For most questions of law, including questions of statutory interpretation, the effect was deference or respect for the administrative decision under review. Legislators drafted accordingly. And reasonableness reigned.

After Vavilov, this is no longer the case. Where the legislature has included a statutory mechanism to appeal from an administrative decision-maker to the court, the principles of appellate review will now apply. The principles of standard of review are no longer applicable. The effect of this change in administrative law means that, when a question of law is appealed (such as a question of statutory interpretation), the court will apply the correctness standard. Deference, which involves review for palpable and overriding error, will extend only to questions of fact and questions of mixed fact and law when the applicable legal principle is not readily extricable. The significance of this change is revealed when one considers the usual treatment of a question of law in the context of judicial review. In that context, a question of statutory interpretation would generally be reviewed with deference. The reasonableness standard of review would apply.

In other words, whether a court shows respect for a question of statutory interpretation will no longer depend upon the existence or expertise of the administrative decision-maker. Rather, it will depend upon whether the legislature has included a statutory appeal provision (or not). For this reason, the words chosen by legislators will have new – and very real – consequences for persons affected by administrative decisions.

For the purpose of illustration, consider the statutes enabling the administrative work of the Workers Compensation Board (“Board”) and the Island Regulatory and Appeals Commission (“Commission”) in Prince Edward Island:

- An injured worker applies for benefits from the Board. Her benefits are determined by an entitlement officer. The decision by the entitlement officer can be reviewed by a reconsideration officer. The decision by the reconsideration officer can be appealed to

40 Vavilov, supra note 9 at paras. 37-38. In their concurring reasons, Justices Abella and Karakatsanis expressed serious concerns regarding this new treatment of statutory appeal rights. See Vavilov, ibid. at paras. 247-278.
41 See e.g. Smith v. Alliance Pipeline Ltd., 2011 SCC 7, ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission), 2015 SCC 45, and Canada (Attorney General) v. Igloo Vikski Inc., 2016 SCC 38. In all three cases, the Supreme Court of Canada applied the reasonableness standard without giving any effect to the appeal provision found in each applicable statute. See also Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53 at para. 30, Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16 at para. 38, and Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47 at para. 28.
42 See Vavilov, supra note 9 at para. 249.
43 Vavilov, ibid. at para. 37.
44 Vavilov, ibid. at para. 37.
45 Vavilov, ibid. at para. 37.
48 WCB Act, supra note 46, s. 56(1.1).
the Workers Compensation Appeals Tribunal.\textsuperscript{49} The decision by the Tribunal can be appealed to the Prince Edward Island Court of Appeal ("Court of Appeal") on a question of law or jurisdiction.\textsuperscript{50} Historically, the decisions made by the Tribunal, including questions of law related to the interpretation of the \textit{Workers Compensation Act} and its policies, were entitled to deference from the Court of Appeal.\textsuperscript{51} Few decisions were appealed, and most were dismissed.\textsuperscript{52}

- A landowner applies to a municipality to rezone a parcel of land. Her application is determined by a municipal council. The decision by the council can be reviewed by the Commission.\textsuperscript{53} The decision by the Commission can be appealed to the Court of Appeal on a question of law or jurisdiction.\textsuperscript{54} Historically, the decisions made by the Commission, including questions of law related to the interpretation of the \textit{Planning Act} and its bylaws, were entitled to deference from the Court of Appeal.\textsuperscript{55} Few decisions were appealed, and most were dismissed.\textsuperscript{56}

After the decision in \textit{Vavilov}, questions of statutory interpretation determined by the Tribunal and the Commission are no longer entitled to deference. The reasonableness standard of review is not applicable. And correctness reigns. For administrative decision-makers like the Tribunal or the Commission, an interpretative exercise undertaken on the day before \textit{Vavilov} would have attracted deference from the Court of Appeal. Today, it does not. The likely consequence of this dramatic change will be more appeals to the court and additional work for its judges. No longer will courts be reviewing the record to ensure that there was a reasonable justification for the decision under review. Rather, the court will be tasked with ensuring that, after a full examination of the entire record, the correct decision was made by the administrative decision-maker. With courts already facing challenges in terms of accessibility, timeliness and self-representation, the potential for additional – and more intensive – work after \textit{Vavilov} is a concern deserving of discussion.

From a practical perspective, it is also worth considering the combined effect of \textit{Vavilov} and the statutory schemes that currently apply to the Tribunal and the Commission. Those administrative schemes were developed to accomplish a number of objectives, including efficiency and economy. However, on questions of interpretation that relate to the enabling statute or any of its associated bylaws and policies, no administrator or tribunal along the entire line of decision-making will be entitled to any deference. The interpretation of the entitlement officer at the Board will be considered anew by the reconsideration officer, the Tribunal, and the Court of Appeal. And the interpretation of the municipal council will be considered

\textsuperscript{49} \textit{WCB Act}, supra note 46, s. 56(6).

\textsuperscript{50} \textit{WCB Act}, ibid., s. 56.2(1).


\textsuperscript{52} Between 2018 and 2019, 5 decisions from the Tribunal were appealed to the Court of Appeal. Only 1 appeal was allowed. During this period, the Tribunal made no less than 88 appealable decisions.

\textsuperscript{53} \textit{Planning Act}, R.S.P.E.I. 1988, c. P-8, s. 28.

\textsuperscript{54} \textit{IRAC Act}, supra note 47, s. 13(1).


\textsuperscript{56} Between 2018 and 2019, 1 decision from the Commission was appealed to the Court of Appeal. It was dismissed. During this period, the Commission made not less than 98 appealable decisions.
anew by both the Commission and the Court of Appeal. None of this sounds very efficient or economical for those affected by these types of administrative decisions.

All of this assumes, of course, that the legislature does not intervene and prescribe the standard of review. The Supreme Court of Canada recognized in *Vavilov* that, where the legislature has directed the applicable standard of review, courts are bound by that designation. It is therefore open to legislators to cement the deference that existed immediately before the decision in *Vavilov*. For administrative decision-makers like the Tribunal and the Commission, they would continue to benefit from the respect historically extended to them by the Court of Appeal. The body of case law developed over the last decade would be preserved. And the current likelihood of final – and earlier – decisions for affected parties would remain unchanged.

In summary, legislators would be wise to consider the new directions in *Vavilov* when exploring amendments to existing statutes or evaluating new pieces of legislation. Access to an efficient and economical administrative justice system will increasingly depend upon the words chosen by them.

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57 *Vavilov*, supra note 9 at paras. 33 and 35.

58 British Columbia, for example, has prescribed standards of review by legislation. Different findings attract different standards of review. See *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 58-59.