The Review of Procedural Fairness Post-*Vavilov*: More of the Same?

The Honourable Simon Ruel[*]

Canada (Minister of Citizenship and Immigration) v. Vavilov[1] *charts a new course forward for determining the standard that applies when a court reviews the merits of an administrative decision. Under the default reasonableness standard, reviewing courts will intervene in administrative matters only if truly necessary to preserve the legality, rationality and fairness of the administrative process.*

The review of procedural fairness is a distinct conceptual exercise. A duty of procedural fairness is triggered when an administrative decision affects the rights, privileges or interests of a person. When reviewing questions of procedural fairness, courts must assess whether the procedures are fair considering all the circumstances.

The question is whether the emphasis on fairness in Vavilov *has brought any change to the procedural fairness review framework. In* Vavilov*, the Supreme Court clearly distinguished substantive and procedural review, and did not intend to collapse procedural fairness into the substantive review. With the enhanced focus on justification, procedural fairness will inform, without being subsumed into, the substantive reasonableness review. From a substantive standpoint, fairness is principally reflected in proper justification.*

Vavilov *has drawn clearer boundaries between questions of procedure and questions of substance. Some defects previously qualified as procedural but closely linked to the decision-making process of administrative tribunals will now be considered through the reasonableness lens. This includes the reliance on stereotypes, the lack of consideration of crucial evidence or responsiveness to the arguments of the parties, and fettering of discretion. However, purely procedural issues will remain subject to the fairness in the circumstances test.*

Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov[2] *trace une nouvelle voie pour la détermination de la norme de contrôle applicable lorsqu'un tribunal se penche sur le fond d'une décision administrative. Sous la norme par défaut de la décision raisonnable, les cours de révision n'interviendront dans les*

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[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 2019 CarswellNat 7883, 2019 CarswellNat 7884 (S.C.C.) [*Vavilov*].

[2] *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, 2019 SCC 65, 2019 CarswellNat 7883, 2019 CarswellNat 7884 (S.C.C.) [*Vavilov*].

affaires administratives que lorsque cela est vraiment nécessaire pour préserver la légitimité, la rationalité et l'équité du processus administratif.

La révision des questions d'équité procédurale constitue un exercice conceptuel distinct. Une obligation d'équité procédurale existe lorsqu'une décision administrative affecte les droits ou intérêts d'une personne. En révisant des questions d'équité procédurale, les cours doivent se demander si les procédures sont équitables compte tenu de l'ensemble des circonstances.

La question est de savoir si l'emphase sur l'équité dans Vavilov *a apporté des modifications au cadre de révision des questions d'équité procédurale. Dans* Vavilov *la Cour suprême a clairement distingué la révision des questions de fond de celles touchant la procédure. Elle n'a pas émis l'intention de fusionner la révision en matière d'équité avec celle portant sur le fond. Avec une insistance accrue sur la justification, l'équité procédurale informera la révision judiciaire sous l'angle de la raisonnabilité, sans y être subsumée. D'un point de vue substantif, l'équité est principalement reflétée par le caractère adéquat de la justification.*

Vavilov *a tracé des lignes de démarcations plus claires entre les questions de procédures et celles de fond. Certaines failles auparavant qualifiées de procédurales mais étroitement liées au processus décisionnel des tribunaux administratif seront maintenant évaluées par le prisme de la raisonnabilité. C'est le cas des stéréotypes, du défaut de considérer à des éléments de preuve cruciaux ou de répondre aux arguments des parties et de la limitation indue de la discrétion. Cependant, les questions purement procédurales resteront sujettes à la révision selon le test de l'équité selon les circonstances.*

1. INTRODUCTION

The review of procedural fairness is a distinct conceptual exercise. Procedural fairness speaks to the relationship between the citizen and the administrative decision-maker.[3] A duty of procedural fairness is triggered when an administrative decision affects the rights, privileges or interests of a person. The scope of the procedural guarantees will depend on circumstances such as the nature of the statutory scheme and the decision in question, and the impact of the decision on the person affected. When reviewing questions of procedural fairness, courts must assess whether the procedures are fair considering all the circumstances.

The question is whether the emphasis on fairness in *Vavilov* has brought any change to the review of procedural fairness. The answer is no and yes. In *Vavilov*, the Supreme Court clearly distinguished substantive and procedural review, and did not intend to collapse procedural fairness into the substantive review of administrative decisions.

On the other hand, with the enhanced focus on justification, principles of procedural fairness will inform, without being subsumed into, the substantive

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[3] *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, 2003 CarswellOnt 1803, 2003 CarswellOnt 1770, [2003] 1 S.C.R. 539 (S.C.C.) at para. 5 (Bastarache J.).

reasonableness review, particularly on the question of reasons. From a substantive standpoint, fairness is principally reflected in proper justification. For example, the importance of an administrative decision, which is a key consideration in determining the existence and scope of procedural fairness guarantees, will also increase the need for thoroughness of reasons.

Vavilov has also drawn clearer boundaries between questions of procedure and questions of substance in judicial review. Some defects previously qualified as procedural but which are closely linked to the decision-making and reasoning processes of administrative tribunals will now be considered as part of the reasonableness review. This includes the reliance on stereotypes, the lack of responsiveness to crucial evidence or arguments raised by the parties and situations in which the administrative decision-maker unreasonably fetters his discretion.

However, purely procedural issues that relate to the way an administrative decision-maker goes about making a decision will remain subject to the non-deferential fairness in the circumstances test. Such questions include bias, the right to notice, the right to a hearing, the right to disclosure, the right to respond, the right to cross-examination, the right to counsel, the right to a thorough regulatory investigation and the right to reasons when required.

2. THE REVIEW OF PROCEDURAL FAIRNSS PRE-*VAVILOV*

Traditionally, administrative decisions could be challenged on judicial review based on two distinct grounds: (1) procedural deficiencies in the administrative process (procedural review) or (2) deficiencies in the analysis of the decision-maker on the merits (substantive review). Separate analytical frameworks were developed to address procedural review and substantive review.

In *Cardinal v. Kent Institution*, the Supreme Court stated that "there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual".[4] The fact that a decision is administrative in nature and affects the rights, privileges or interests of a person is sufficient to trigger the application of the duty of procedural fairness.[5]

Procedural fairness comprises two main sub-rules: *audi alteram partem* — persons must know the case being made against them and be given an opportunity to respond — that is, the right to be heard; and *nemo judex in sua causa* — no one should be a judge in their own case — that is, the rule against bias.[6]

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4 *Cardinal v. Kent Institution*, 1985 CarswellBC 402, 1985 CarswellBC 817, [1985] 2 S.C.R. 643 (S.C.C.) at para. 14 [*Cardinal*].

5 *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124, 1999 CarswellNat 1125, [1999] 2 S.C.R. 817 (S.C.C.) at para. 20; *Cardinal, ibid.*, at para. 14 [*Baker*].

The content of the duty of procedural fairness is eminently variable. In *Baker v. Canada (Minister of Citizenship & Immigration)*, the Court recognized that once the existence of a duty of procedural fairness is established, the content of that duty will depend on the circumstances of each case,[7] considering the following non-exhaustive factors:

1. The nature of the decision being made and the process followed in making it; the more the process resembles judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required;
2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates; e.g., greater procedural protections will be required when no appeal procedure is provided for within the statute;
3. The importance of the decision to the person affected; the greater the consequences, the higher is the degree of procedural fairness owed;
4. Legitimate expectations; "[i]f the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness"; "if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded";[8]
5. The choices of procedure made by the administrative body; e.g. less stringent procedural safeguards may exist when the statute grants discretion to the decision-maker in choosing its own procedures, or when the administrative body has an expertise in determining what procedures are appropriate in the circumstances.[9]

The right to be heard comprises a number of sub-rights which may or may not find application, depending on the circumstances: the right to notice, the right to disclosure of prejudicial allegations, the right to a hearing, the right to make submissions, the right to counsel, the right to examine and cross-examine witnesses, the right to reasons when the statutory scheme requires it, the right to a thorough investigation by a regulatory investigator, and the right to interpretation services in administrative proceedings.

The rule against bias[10] applies with flexibility along a spectrum depending on the nature of the administrative process and other contextual considerations. At

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[6] David Jones and Anne de Villars, *Principles of Administrative Law*, 5th ed., Toronto, Carswell, 2009, at page 210.

[7] *Baker, supra,* note 5, at paras. 21, 22.

[8] *Ibid.*, at para. 26.

[9] *Ibid.*, at paras. 23-28.

[10] David Jones and Anne de Villars, *Principles of Administrative Law*, 5th ed., Toronto, Carswell, 2009, at 395 ff.

one end, adjudicative tribunals are expected to comply with the impartiality standard applicable to courts of justice. At the other end, a more lenient standard will apply to boards with policy-making functions.[11] A middle standard may find application, for example in the case of investigative bodies.[12]

Once it is established that a duty of procedural fairness applies and once the scope of the duty has been defined, the reviewing court determines whether the administrative body breached the requirements of fairness in the particular circumstances of the case.[13]

In *C.U.P.E. v. Ontario (Minister of Labour)*, Binnie J. wrote for the majority that the "content of procedural fairness goes to the manner in which [the decision-maker goes about] making his decision, whereas the standard of review is applied to the end product of his deliberations".[14]

Procedural fairness is therefore an independent right that does not depend on the merits of the decision. As the Supreme Court wrote in *Cardinal v. Kent Institution*, "[t]he right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have".[15]

In *Moreau-Bérubé c. Nouveau-Brunswick*, the Supreme Court confirmed that the review of the procedural fairness of administrative actions or decisions is an exercise independent of the standard of review analysis:

> The [issue of procedural fairness] requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation [according to the factors developed in *Baker*].[16]

A court reviewing a procedural fairness question applies *Baker* and asks itself whether the administrative process is fair considering all the circumstances: the "fairness in the circumstances" test. A breach of procedural fairness is a jurisdictional error[17] which renders an administrative decision void.[18]

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11 *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CarswellNfld 179, 1992 CarswellNfld 170, [1992] 1 S.C.R. 623 (S.C.C.).

12 *Beno v. Canada (Somalia Inquiry Commission)*, 1997 CarswellNat 688, 1997 CarswellNat 1572, (*sub nom.* Beno v. Canada (Commissioner & Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)) [1997] 2 F.C. 527 (Fed. C.A.) at para. 27, leave to appeal refused (1997), (*sub nom.* Beno v. Létourneau) 224 N.R. 395 (note) (S.C.C.).

13 *Baker, supra,* note 5, at paras. 44, 48.

14 *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, 2003 CarswellOnt 1803, 2003 CarswellOnt 1770, [2003] 1 S.C.R. 539 (S.C.C.) at para. 102 (Binnie J.).

15 *Cardinal, supra,* note 4, at para. 23.

16 *Moreau-Bérubé c. Nouveau-Brunswick*, 2002 SCC 11, 2002 CarswellNB 46, 2002 CarswellNB 47, [2002] 1 S.C.R. 249 (S.C.C.) at para. 74.

17 *Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c.*

In 2008, the Supreme Court issued its decision in *Dunsmuir v. New Brunswick*.[19] That case concerned the review of a labour arbitrator's decision on a grievance brought by a terminated employee of the Department of Justice for the Province of New Brunswick.

On the standard of review, Bastarache and Lebel JJ. wrote that the application of the multiple standards (at the time correctness, patent unreasonableness and reasonableness *simpliciter*) brought theoretical and practical difficulties, and that reconsideration of the number and of the definition of the standards was necessary. Two standards would now apply to the judicial review of the merits of administrative decisions: correctness and reasonableness.[20]

Under the standard of review analysis, a consideration of the following factors should lead to the application of reasonableness: a privative clause, the expertise of the decision-maker and the nature of the question (questions of fact and questions of law within the specialization of the decision-maker).[21] Correctness should be applied to constitutional questions, to questions of law both of central importance to the legal system as a whole and outside the adjudicator's area of expertise and to questions regarding the jurisdictional lines between competing tribunals.[22]

In *Dunsmuir*, procedural fairness was not mentioned as a factor relevant to the standard of review analysis. This is consistent with the prior position of the Supreme Court that the review of the procedural aspects of the administrative process is distinct from the review of the merits of an administrative decision.

It should further be noted that in *Dunsmuir*, the Court tackled two issues, which confirms the distinct approaches to substantive and procedural review. Firstly, it determined the appropriate standard of review and its application to the merits of the decision of a labor adjudicator. Secondly, it determined whether a public law duty of procedural fairness applies to a public employee under an employment contract.

Binnie J., concurring with the result in *Dunsmuir*, confirmed that no deference was owed to questions of procedural fairness, writing that "a fair procedure is said to be the handmaiden of justice", consequently, "[o]n such

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Université du Québec à Trois-Rivières, 1993 CarswellQue 142, 1993 CarswellQue 154, (*sub nom.* Université du Québec à Trois-Rivières v. Larocque) [1993] 1 S.C.R. 471 (S.C.C.) at 490 [S.C.R.] [*Université du Québec à Trois-Rivières*].

18 David J. Mullan, *Administrative Law*, Toronto, Irwin Law, 2001, at 227-230; David Jones and Anne de Villars, *Principles of Administrative Law*, 5th ed., Toronto, Carswell, 2009, at 248250; Patrice Garant, *Précis des administrations publiques*, 5th ed., Cowansville, Yvon Blais, 2010, at 274.

19 *Dunsmuir v. New Brunswick*, 2008 SCC 9, 2008 CarswellNB 124, 2008 CarswellNB 125, [2008] 1 S.C.R. 190 (S.C.C.) [*Dunsmuir*].

20 *Ibid.*, at paras. 34-43.

21 *Ibid.*, at paras. 53-55.

22 *Ibid.*, at paras. 58, 60, 61.

matters [. . .] courts have the final say [and] [n]obody should have his or her rights, interests or privileges adversely dealt with by an unjust process."[23]

In *Canada (Minister of Citizenship and Immigration) v. Khosa*, Binnie J. wrote for the majority that "*Dunsmuir* says that procedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review".[24] This comment seemed to deviate from previous Supreme Court pronouncements on procedural fairness. However, that observation was qualified as an *obiter*,[25] and further, as indicated, in *Dunsmuir*, the Court did not attribute a standard of review to questions of procedural fairness. The comments of Binnie J. in *Khosa* may be therefore interpreted to mean that no deference is owed to questions of procedural fairness.[26]

In *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, the Supreme Court wrote that "the breach of a duty of procedural fairness is an error in law" which would justify quashing the administrative decision in its entirety.[27]

In *Khela v. Mission Institution*, which dealt with whether the transfer of a federal inmate from a medium to a maximum security penitentiary institution met the statutory requirements of procedural fairness, the Supreme Court identified correctness as the standard of review, but *de facto* applied the "fairness in the circumstances test", concluding that the decision to withhold information considered in making the transfer decision, information that might not reasonably threaten the security of the prison, "was unlawful because it was procedurally unfair".[28]

Prior to *Vavilov*, it could "fairly" be drawn from Supreme Court precedents that the standard of review analysis did not apply to questions of procedural fairness. Under the *Baker* framework, if a duty of procedural fairness exists, the scope of that duty is determined based on a contextual analysis, taking into account the nature of the decision, its importance to the person affected, and the choice of procedures made by the administrative body. The Supreme Court did not alter that framework in and since *Dunsmuir*.

The application of these precedents by first instance and appellate courts in particular cases has sometimes proved to be challenging.

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[23] *Ibid.*, at para. 129 (Binnie J.).

[24] *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435, (*sub nom.* Canada (Citizenship & Immigration) v. Khosa) [2009] 1 S.C.R. 339 (S.C.C.) at para. 43.

[25] Derek McKee, "The Standard of Review for Questions of Procedural Fairness", (2016) 41 Queen's LJ 355, at 362.

[26] *Dunsmuir, supra,* note 19, at para. 129.

[27] *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, 2011 CarswellNfld 414, 2011 CarswellNfld 415, (*sub nom.* Newfoundland & Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board)) [2011] 3 S.C.R. 708 (S.C.C.) at para. 22 [*Newfoundland and Labrador Nurses' Union*].

[28] *Khela v. Mission Institution*, 2014 SCC 24, 2014 CarswellBC 778, 2014 CarswellBC 779, (*sub nom.* Mission Institution v. Khela) [2014] 1 S.C.R. 502 (S.C.C.) at para. 80 [*Mission*].

Some courts have determined that the "fairness in the circumstances test" applies, which is consistent with Supreme Court pronouncements that procedural review goes directly to jurisdiction and that there is no need to determine whether a particular degree of deference should be applied. Others have applied correctness, in some cases applying a "margin of appreciation"[29] or a "degree of deference"[30] in making a procedural determination. Yet others have applied the reasonableness standard to procedural questions.

Two considerations appear to have provoked these variations.

Firstly, some defects, qualified as "procedural", are in fact closely related to the adjudication of the merits of the matter. The closer the defect to the administrative tribunal's decision-making function (matters of substance), the higher the chances that the reviewing court will want to apply a deferential standard. The difficulty lies in drawing a line between what is procedural and what is substantive[31].

An illustration is the case of *Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières*, where the Supreme Court grappled with the issue of whether a refusal to admit evidence constitutes a breach of procedural fairness. This is an issue closely related to the decision-making function of an administrative tribunal.

The Court wrote that the rejection of relevant evidence by a tribunal is not necessarily a breach of natural justice.[32] In fact, reviewing courts should recognize "the very wide measure of autonomy which the legislature intended to give grievance arbitrators in settling disputes within their jurisdiction".[33] On the other hand, according to the Court, "[i]t may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice."[34]

In *Forest Ethics Advocacy Assn. v. National Energy Board*,[35] the Court made a distinction between defects that could be qualified as substantive (reviewable on a reasonableness standard) or procedural (reviewable on a correctness standard).

For example, the Court found that the Board's process decisions are reviewable on a correctness standard, "with some deference to the Board's choice

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29 *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245, 2014 CarswellNat 4233, 2014 CarswellNat 6533 (F.C.A.) at para. 72 [*Forest Ethics Advocacy Association*].

30 *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, 2014 CarswellNat 395, 2014 CarswellNat 2858 (F.C.A.) at para. 42.

31 See on this point Derek McKee, "The Standard of Review for Questions of Procedural Fairness", (2016) 41 Queen's LJ 355, at 390-391; Paul Daly, "Canada's Bipolar Administrative Law: Time for Fusion, (2014) 40:1 Queen's LJ 213.

32 *Université du Québec à Trois-Rivières, supra,* note 17, at 491.

33 *Ibid.*, at 490.

34 *Ibid.*, at 490-491.

35 *Forest Ethics Advocacy Association*, *supra*, note 29.

of procedure".[36] The decision "that certain issues were irrelevant to the larger proceeding is one of substance" which attracted the application of the reasonableness standard.[37] Finally, the decision to deny an intervener participation before the Board "is a mix of substance *and* procedure"[38] and "[r]egardless of how we characterize the Board's decision, the Board deserves to be allowed a significant margin of appreciation".[39]

Secondly, in other cases, recognizing that an administrative tribunal is the "master of its own procedure",[40] some courts have shown deference on judicial review even on matters that appear squarely procedural.[41]

For example, in *Syndicat des employés de Au dragon forgé inc. c. Québec (Commission des relations du travail)*,[42] the question was whether the Quebec Labour Board was required to disclose the identity of the members of competing unions in a certification challenge. The Quebec Court of Appeal noted that "[translation] the respect of the rule *audi alteram partem* is being raised here in a particular legislative context, and consequently, it is not the correctness standard that is applicable, but rather the standard of reasonableness".[43]

In *Saskatchewan (Workers Compensation Board) v. Gjerde*, the Saskatchewan Court of Appeal found that the process by which physicians were chosen to sit on the Medical Reviews Panel was primarily a question of the Board's interpretation and application of its home statute, which should presumptively be reviewed on a standard of reasonableness.[44]

To a large extent, however, purely procedural questions have been reviewed on a fairness in the circumstances standard, including: bias;[45] the right to a notice of hearing;[46] the disclosure of will say statements to a participant in a commission of inquiry;[47] the timing and level of details of notices of alleged

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36 *Ibid.*, at para. 70.

37 *Ibid.*, at para. 63.

38 *Ibid.*, at para. 79.

39 *Ibid.*, at para. 82.

40 *Knight v. Indian Head School Division No. 19*, 1990 CarswellSask 146, 1990 CarswellSask 408, [1990] 1 S.C.R. 653 (S.C.C.) at 685 [S.C.R.].

41 See the opinion of Stratas J. in *Maritime Broadcasting System Ltd. v. Canadian Media Guild*, 2014 FCA 59, 2014 CarswellNat 474, 2014 CarswellNat 8485 (F.C.A.) at para. 50.

42 *Syndicat des employés de Au dragon forgé inc. c. Québec (Commission des relations du travail)*, 2013 QCCA 793, 2013 CarswellQue 4147 (C.A. Que.).

43 *Ibid.*, at para. 38.

44 *Saskatchewan (Workers Compensation Board) v. Gjerde*, 2016 SKCA 30, 2016 CarswellSask 126 (Sask. C.A.) at paras. 56-59.

45 *Baker, supra,* note 5, at para. 47; *Terceira v. LIUNA*, 2014 ONCA 839, 2014 CarswellOnt 16542 (Ont. C.A.) at para. 41; *Chrétien v. Gomery*, 2008 FC 802, 2008 CarswellNat 1998, 2008 CarswellNat 1999 (F.C.) at para. 66, affirmed 2010 FCA 283, 2010 CarswellNat 3874, 2010 CarswellNat 3875 (F.C.A.), additional reasons 2011 CarswellNat 290, 2011 CarswellNat 291 (F.C.A.).

46 *Waterman v. Waterman*, 2014 NSCA 110, 2014 CarswellNS 930 (N.S. C.A.) at para. 23.

misconduct issued by a commission of inquiry;[48] the disclosure of key information essential to the matter to be decided by the administrative body;[49] the right to counsel;[50] the refusal of the tribunal to allow a party to present crucial evidence;[51] the right to make representations on substantive issues;[52] and the complete failure to provide reasons for a decision.[53]

In *Canadian Pacific Railway Company v. Canada (Attorney General)*,[54] the Federal Court of Appeal seems to have resolved some of the tensions in the procedural review framework,[55] particularly the question of whether the "margin of deference" that should be owed to administrative tribunals on procedural issues logically fits within the procedural fairness framework. The Court wrote [my emphasis]:

> [54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court [. . .] asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. [. . .] even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.

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47 *Southern First Nations Network of Care v. Hughes*, 2012 MBCA 99, 2012 CarswellMan 583 (Man. C.A.) at para. 35.

48 *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, 1997 CarswellNat 1387, 1997 CarswellNat 1388, (*sub nom.* Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)) [1997] 3 S.C.R. 440 (S.C.C.).

49 *Mission, supra,* note 28, at paras. 83, 91-98.

50 *Canadian Transportation Accident Investigation & Safety Board, Re*, 1993 CarswellNat 812, 1993 CarswellNat 1306, (*sub nom.* Parrish, Re) [1993] 2 F.C. 60 (Fed. T.D.) at para. 56; *Ha v. Canada (Minister of Citizenship & Immigration)*, 2004 FCA 49, 2004 CarswellNat 247, 2004 CarswellNat 5581 (F.C.A.) at paras. 66, 68; *Torres c. Québec (Commission des lésions professionnelles)*, 2016 QCCS 119, 2016 CarswellQue 122 (C.S. Que.) at paras. 135-137.

51 *Air Canada v. Canadian Transportation Agency*, 2014 FCA 288, 2014 CarswellNat 5323, 2014 CarswellNat 6598 (F.C.A.) at para. 26.

52 *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, 2014 CarswellNat 395, 2014 CarswellNat 2858 (F.C.A.) at para. 39.

53 *Newfoundland and Labrador Nurses' Union, supra,* note 27, at paras. 20-22.

54 *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, 2018 CarswellNat 1433, 2018 CarswellNat 8988 (F.C.A.) [*Canadian Pacific Railway Company*].

55 Qualified as a "jurisprudential muddle": *Bergeron v. Canada (Attorney General)*, 2015 FCA 160, 2015 CarswellNat 2700, 2015 CarswellNat 10326 (F.C.A.) at para. 71, leave to appeal refused 2016 CarswellNat 1073, 2016 CarswellNat 1074 (S.C.C.).

> [55] Attempting to shoehorn the question of procedural fairness into a standard of review analysis is also, at the end of the day, an unprofitable exercise. Procedural review and substantive review serve different objectives in administrative law. While there is overlap, the former focuses on the nature of the rights involved and the consequences for affected parties, while the latter focuses on the relationship between the court and the administrative decision-maker. Further, certain procedural matters do not lend themselves to a standard of review analysis at all, such as when bias is alleged. As *Suresh* demonstrates, the distinction between substantive and procedural review and the ability of a court to tailor remedies appropriate to each is a useful tool in the judicial toolbox, and, in my view, there are no compelling reasons why it should be jettisoned.
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> [56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an *a priori* decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice — was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.[56]

On the question of the "margin of deference", the Court wrote that "[t]he suggestion that procedural fairness is reviewed on a correctness standard with some deference is both confusing and unhelpful. It is confusing because the standard of review is applied to consideration of outcomes, and, as a doctrine, is not applied to the procedure by which they are reached".[57]

The leeway of administrative tribunals in determining their own procedures remains relevant in the analysis, but at the level of the determination of the content of the duty of fairness in the *Baker* grid. In fact, "deference is owed to the decision-maker's choice of procedure in determining the content of the duty of fairness but none is owed in determining whether the decision-maker fulfilled that duty".[58]

Canadian Pacific Railway Company was largely followed in the Federal Court on the review of procedural fairness questions, although most decisions referred to "correctness" as the applicable standard.[59]

The difficulty with applying correctness to questions of procedural fairness is that it may tend to overlook the procedural discretion granted to administrative

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[56] *Canadian Pacific Railway Company, supra,* note 54, at paras. 54-56.

[57] *Ibid.*, at para. 44.

[58] *Ibid.*, at para. 45, referring to *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27, 2006 CarswellNS 83 (N.S. C.A.) at paras. 20, 21.

[59] See also *Murray Purcha & Son Ltd. v. Barriere (District)*, 2019 BCCA 4, 2019 CarswellBC 2 (B.C. C.A.) at para. 28.

bodies, a factor included in the *Baker* fairness review framework.[60] Even if the Court in *Canadian Pacific Railway Company* mentioned that the reviewing exercise is "best reflected in the correctness standard",[61] it also noted that, "strictly speaking, no standard of review is being applied".[62] It therefore appears preferable to use the terminology "fairness in the circumstances",[63] which encapsulates the test and criteria articulated in *Baker* for reviewing questions of procedural fairness.

If *Canadian Pacific Railway Company* seems to have resolved, at least federally, the uncertainties concerning the review of purely procedural matters, questions remain on the review of procedural matters that are either closely related to the adjudication of the merits of the matter or that may be qualified as mixed procedural and substantive, which may require a qualification exercise.

3. *VAVILOV*

(a) Key findings in *Vavilov*

Now comes *Canada (Minister of Citizenship and Immigration) v. Vavilov*, which has implications for the judicial review of procedural questions. *Vavilov* charts "a new course forward for determining the standard of review that applies when a court reviews <u>the merits</u> of an administrative decision".[64]

A first set of concerns that the majoritarian judges of the Supreme Court sought to address in *Vavilov* relates to the determination of the appropriate standard of review: the lack of predictability of the standard of review analysis and the deference routinely applied by reviewing courts even when the legislature has provided a statutory appeal mechanism.

The Supreme Court responded to these problems by determining that the reasonableness standard is presumed to be applicable in all cases, except in the face of a clear contrary legislative intent or if the rule of law requires the application of a less deferential standard.

The other set of concerns that the Supreme Court sought to address was the lack of guidance and clarity in the application of the reasonableness standard, which became elusive and difficult to grasp. The Court therefore seized the opportunity to flesh out the concept of reasonableness.

On the one hand, under the reasonableness standard, "courts must recognize the legitimacy and authority of administrative decision-makers within their

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[60] John M. Evans, "Fair's Fair: Judging Administrative Procedures", (2015) 28 Can J Admin Law & Prac 111.

[61] *Canadian Pacific Railway Company, supra,* note 54, at para. 54.

[62] *Ibid.*, at para. 54.

[63] *Elson v. Canada (Attorney General)*, 2019 FCA 27, 2019 CarswellNat 280 (F.C.A.) at para. 31, leave to appeal refused *Kirby Elson v. Attorney General of Canada*, 2019 CarswellNat 3592, 2019 CarswellNat 3593 (S.C.C.).

[64] *Vavilov, supra,* note 1, at para. 2.

proper spheres and adopt an appropriate posture of respect".[65] This is meant "to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" [my emphasis].[66]

On the other, hand, "administrative decision-makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be 'justified to citizens in terms of rationality and fairness'" [my emphasis].[67]

According to the Court in *Vavilov*, in conducting a reasonableness review, a court must consider the outcome of the administrative decision, in light of its underlying rationale and justification, and not attempt to reach the result that it would have reached in the administrative decision-maker's place.[68]

A reasonable decision is one that: (1) is based on internally coherent reasoning, and (2) is justified in light of the legal and factual constraints that bear on the decision. Those constraints include: the governing statutory scheme, common law principles, principles of statutory interpretation, the evidence before the decision-maker, the submission of the parties, the past practices and decisions of the tribunal, and the impacts of the decision on the individual concerned.[69]

(b) *Vavilov* and procedural fairness — focus on reasoning

The reference to the "legality, rationality and fairness" of the administrative process in conducting judicial review is not a new concept. In *Dunsmuir*, the Supreme Court stated that "[t]he function of judicial review is [. . .] to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes".[70]

That broad statement made by the Supreme Court in *Vavilov* was not intended to collapse procedural fairness into the substantive review of administrative decisions. Judicial review comprises two prongs: substantive review and procedural review. That cleavage, reflected in Supreme Court jurisprudence for decades, remained under *Dunsmuir*, where substantive and procedural review were treated separately. *Vavilov* did not alter that position.

In *Vavilov*, the Supreme Court in fact clearly distinguished substantive and procedural review, stating that: "[w]here a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with

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65 *Ibid.*, at para. 14.
66 *Ibid.*, at para. 13.
67 *Ibid.*, at para. 14.
68 *Ibid.*, at para. 15.
69 *Ibid.*, at paras. 102-135.
70 *Dunsmuir, supra,* note 19, at para. 28.

respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law" [my emphasis].[71]

Further, procedural fairness is not included in *Vavilov* in the list of questions that may be reviewed under the correctness standard, which questions only include the following for the moment: 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.

However, in introducing the discussion on what the reasonableness standard means, the Supreme Court indicated that "the requirements of the duty of procedural fairness in a given case — and in particular whether that duty requires a decision-maker to give reasons for its decision — will impact how a court conducts reasonableness review" [my emphasis].[72]

In other words, the principles of procedural fairness will inform but will not be subsumed into the substantive reasonableness review. This is particularly so on the question of the issuance of reasons by an administrative tribunal, which has both a substantive aspect and a procedural aspect.

Citing *Baker*, the Supreme Court acknowledged in *Vavilov* that "[w]here a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances".[73]

In the discussion that followed, the Court emphasized the importance of reasons in the administrative decision-making process, as they "explain how and why a decision was made", "help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner", and they "shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power".[74]

In fact, according to the Court, a principled approach to reasonableness review is one which puts reasons first.[75] Thus, under the new substantive review framework, not only the outcome of an administrative process has to be justifiable: "[w]here reasons for a decision are required, the decision must also be *justified*, by way of those reasons".[76] In conducting a reasonableness review, a court therefore "properly considers both the outcome of the decision and the reasoning process that led to that outcome".[77] According to the Court, this is a "more robust form of reasonableness review" than before.[78]

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[71] *Vavilov, supra,* note 1, at para. 23.
[72] *Ibid*., at para. 76.
[73] *Ibid*., at para. 77.
[74] *Ibid*., at para. 79.
[75] *Ibid*., at para. 84.
[76] *Ibid*., at para. 86.
[77] *Ibid*., at para. 87.
[78] *Ibid*., at para. 72.

This is where procedural fairness and substantive review intersect: "the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable".[79]

In *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, the Supreme Court suggested that procedural fairness could be triggered "[w]here there are no reasons in circumstances where they are required", because "there is nothing to review"[80], but it went on to say that where there are reasons, even if they are deficient, they should be considered in the reasonableness analysis.[81]

In *Vavilov*, the Supreme Court kept that distinction, writing that "[w]here the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision-maker".[82] This is the essence of procedural review: an unreasoned decision (where reasons are required) is an unfair decision which ought to be quashed. However, "where reasons are provided but they fail to provide a transparent and intelligible justification [. . .], the decision will be unreasonable".[83]

In other words, it can be drawn from *Vavilov* that the absence of reasons when required is a procedural fairness question, but the inadequacy of reasons goes to reasonableness, because the decision will "fail to meet the requisite standard of justification, transparency and intelligibility".[84]

(c) Other areas where fairness influences reasonableness

In addition to the adequacy of reasons, which ought to be considered as a substantive question, some other flaws closely related to the substantive decision-making functions of the tribunal, previously qualified in some cases as procedural, will now clearly be considered under the reasonableness review.

Although bias remains a question of procedural fairness, the reliance on stereotypes will render a decision unreasonable. The Court wrote in *Vavilov* that "a reasonable decision is one that is justified in light of the facts", which excludes the reliance on stereotypes by the administrative decision-maker.[85]

In fairness, reasons have to be responsive to the arguments brought forward by the parties,[86] and the failure of a tribunal "to meaningfully grapple with key

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[79] *Ibid.*, at para. 81.

[80] *Newfoundland and Labrador Nurses' Union, supra,* note 27, at para. 22.

[81] *Ibid.*, at para. 22.

[82] *Vavilov, supra,* note 1, at para. 136.

[83] *Ibid.*, at para. 136.

[84] *Ibid.*, at para. 98.

[85] *Ibid.*, at para. 126.

[86] *Ibid.*, at para. 127.

issues or central arguments raised by the parties" or to consider relevant evidence will render an administrative decision unreasonable.[87]

Prior to *Vavilov*, in some cases, the failure to consider arguments or evidence presented before the administrative tribunal was treated as a procedural defect.[88] It now appears that evidentiary issues and responsiveness to parties' arguments, which are linked to justification, will be dealt with in the application of the reasonableness standard of review.[89]

Fettering of discretion occurs when decision-makers limit the exercise of the discretion imposed upon them by adopting an internal policy or guidelines to assist in decision-making, but then refuse to consider other factors that are legally relevant.[90] Where an administrative tribunal has a wide discretion under a statute for making decisions, the fettering of that discretion by the tribunal has been qualified as a breach of procedural fairness.[91]

This is also a question linked to justification and *Vavilov* clarified that when a decision-maker is given wide discretion in the relevant statutory scheme, "it would be unreasonable for it to fetter that discretion".[92]

One of the key factors considered in *Baker* in determining both the existence and scope of procedural fairness guarantees is the importance of the decision to the person affected. In fact, "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated".[93]

In *Vavilov*, the Supreme Court concluded that the fact that procedural protections increase when "the decision in question involves the potential for

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87 *Ibid.*, at paras. 126, 128.

88 *Université du Québec à Trois-Rivières, supra,* note 17, at 490-491; *MPI moulin à papier de Portneuf inc. c. Québec (Commission des lésions professionnelles)*, 2013 QCCA 889, 2013 CarswellQue 4444 (C.A. Que.) at paras. 89, 93.

89 See post-*Vavilov* in the Federal Court: *Siffort v. Canada (Citizenship and Immigration)*, 2020 FC 351, 2020 CarswellNat 733 (F.C.) at para. 17; *Idugboe v. Canada (Citizenship and Immigration)*, 2020 FC 334, 2020 CarswellNat 633 (F.C.) at para. 18; in the provincial courts, see: *Airdrie (City) v. 803969 Alberta Ltd*, 2020 ABQB 114, 2020 CarswellAlta 304 (Alta. Q.B.) at paras. 63-70; *Mattar v. The National Dental Examining Board of Canada*, 2020 ONSC 403, 2020 CarswellOnt 2476 (Ont. Div. Ct.) at paras. 44-52.

90 *Maple Lodge Farms Ltd. v. Canada*, 1982 CarswellNat 484, 1982 CarswellNat 484F, [1982] 2 S.C.R. 2 (S.C.C.); *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, 1999 CarswellBC 1821 (B.C. C.A.) at para. 62, quoted in *Minhas v. British Columbia (Superintendent of Motor Vehicles)*, 2017 BCCA 304, 2017 CarswellBC 2273 (B.C. C.A.) at para. 21.

91 *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, 1999 CarswellBC 1821 (B.C. C.A.) at paras. 58, 60, quoted in *Minhas v. British Columbia (Superintendent of Motor Vehicles)*, 2017 BCCA 304, 2017 CarswellBC 2273 (B.C. C.A.) at paras. 20-22.

92 *Vavilov, supra,* note 1, at paras. 108, 130; see also *Langlais c. CollÉge des médecins du Québec*, 2020 QCCA 134, 2020 CarswellQue 343 (C.A. Que.) at para. 62.

93 *Baker, supra,* note 5, at para. 25.

significant personal impact or harm"[94] will also increase the need for thoroughness of reasons: "[w]here the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes".[95]

This is another illustration of how fairness will influence the reasonableness review of the merits of administrative decisions.

(d) Purely procedural issues — application of *Baker* post-*Vavilov*

Post-*Vavilov*, the Federal Court and other Canadian courts have consistently continued to apply the *Baker* fairness in the circumstances test (clothed in a number of cases under the correctness standard) to purely procedural questions. For example, in *Iyiola v. Canada (Citizenship and Immigration)*, the Federal Court wrote the following (which is representative of a number of other cases):

> [14] The SCC decision in *Vavilov* has not displaced the overarching principle of ensuring a fair process, nor the factors to be considered in assessing whether a fair process was followed [. . .]. Confirming the duty of procedural fairness "is 'eminently variable', inherently flexible and context-specific", *Vavilov* instructs that where a duty of procedural fairness arises, the procedural requirements imposed by the duty are to be determined with reference to all the circumstances, including the *Baker* factors [. . .][96]

Pursuant to Federal Court jurisprudence and case law from other Canadian jurisdictions, purely procedural questions that remained subject to the fairness in the circumstances grid post-*Vavilov* include the following:

- Bias;[97]
- Decision on whether to hold a hearing;[98]
- Right to a notice of hearing[99] and right to respond to allegations of misconduct that may result in legal consequences;[100]

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94 *Vavilov, supra,* note 1, at para. 133.

95 *Ibid.*, at para. 133.

96 *Iyiola v. Canada (Citizenship and Immigration)*, 2020 FC 324, 2020 CarswellNat 602 (F.C.) at para. 14 [*Iyiola*].

97 *Weng v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 151, 2020 CarswellNat 149 (F.C.) at paras. 17-21 and 54; *Pages jaunes solutions numériques et médias limitée c. Martin*, 2020 QCCS 1155, 2020 CarswellQue 2711 (C.S. Que.) at paras. 37-45.

98 *Idugboe v. Canada (Citizenship and Immigration)*, 2020 FC 334, 2020 CarswellNat 633 (F.C.) at paras. 34, 39; *Zhou v. Cherishome Living*, 2020 ONSC 500, 2020 CarswellOnt 646 (Ont. Div. Ct.) at paras. 39, 53-60.

99 *G.S.R. Capital Group Inc. v. The City of White Rock*, 2020 BCSC 489, 2020 CarswellBC 804 (B.C. S.C.) at paras. 140-142.

100 *Tourangeau v. Smith's Landing First Nation*, 2020 FC 184, 2020 CarswellNat 316 (F.C.) at paras. 55-61.

- Right to be heard and to make submissions on the issues to be adjudicated;[101]
- Right to respond to the decision-maker's concerns in an administrative process;[102]
- Right to notice and opportunity to respond to new credibility findings made by an administrative appellate board not raised in a previous administrative decision;[103]
- Outright refusal to accept relevant evidence substantiating a claim;[104]
- Thoroughness of a regulatory investigation;[105]
- In regulatory investigations (investigation of the Public Service Commission into allegations of fraud in an appointment process), fairness requires that the target of the investigation be informed of the substance of the case against him and of the evidence obtained by the investigator;[106] in regulatory investigations, fairness could, in some cases, include the communication of the investigator's report, with appropriate redactions, if necessary;[107]
- Right to notice if the decision-maker departs from the conclusion of a regulatory investigator (decision of the Canadian Human Rights Commission to dismiss a complaint despite the investigator's recommendation that the matter be referred to the Canadian Human Rights Tribunal);[108]
- Right to interpretation services before an administrative decision-maker;[109]

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[101] *Canada (Public Safety and Emergency Preparedness) v. Ahmadi*, 2020 FC 317, 2020 CarswellNat 601 (F.C.) at paras. 9, 16; *Rasasoori v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 207, 2020 CarswellNat 293, 2020 CarswellNat 629 (F.C.) at paras. 11, 17.

[102] *Iyiola, supra,* note 96, at para. 17; *Feng v. Saskatchewan (Economy)*, 2020 SKCA 6, 2020 CarswellSask 7 (Sask. C.A.) at paras. 43-47, 78-100; *Smith v. Canada (Attorney General)*, 2020 FC 629, at paras. 67, 160-166, 169.

[103] *Dalirani v. Canada (Citizenship and Immigration)*, 2020 FC 258, 2020 CarswellNat 390 (F.C.) at paras. 31, 32; *Likhi v. Canada (Citizenship and Immigration)*, 2020 FC 171, 2020 CarswellNat 1190, 2020 CarswellNat 211 (F.C.) at paras. 19, 20 and 35; *Patel v. Canada (Citizenship and Immigration)*, 2020 FC 77, 2020 CarswellNat 73, 2020 CarswellNat 516 (F.C.) at paras. 7, 10.

[104] *Trboljevac v. Canada (Citizenship and Immigration)*, 2020 FC 26, 2020 CarswellNat 32, 2020 CarswellNat 513 (F.C.) at paras. 26-29, 46-50.

[105] *Desgranges v. Canada (Elections)* (2020), 2019 FC 314, 2020 CarswellNat 735 (F.C.) at para. 49.

[106] *Cadostin v. Canada (Attorney General)*, 2020 FC 183, 2020 CarswellNat 243 (F.C.) at paras. 28-31, 80-81.

[107] *Anglin v. Alberta (Chief Electoral Officer)*, 2020 ABQB 131, 2020 CarswellAlta 531 (Alta. Q.B.) at paras. 26, 73.

[108] *Ennis v. Canada (Attorney General)*, 2020 FC 43, 2020 CarswellNat 37, 2020 CarswellNat 434 (F.C.) at paras. 51-53.

- Incompetence of counsel in administrative proceedings, in extraordinary circumstances, where "(i) prior counsel's acts or omissions constituted incompetence; (ii) a miscarriage of justice resulted in the sense that, but for the alleged conduct, there is a reasonable probability that the result would have been different; and (iii) the representative was given a reasonable opportunity to respond".[110]

4. CONCLUSION

In *Dunsmuir*, the Supreme Court did not change the direction of administrative law on the review of questions of procedural fairness. As outlined in *Baker*, the concept of procedural fairness is variable and its content is to be decided in the specific context of each case, considering a number of factors, which include the nature of the decision and the process for making it, the nature of the statutory scheme, the importance of the decision to the person affected, legitimate expectations and procedural choices made by the administrative body.

That direction was not substantially altered in *Vavilov*. *Vavilov* charts a new course forward for determining the standard of review applicable when a court reviews the merits of an administrative decision, not the procedure for achieving it.

Vavilov articulates that a principled approach to reasonableness review is one that puts reasons first. Under the newly fleshed out substantive review framework, it is not only the outcome of an administrative process that has to be justifiable, the decision itself must also be justified by way of those reasons. This focus on justification in *Vavilov* calls for a respectful, but also robust evaluation of administrative decisions.

Deference in this context means that reviewing courts will only intervene when truly necessary to preserve the legality, rationality and fairness of the administrative process. To allow superior courts to exercise their supervisory jurisdictions, administrative decision-makers must adopt a culture of justification in order to demonstrate that their exercise of delegated public powers can be justified.

Procedural fairness informs but is not subsumed into substantive judicial review. From a substantive standpoint, fairness is principally concerned with proper justification. For example, the importance of an administrative decision to the person affected is a key consideration in determining both the existence and scope of procedural fairness guarantees (procedural review) and will also increase the need for thoroughness of reasons (substantive review).

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[109] *Weng v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 151, 2020 CarswellNat 149 (F.C.) at paras. 21, 25-31; *Brar v. Canada (Citizenship and Immigration)*, 2020 FC 70, 2020 CarswellNat 916, 2020 CarswellNat 272 (F.C.) at paras. 8, 19-22.

[110] *Rendon Segovia v. Canada (Citizenship and Immigration)*, 2020 FC 99, 2020 CarswellNat 78, 2020 CarswellNat 620 (F.C.) at paras. 9, 22.

Some defects previously qualified as procedural in some cases, but closely linked to the decision-making and reasoning processes of administrative tribunals, will now be considered as part of the reasonableness review.

An administrative decision will not stand in the face of inadequate reasoning that fails to meet the standards of justification, transparency and intelligibility. Reliance on stereotypes will render an administrative decision substantially unreasonable. So will the lack of responsiveness to the central arguments raised by the parties, and the situation where an administrative decision-maker fetters his discretion.

However, purely procedural questions that are related to the manner in which an administrative decision-maker goes about making a decision will remain subject to the non-deferential "fairness in the circumstances" test. Such questions include (depending on the circumstances): bias, right to notice, right to a hearing, right to disclosure, right to respond (right to present evidence and right to make representations), right to cross-examination, right to counsel, and right to reasons when required.