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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Supreme Court reboots the approach to judicial review of decisions on substantive grounds: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65

Facts: V was born in Canada in 1994. At the time of his birth, V's parents – foreign nationals who were working on assignment for the Russian foreign intelligence service – were posing as Canadians under assumed names. V did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth. He identified as a Canadian and held a Canadian passport. In 2010, V's parents were arrested in the United States and charged with espionage. They pled guilty and were returned to Russia. Following their arrest, V's attempts to renew his Canadian passport were unsuccessful. However, in 2013, he was issued a certificate of Canadian citizenship.

Then, in 2014, the Canadian Registrar of Citizenship cancelled V's certificate on the basis of her interpretation of s. 3(2)(a) of the *Citizenship Act*.[1] That provision exempts children of "a diplomatic or consular officer or other representative or employee in Canada of

[1] RSC 1985, c C-29.

a foreign government" from the general rule that individuals who are born in Canada acquire Canadian citizenship by birth. The Registrar concluded that because V's parents were employees or representatives of Russia at the time of V's birth, the exception in s. 3(2)(a) to the rule of citizenship by birth applied to V; as a result, V was not, and had never been, entitled to citizenship. V's application for judicial review of the Registrar's decision was dismissed by the Federal Court. The Court of Appeal allowed V's appeal and quashed the Registrar's decision because it was unreasonable. The Minister of Citizenship and Immigration appealed to the Supreme Court of Canada. The appeal was heard in conjunction with another appeal[2] and the Court expressly indicated its intention to use the cases as an opportunity consider and clarify the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir v. New Brunswick*[3] and subsequent cases.

Decision: Appeal dismissed.

The joint reasons of the majority (Wagner CJC and Moldaver, Gascon, Côté, Brown, Rose and Martin JJ) began by acknowledging the need for clarification and simplification of the law of judicial review, and the complexities and incoherencies that have emerged since *Dunsmuir* was decided, while reaffirming its two bedrock principles: maintaining the rule of law and giving effect to legislative intent. The majority also affirmed the need to develop and strengthen a culture of justification in administrative decision making.

When a court reviews an administrative decision on its merits, the starting point is a presumption that the standard of review is reasonableness. For years the Court's jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court's review of an administrative decision. However, in the past the principal rationale for the reasonableness standard had been the assumed greater expertise of administrative decision-makers with respect to the questions before them as compared with that of the reviewing court. The majority acknowledged that the concept of relative expertise is problematic for many reasons. Instead, the presumption of reasonableness review is based on respect for the institutional design choice of the legislature to delegate certain decisions to non-judicial decision-makers.

The presumption of reasonableness review is rebutted where the legislature has indicated that a different standard should apply. The legislature can do so by legislating a correctness standard of review or by creating a statutory appeal mechanism. Where the legislature has provided for an appeal from an administrative decision to a court, the court hearing such an appeal must apply appellate standards of review to the decision. The applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. For questions of law, the court should apply the standard of correctness. Where the scope of the statutory appeal

[2] Bell Canada v. Canada (Attorney General), 2019 SCC 66
[3] 2008 SCC 9

includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable).

In addition, the presumption of reasonableness review is rebutted and the standard of correctness applies where required by the rule of law, namely for constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies. These categories of correctness review had been identified in *Dunsmuir*, except that the second category previously had two component: general questions of law that are *both* of central importance to the legal system as a whole *and* outside the adjudicator's specialized area of expertise. However, the majority dispensed with latter requirement since the decision maker's specialized expertise is no longer a stand-alone rationale but rather is folded into the new starting point presumption of reasonableness review.

The majority also discarded jurisdictional questions as a distinct category attracting correctness review. The majority recognized the concern that a delegated decision maker should not be free to determine the scope of its own authority. However, in light of the difficulties identifying "truly" jurisdictional questions, the majority explained that the framework for conducting reasonableness review allows courts to ensure that administrative bodies have acted within the scope of their lawful authority. The majority did not foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case.

Turning to the framework for conducting reasonableness review, the majority emphasized that the reasonableness standard remains a single standard that takes its colour from the context. The focus of reasonableness review must be the reasons of the decision-maker, where they exist. The majority left for another day a comprehensive consideration of the approach to reasonableness review in the absence of reasons. Reviewing courts must consider reasons for decision with sensitivity to the institutional setting in which they were given, but must also keep in mind the principle that the exercise of public power must be justified, intelligible and transparent. Thus, where reasons contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, ordinarily it will not be appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision.

The majority then offered guidance on "what makes a decision unreasonable", focussing on two types of fundamental flaws: a failure of rationality internal to the reasoning process (in other words, a reasonable decision is based on *internally* coherent reasoning); and irrationality in light of the legal and factual constraints that bear on the decision. With respect to the first category, the majority explained that a decision will be unreasonable if it is not both rational and logical; if the reasons fail to reveal a rational chain of analysis or exhibit clear logical fallacies, such as circular reasoning,

false dilemmas, unfounded generalization or an absurd premise.

With respect to the second category, the majority identified and discussed a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely: (a) the governing statutory scheme; (b) other relevant statutory or common law; (c) the principles of statutory interpretation; (d) the evidence before the decision maker and facts of which the decision maker may take notice; (e) the submissions of the parties; (f) the past practices and decisions of the administrative body; and (g) the potential impact of the decision on the individual to whom it applies. Those elements are not a checklist for conducting reasonableness review, and their significance may vary depending on the context.

Finally, the majority commented on the court's remedial discretion in conducting judicial review. Where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker for reconsideration, this time with the benefit of the court's reasons. However, in some situations remitting the matter would frustrate the timely and effective resolution of matters in a manner that the legislature could not have intended. Declining to remit a matter to the decision maker may be appropriate where a particular outcome is inevitable and remitting the case would therefore serve no useful purpose In addition, 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.

In separate reasons that concurred with the majority on the result of the appeal but little else, Abella and Karakatsanis JJ. provided a harsh criticism of the majority's approach and departure from precedent. The concurring judges would have retained institutional expertise and specialization as the rationale for a presumption of reasonableness review. In their view, the exclusion of expertise, specialization and other institutional advantages from the majority's standard of review framework is not merely a theoretical concern. The removal of the current "conceptual basis" for deference opens the gates to expanded correctness review. Their concern is that the majority's "presumption" of deference will yield all too easily to justifications for a correctness-oriented framework.

The concurring judges also took issue with endorsement of applying correctness review to legal questions whenever an administrative scheme includes a right of appeal. They do not see appeal rights as representing a "different institutional structure" that requires a more searching form of review. The mere fact that a statute contemplates a reviewing role for a court says nothing about the degree of deference required in the review process. They criticised the majority's decision for "its disregard for precedent and *stare decisis*, with the potential to undermine both the integrity

of the Court's decisions, and public confidence in the stability of the law.

Justices Abella and Karakatsanis proposed "a more modest approach to modifying our past decisions, one that goes no further than necessary to clarify the law and its application". With respect to determining the standard of review, they would have all administrative decisions reviewed for reasonableness, apart from the three remaining correctness categories from *Dunsmuir* and absent clear and explicit legislative direction on the *standard* of review. Like the majority, they would support eliminating the category of "true questions of jurisdiction" and foreclosing the use of the contextual factors identified in *Dunsmuir*.

With respect to conducting reasonableness review, the concurring judges acknowledged the need for additional direction. However, they criticised the majority for structuring reasonableness review in a fashion effectively imposes on administrative decision-makers a higher standard of justification than that applied to trial judges. In their view, deference imposes three requirements on courts conducting reasonableness review: (1) it informs the attitude a reviewing court must adopt towards an administrative decision-maker; (2) it affects how a court frames the question it must answer on judicial review; and (3) it affects how a reviewing court evaluates challenges to an administrative decision. The reviewing court starts with the reasons offered for the administrative decision, read in light of the surrounding context and based on the grounds advanced to challenge the reasonableness of the decision. The reviewing court must remain focussed on the reasonableness of the decision viewed as a whole, in light of the record, and with attention to the materiality of any alleged errors to the decision-maker's reasoning process.

Commentary: The majority's reasons in *Dunsmuir* largely deliver what they promise: charting a new course for determining the standard of review that applies when a court reviews the merits of an administrative decision and providing additional guidance for reviewing courts to follow when conducting reasonableness review. The reasons are long and carefully written, offering a comprehensive analysis of the foundation for substantive judicial review and a workable framework. At the same time, the majority leaves to be developed in future cases some issues that were not directly engaged in *Vavilov* and its companion appeal, including the approach to reasonableness review in the absence of reasons, and the approach in cases where it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Charter*.

Perhaps the most significant development in *Vavilov* is the direction that statutory appeals of administrative decisions should be conducted as appeals, applying the standards of review that apply in appeals of court decisions. This approach is consistent with the doctrine that judicial review is an exercise in statutory interpretation and meant to give effect to legislative intent, insofar as it is not inconsistent with the rule of law. If a legislature grants a right of appeal, it indicates an intention to make the courts part of the administrative apparatus. It is therefore

appropriate to take a different approach to appeals than in respect of statute where the legislature has not seen fit to grant an appeal to a court.

The new approach to statutory appeals is also more workable on a practical level. Statutory appeal provisions are prevalent; the development in *Vavilov* frees parties and courts of the need to engage in a thorny standard of review analysis in those such cases. The move to conducting statutory appeals as appeals for standard of review purposes was enabled by the majority's rejection of expertise as the rationale for reasonableness review. Expertise has long been a trouble spot in the Supreme Court's judicial review jurisprudence. By dispensing with expertise as the rationale for deference and looking instead to respect for institutional design choices, the majority's approach brings greater coherence and simplicity to the law, without sacrificing respect for legislative policy choices to put certain decisions in the hands of non-judicial decision makers.

The presumption of reasonableness for "true" judicial reviews, rebuttable only where the rule of law requires it will reduce much of the debate over standard of review in the remaining cases where there is no statutory right of appeal. That reduction of complexity should be welcomed, even if one holds the view that a broader range of decisions should be subjected to correctness review.

The reasons of the majority on how to conduct reasonableness review provide more guidance than the Supreme Court has offered in the past. While some might suggest that *Vavilov* does not actually change the reasonableness standard, it only provides additional guidance on how to apply the standard that always existed, there are strong indications in the majority's reasons lay out a new, more rigorous standard. Certainly the legal and factual constraints identified by the majority put a new focus on the interests and perspective of the individual affected by the administrative decision. The identified constraints support the majority's desire to establish a "culture of justification" in administrative law which ought to lead to better, more carefully reasoned administrative decisions, enhancing the confidence of individuals and the public at large in administrative justice.

The impact of *Vavilov* will be appreciated only with the fullness of time and as lower courts seek to apply it to the decisions and legislative contexts that arise before them. While *Vavilov*'s implications will continue to evolve—and no doubt the Supreme Court will need to provide further guidance on some aspects of the new framework—what is clear even in these early days of the *Vavilov* era is that parties, counsel and lower courts have been given a better stocked toolbox to hold administrative decision makers to account and to ensure a just result where they have exceeded or misused their authority.

No remedy granted despite unreasonable reasons: *Farrier v. Canada (Attorney General)*, 2020 FCA 25

Facts: F had been serving a life sentence since 1992. In December 2017, the Parole Board of Canada (the "Board") refused to grant him

pre-release day parole or full parole. A few days after his parole hearing, F requested a copy the recording of the hearing. He was informed that the hearing was not recorded due to technical problems.

F appealed the Board's decision to the Appeal Division of the Parole Board of Canada (the "Appeal Division"). The only issue on the appeal was the Board's failure to record the hearing. F argued that the Board: (1) contravened its own policy manual, which required audio recordings of parole hearings; (2)contravened provisions of the *Corrections and Conditional Release Act*[4] (the "Act") that entitled particular persons to listen to audio recordings of hearings; and (3) failed to respect the principles of fundamental justice.

The Appeal Division issued short reasons dismissing F's appeal. While its reasons explicitly listed F's three grounds of appeal, it provided a single page of analysis that referred to only one of those grounds. It held that the Board is not required by law to record its hearings and that the "record of proceedings" that the Board must maintain under the Act does not include the recordings of hearings.

F's application for judicial review of the Appeal Division's decision was dismissed. The Federal Court's decision — released before the Supreme Court of Canada's reasons in *Vavilov*[5] — found that the reasonableness standard applied to the Appeal Division's interpretation of the law. The Court went on to conclude that the Board is not required by law to record its hearings. The Court also rejected F's argument that he was denied procedural fairness.

F appealed the dismissal of his judicial review application to the Federal Court of Appeal. Prior to the Court of Appeal's hearing of the matter, the Supreme Court released *Vavilov*.

Decision: The Federal Court of Appeal dismissed F's appeal. Despite holding that, in light of *Vavilov*, the Appeal Division's reasons do not meet the standard of reasonableness, the Court found it would be "pointless" to refer the case back for reconsideration.

Gauthier J.A., writing for a unanimous Court, began her reasons by admitting candidly that, prior to *Vavilov*, she likely would have held that the Appeal Division's reasons were reasonable. She indicated that the Appeal Division's absence of reasons dealing with two of the issues raised by F likely would not have been sufficient to set aside the decision. The reviewing court would simply have presumed that the Appeal Division had considered and rejected all of F's arguments.

That being said, based on the heightened importance that *Vavilov* attaches to the reasons of the decision-maker, the Appeal Division's sparse reasons could not stand. The Court pointed to the fact that the Appeal Division had not addressed two of F's three arguments, nor had it indicated why it was not necessary to address them. Further, the Appeal Division had relied on a Federal Court decision that pre-dated the relevant sections of the Act and policy manual. Finally, there was nothing in the Appeal Division's reasons to indicate that it had considered the relevant factors

[4] S.C. 1992, c. 20.
[5] 2019 SCC 65.

concerning the duty of fairness that the Board owed to F. In light of all of these missing aspects, the Court concluded that the Appeal Division's reasons were not reasonable.

While the Court recognized that it cannot simply remedy deficient reasons by providing its own interpretation, and that Parliament clearly expressed its intention for the Appeal Division to rule on the issues raised, it declined to quash the unreasonable decision and remit the matter back to the Appeal Division. According to her, *Vavilov* also provides reviewing courts with "some discretion and latitude" in terms of the remedy to be granted (para. 21). The Court of Appeal found that it was an appropriate case to exercise this discretion not to remit the matter because F's appeal before the Appeal Division could not succeed and thus it would be pointless to force it to reconsider the case.

In concluding that the appeal was doomed to fail, the Court assumed that the Board was legally required to record its hearings, as F had argued. Even if that were the case, F would still be required to establish a serious possibility of an error on the record or that the lack of a recording deprived him of his grounds of appeal. The Court of Appeal concluded that F's arguments could not rise to that level and, therefore, the Appeal Division could only arrive at one decision: the dismissal of F's appeal. Because it was inevitable that the Appeal Division would reach the same result, the Court of Appeal declined to quash the decision.

Commentary: There is considerable tension in the Court of Appeal's approach to *Vavilov* in the *Farrier* decision. The Court relies on the Supreme Court's newest guidance on the standard of review to demand a higher level of justification from administrative decision-makers, while at the same time declining to provide any remedy when that standard is not met.

The *Farrier* decision is an indication that (at least some) courts are interpreting *Vavilov* as mandating a more stringent standard of reasonableness. The Court of Appeal openly admits in its reasons that its decision regarding the reasonableness of the Appeal Division's decision would have been different in the pre-*Vavilov* era. Even before *Vavilov* a reviewing court might have rightly found that it unreasonable for a decision-maker to provide only a single page of analysis and to fail even to mention two of the party's three arguments. The language from *Vavilov* that Gauthier J.A. cites for a indicating a new level of heightened scrutiny is that reasonableness review must assess "justification and transparency" — that is, of course, the precise language of reasonableness from *Dunsmuir v. New Brunswick*.[6]

That said, the Federal Court, which considered the case prior to *Vavilov*, spent little time on the Appeal Division's actual reasoning and did not hesitate to find it reasonable. This suggest that some courts might understandably read *Vavilov* as imposing a more robust form of reasonable review. Other courts have taken a different view: Ontario's Divisional Court, for example, has expressly rejected the

[6] 2008 SCC 9.

proposition that *Vavilov* imposes a more robust form of reasonableness review.[7]

Farrier also illustrates a reviewing court taking seriously the direction from the Supreme Court not to merely supplement deficient reasons with their own analysis. Rather, "[w]here a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility" (*Vavilov*, at para. 98). To the extent that courts read *Vavilov* to require decision-makers to provide reasons that are responsive to the submissions before them, it is a positive development. In light of *Farrier*, administrative bodies should expect to actually address the arguments made by the parties, or to at least explain why it is not necessary to do so.

However, what the Court of Appeal provides with one hand, it takes away with the other. Despite finding that the Appeal Division's decision was unreasonable, the Court refuses to set the decision aside or provide any other remedy to the applicant. It does so because, according to its analysis, the applicant's case before the Appeal Division could not possibly succeed. The Court of Appeal's analysis of remedy arguably represents a sort of backdoor into correctness review: the Court considered the substantive issue before the Appeal Division and concluded that it came to the correct (or perhaps the only reasonable) result, even though its reasons were lacking. By doing so, the Court undermines the message conveyed earlier in its decision that the reasonableness standard demands responsive reasons. The focus on the decision-maker's reasons is weakened if courts will simply decline to provide any remedy if the decision-maker happened to reach the only right result anyway. In this way, the Court of Appeal appears to do what *Vavilov* cautions against: providing the reasons that the decision-maker could or should have provided.

In *Vavilov*, the Supreme Court noted that the standard remedy for an unreasonable decision is to remit the question to the decision-maker. However, the majority also indicated that "there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended" (*Vavilov*, at para. 142; emphasis added). The decision in *Farrier* relies heavily on this single paragraph from *Vavilov* and may mark a step towards greatly expanding this principle.

Disguised reasonableness review: *Syndicat de l'enseignement de Champlain c. Commission scolaire Marie-Victorin*, 2020 QCCA 135

Facts: This case concerned a dispute between a teachers' union and a school board about whether supply teachers are entitled to holiday pay. In particular, the issue was whether supply teachers remain "employees" within the meaning of the *Labour Standards Act*, CQLR c N-1.1 (the **"Act"**) while they are in between contracts, such that they are entitled to holiday pay for holidays that fall between those contracts.

[7] *Correa v. Ontario Civilian Police Commission*, 2020 ONSC 133 (Div Ct) at para 54.

It was common ground that there is no employment contract in the private law sense between a school board and a supply teacher in between supply teaching engagements. A school board has no obligation to offer employment and the supply teacher has no obligation to accept it. The question was whether the Act used the word "employee" in a broader sense that would encompass a casual employee who is between engagements.

The Act defines "employee" as "a person who works for an employer and who is entitled to a wage". The entitlement to holiday pay is set out in ss. 62 and 65 of the Act as follows:

> 62. For each statutory general holiday, the employer must pay the employee an indemnity equal to 1/20 of the wages earned during the four complete weeks of pay preceding the week of the holiday, excluding overtime…
>
> 65. To benefit from a statutory general holiday, an employee must not have been absent from work without the employer's authorization or without valid cause on the working day preceding or on the working day following the holiday.

These provisions reflect amendments made to the Act made in 2003 to address changes in the labour force. The 2003 amendments removed two limits on holiday pay. Under the prior version of the Act, an employee was entitled to holiday pay only "[w]hen a holiday coincides with a working day" and where the employee could show "60 days of uninterrupted service in the undertaking" prior to the holiday.

The labour arbitrator sided with the union. The arbitrator noted that many supply teachers were engaged on a regular basis. While there is no employment contract as such in between engagements, the practical reality is that the supply teachers must remain available. The arbitrator considered the 2003 amendments as abolishing "continuous employment" as a precondition of entitlement to holiday pay. Supply teachers would therefore be entitled to holiday pay even if they were not under contract on the day of the holiday.

On judicial review, the application judge applied the reasonableness standard of review, found that the arbitrator's decision was unreasonable, and quashed the decision. The application judge focused on the lack of an employment relationship between the parties in between contracts. The 2003 amendments did not eliminate the requirement that an employee must be employed at the date of the holiday. The arbitrator's analysis rendered meaningless the requirement in s. 65 that an employee not be absent on the working day before or after the holiday.

Held: appeal allowed. The Quebec Court of Appeal held unanimously that the application judge's approach to reasonableness review was inconsistent with the guidance provided by the Supreme Court in *Vavilov*.

The Court noted that the application judge correctly identified reasonableness as the standard of review but then in effect embarked

on a *de novo* interpretation of the Act. The application judge did not consider what specific aspect of the arbitrator's decision rendered it unreasonable. Rather, he set out an alternative interpretation of the relevant provisions and held that this alternative interpretation was more consistent with the Act than the arbitrator's approach. By contrast, the Court held that the arbitrator's decision was well-founded as a matter of statutory interpretation and was supported by the history of the 2003 amendments.

The Court relied on the typology of unreasonable decisions articulated by the Supreme Court in *Vavilov*. The Supreme Court held that there are two main categories of unreasonable decision: first, decision that are internally inconsistent; and second, decisions that conflict with factual or legal constraints. Within the latter category, the Court identified seven (non-exhaustive) considerations that constrain a reasonable decision.

The application judge's analysis did not establish that any of these constraints rendered the decision unreasonable. While the arbitrator's definition of "employee" was broader than that employed in the *Civil Code*, it was a reasonable interpretation in light of the broader public policy goals of the Act. While the arbitrator's interpretation appeared to conflict with the "no absence on the working day before or after the holiday" requirement in s. 65, the arbitrator had reasonably addressed this concern by reading that section as referring only to *scheduled* working days, i.e. the employee could not be absent on the working schedule immediately before or after the holiday on which they were scheduled to work.

The Court accepted that there could be some practical difficulties in applying the arbitrator's decision and that it was not necessarily the *only* reasonable interpretation of the Act. However, this was not in itself a sufficient basis to quash the arbitrator's decision. The appellant had argued that the arbitrator's interpretation led to the absurd result that a supply teacher who taught one time 20 days before a holiday would be entitled to holiday pay even if they were never hired again. The Court held that this consequence had to be balanced against the consequences that would flow from the alternative approach, e.g. that a supply teacher serving lengthy successive contracts would lose out on holiday pay if the holiday fell between contracts. The Court held that neither approach was inherently more reasonable or just than the other and so the arbitrator's approach must stand.

Commentary: This decision is an indication that the appellate courts will be on the look-out for unfaithful applications of reasonableness review post-*Vavilov*. The arbitrator's approach adopted a broader definition of "employee" than is used in other legal contexts. It was in some respects in tension with other provisions of the Act (particularly s. 65). And it resulted in some practical difficulties in determining when or how this broader notion of "employment" could be terminated. However, the arbitrator's decision was consistent with the legislative intention behind the 2003 amendments and addressed a potential gap in entitlements for certain employees. This is a context in which there are advantages and drawbacks to the

interpretations advocated by both parties. In such a scenario, even if the reviewing court believes the alternative interpretation is superior, that in itself is not grounds to quash.

In this case, the Court identified that the application judge had engaged in a *de novo* interpretation of the legislation by the fact that the application judge had compared the arbitrator's decision with his preferred alternative. Reasonableness review does not always require a decision maker to articulate an alternative interpretation. In some cases, doing so may be necessary to demonstrate the weaknesses of the decision under review. However, where a reviewing court engages in such a comparative analysis, they must be sensitive to the risk that do so substantively amounts to a *de novo* interpretation.

The decision is also noteworthy for its use of the "typology" of unreasonableness articulated by the Supreme Court in *Vavilov*. While the Supreme Court stated that its list should not be used as a checklist, this decision suggests it may guide appellate courts in scrutinizing the decisions of first instance reviewing courts. Where a reviewing court has not clearly identified the basis on which a decision is being quashed, it will be vulnerable to challenge on appeal.

Court's discretion not to hear issues raised for first time on appeal: *Planet Energy (Ontario) Corp. v. Ontario Energy Board*, 2020 ONSC 598 (Div Ct)[8]

Facts: Planet Energy is licensed by the Ontario Energy Board (the "OEB") to sell fixed term contracts for natural gas and electricity to commercial and residential customers. For a period of time it marketed its products through a multi-level marketing company that relied on "independent business owner" representatives ("IBOs"). The IBOs were supposed to introduce Planet Energy's products to their friends, family and acquaintances, who would then visit Planet Energy's website to sign up for the products on their own.

After receiving customer complaints relating to two IBOs, the OEB launched an investigation into Planet Energy's marketing practices. The investigation led to the OEB giving notice of its intention to make an order requiring Planet Energy to pay an administrative penalty under the *Ontario Energy Board Act, 1998*[9] ("*OEB Act*").

Following a hearing, the OEB concluded that (1) Planet Energy's marketing practices through the actions of the two IBOs, and (2) Planet Energy's training and testing of those two IBOs, had violated the *Energy Consumer Protection Act, 2010*, its regulations and the OEB's *Electricity Retailer Code of Conduct*. The OEB (a) ordered Planet Energy to pay an administrative penalty of $155,000, (b) declared twenty-six of its electricity contracts to be void, and (c) ordered Planet Energy to pay refunds to the affected customers.

Planet Energy appealed the decision.

[8] Stockwoods LLP was counsel of record for the Respondent in this appeal.

[9] SO 1998, c 15, Sch B

Decision: The Divisional Court unanimously dismissed the appeal.

Under the statutory appeal provision in the *OEB Act*, appeals are available only on questions of law or jurisdiction.

One of the grounds of appeal raised by Planet Energy was that the OEB lacked jurisdiction to order an administrative penalty because the order was made outside the limitation period set out in the *OEB Act*, which began to run from "the day on which the evidence of the contravention first came to the attention of" the OEB . Although Planet Energy had not raised this limitation period issue before the OEB, Planet Energy argued that the interpretation of the limitation provision raised a pure question of law, which would be appropriate for the Divisional Court to determine given that following *Vavilov* the applicable standard of review for a statutory appeal of an administrative decision is correctness. The OEB had never considered the interpretation of the provision in question.

Justice Swinton, writing for the Court, held that Planet Energy's argument ignored the fact that the OEB is an expert and highly specialized tribunal that could assist the Court in the exercise of statutory interpretation by providing context and a consideration of the impact of various possible interpretations. Although after *Vavilov* the Court's analysis of the proper interpretation of the *OEB Act* is on a correctness standard, respect for the specialized function of the OEB remains important. The Court noted that it would be greatly assisted with its interpretive task if it had the benefit of the OEB's interpretation of the words of the *OEB Act*, the general scheme of the *OEB Act* and the policy objectives behind the provision.

The Court also determined that the interpretation and application of the limitation provision was not a pure question of law, since it required a finding of fact as to when the OEB first had evidence of a contravention.

In light of these concerns, the Court exercised its discretion to refuse to consider the limitation issues, as Planet Energy could have and should have raised the issue before the OEB.

The Court gave no effect to the remaining two grounds of appeal, neither of which raised errors of law or jurisdiction suitable for appeal.

Commentary: This case is an early example of a court applying the *Vavilov* framework in the context of the statutory appeal of an administrative decision. Justice Swinton's reasons indicate that the Divisional Court would be inclined to give weight to the OEB's interpretation of its home statute — or, at the very least, would be interested in understanding why the OEB reached that interpretation — despite the Supreme Court's direction in *Vavilov* that statutory appeals of administrative decisions are subject to correctness review.

If other courts follow the lead of the Divisional Court in this instance, the conduct of statutory appeals from decisions administrative tribunals may (at least in some respects) end up occupying a middle ground somewhere between the conduct of appeals from court decisions and the conduct of judicial reviews. This middle ground might, in some situations, take the form of correctness review in which

the appellate court arrives at the correct interpretation of a statutory provision after having regard for and giving some weight to the tribunal's own interpretation — at least to the extent the reviewing court finds that interpretation to be persuasive.

This decision also provides an example of a case in which it may be advantageous to pursue a parallel judicial review application along with a statutory appeal. The Divisional Court concluded that two of the three grounds of appeal did not fall within the scope of the appeal clause as they did not raise errors of law or jurisdiction, and the third was not a pure question of law as it required findings of fact. *Vavilov* clarified that the existence of a limited statutory appeal clause does not preclude judicial review applications in respect of issues not captured by the appeal clause. In future cases, where the issues raised do not fit squarely within the circumscribed appeal clause and yet there are clear signs of an unreasonable error, it may be prudent for the aggrieved party to commence a judicial review application in parallel with the statutory appeal to take advantage of the broadest possible scope of review.

Application of *Vavilov* to appeals of arbitration decisoins: *Allstate Insurance Company v. Her Majesty the Queen*, 2020 ONSC 830

Facts: In July 2012, Allstate Insurance Company issued an automobile insurance policy to M. That policy was cancelled in 2013 for non-payment. M then paid the outstanding amounts and, in March 2014, he received a new insurance policy, valid for one year. Again, the policy fell into arrears and Allstate sent M a notice in May 2014 that his policy would be terminated if he did not pay the premiums. However, because he had moved he did not receive this notice.

Six months later, M was involved in a motor vehicle accident and suffered catastrophic injuries. He applied for statutory accident benefits through the Motor Vehicle Accident Claims Fund in accordance with s. 268(4) of the *Insurance Act*.[10] The Fund paid him, but took the position that Allstate's notice of termination was defective, and that M was still insured by Allstate at the time of the accident. The Fund sought reimbursement from Allstate for the benefits paid.

The matter went to arbitration, and the arbitrator ruled that Allstate was liable to reimburse the Fund, because the notice of cancellation had been defective in two ways: first, it did not contain an address where M could pay the outstanding premiums and fees to avoid the cancellation of his policy; and second, it was not sent to Mr. Miller's last postal address as indicated to the insurer.

Allstate then appealed the arbitrator's decision under s. 45 of the *Arbitration Act, 1991*.[11]

Decision: Appeal dismissed.

The court first considered the applicable standard of review of the arbitrator's decision. Prior to *Vavilov*, an arbitrator's decisions were generally reviewed on a reasonableness

[10] RSO 1990, c I.8.
[11] SO 1991, c 17.

standard, even though the review of an insurance arbitration decisions is styled as a statutory "appeal" under s. 45 of the *Arbitration Act, 1991*.

As the court pointed out, the rationale for applying a reasonableness standard was essentially twofold: first, arbitrators are considered experts in resolving these types of disputes (and are hired by the parties for this reason); and second, the legislation limits the appeal right of the parties to an arbitration, which was seen to be similar to a legislative privative clause. Following previous jurisprudence of the Supreme Court, both of those factors were considered to favour a reasonableness standard.

However, the court in *Allstate* noted that in *Vavilov* the majority expressed the concern that the reasonableness standard of review — which is premised on the notion of judicial restraint when reviewing questions that the legislature intended to be decided by administrative bodies — was routinely being applied even when the legislature has provided for a different institutional structure through a statutory appeal mechanism. *Vavilov* held that a statutory appeal mechanism signals that the legislature intends the court to perform an appellate function and reviewing courts should therefore apply appellate standards of review. On that basis, the court in *Allstate* held that it was appropriate to revisit the applicable standard of review in the context of commercial arbitrations.

The court stated that while s. 45 of the *Arbitration Act, 1991*, is silent on the applicable standard of review in appeals from arbitration decisions, it holds that a party to an arbitration can appeal an arbitration award on a question of law with leave of the court (unless the arbitration agreement provides a broader right of appeal). In the specific case before the court, the agreement *did* provide a broader right of appeal, allowing for appeals on questions of both law and mixed fact and law without leave of the court.

However, the court held that just because the legislation allows the parties to agree on the *scope* of an appeal from an arbitration award does not change the fact that the right of appeal itself arises out of a statutory appeal mechanism. As a result, appellate standards of review should apply: where the scope of the appeal was limited to questions of law (the default under s. 45 of the *Act*), the correctness standard will apply; where the parties broaden the scope to include questions of fact or mixed fact and law, the palpable and overriding error standard will apply.

With respect to the arbitrator's actual decision, the court found no error in the arbitrator's legal analysis, nor in his application of the law to the facts in the case, and therefore held there was no reason to disturb his ruling.

Commentary: While this decision does not bind other courts at the same level, it is an early indication that Ontario courts are re-evaluating the degree of scrutiny they will apply to arbitration decisions in light of *Vavilov*. Whereas an arbitrator's legal interpretations were previously afforded deference (as they were considered experts about the manner in which their particular statute should be applied), the court in *Allstate*

accepted that the reasoning in *Vavilov* extends to appeals of commercial arbitration decisions. This view is notable because the majority did not comment at all on arbitration appeals in *Vavilov*.

It remains an open question whether parties can use an arbitration agreement to specify the standard of review applicable in statutory appeals. The decision implies, but does not explicitly decide, that this cannot be done. On the one hand, both the language of s. 45 of the *Arbitration Act, 1991* and the decision in *Allstate* would suggest that appellate standards are binding in all circumstances. On the other hand, the recent Supreme Court decision of *Telus v Wellman* (2019 SCC 19) suggests that commercial arbitration agreements should be broadly enforced on their terms, without intervention by the courts (see paras 52 and 54, for instance) — which would presumably include enforcing the standard of review to which the parties agree on appeal from the arbitrator's decision.

There has already been a split among lower courts in the application of the *Vavilov* statutory appeal reasoning to appeals of arbitration decisions. The Manitoba Court of Queen's Bench has taken an approach consistent with *Allstate*. In *Buffalo Point First Nation et al. v. Cottage Owners Association*,[12] the Court of Queen's Bench ruled that since s. 44(2) of Manitoba's *Arbitration Act* expressly states "a party may appeal an award to the court … ", *Vavilov* requires a court hearing an appeal of an arbitration decision to apply the appellate standards of review, including a standard of correctness where the appeal concerns a question of law.

The Alberta Court of Queen's Bench has taken a different view. In *Cove Contracting Ltd v Condominium Corporation No 012 5598 (Ravine Park)*,[13] the Alberta court held that *Vavilov* should be read narrowly as applying only to administrative bodies, since the Supreme Court did not explicitly consider the standard of review applicable to commercial arbitration decisions. Although the majority *Vavilov* spoke of statutory appeal provisions generally, which suggests that appeals should be treated similarly across all areas of law, the decision in *Cove Contracting* was not prepared to find that *Vavilov* applies to commercial arbitration decisions without express consideration. Rather, the court considered the discussion of the approach to statutory appeals generally to be *obiter*.

The inconsistent approaches across lower courts on the issue of how commercial arbitration agreements should be reviewed in light of *Vavilov* — including whether parties to arbitration can specify a reasonableness standard on appeal, and how broadly outside of the administrative context *Vavilov* should be applied — all remain issues ripe for appellate (and perhaps eventually Supreme Court) guidance.

[12] 2020 MBQB 20

[13] 2020 ABQB 106

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