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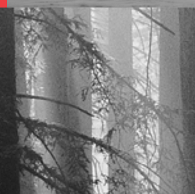


VAVILOV AND THE JUDICIAL REVIEW OF NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL DECISIONS IN CANADA

Article by Shaun Fluker ◆

Background

In the summer of 2018, the Supreme Court of Canada announced it would once again revisit the principles on the standard of review in Canadian administrative law. The Court conducted this work with its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov,*[1] issued in December 2019. This article describes the *Vavilov* decision and provides some early observations on how *Vavilov* has impacted the judicial review of natural resources, energy and environmental decisions. The article is organized as follows: (1) an overview on the law regarding the standard of review prior to *Vavilov*; (2) a description of the law as per *Vavilov* on selecting the standard of review; (3) a description of the law as per *Vavilov* on applying the standard of reasonableness; (4) a brief look at how Canadian courts have been applying *Vavilov* in the judicial review of statutory decisions concerning natural resources, energy and environmental matters; and (5) some concluding thoughts.

Overview on the Law regarding Standard of Review prior to *Vavilov*

The form of decisions in natural resources, energy and environmental matters varies extensively from the exercise of broad ministerial discretion to decisions made by statutory delegates following policy guidance, to determinations of legal rights made by a statutory tribunal. Inherent in all these forms is the common thread of a decision made pursuant to the exercise of power granted in legislation. In Canada, this exercise of statutory authority is reviewable by a superior court. And where the judicial review is on the substance of a statutory decision (as opposed to the process followed in making the decision), a standard of review analysis applies. The first step in a judicial review on the substance of a statutory decision is for the reviewing court to select the standard of review, and the second step is for the court to apply the chosen standard to the alleged errors contained in the decision.

The essential function performed by the standard of review is to determine the measure of deference owed by the reviewing court to the findings and conclusions made by the statutory decision-maker. The development of a principled approach to deciding how much deference should be afforded to a statutory decision-maker has been an ongoing source of difficulty for Canadian courts ever since the era of judicial deference was ushered in by *CUPE v NB Liquor Corporation*.[2] Problems have been most evident in relation to the review of legal determinations made by statutory decision-makers, rather than their factual or policy-based decisions. By my count, *Vavilov* represents the fourth significant overhaul by the Supreme Court of Canada since *CUPE 1979* on how to conduct a standard of review analysis. The Supreme Court continues to search for a principled resolution to what seems to be an irreconcilable tension. On the one hand, respect the intention of the legislative branch to empower the executive and its delegates with the authority to decide legal rights and interests. On the other hand, supervise the exercise of that authority to ensure it is lawful.

There are many difficulties or complications associated with resolving this dilemma over deference. These include:

(1) what might be appropriate deference for one form of decision such as a legal determination made by a specialized agency will not be appropriate for another form of decision such as that issued by an ad-hoc tribunal with case-specific facts or a discretionary decision made by a cabinet minister;
(2) statutory decision-makers are often charged with implementing policy direction which is necessarily infused into their legal determinations;
(3) statutory decision-makers are sometimes unable to exercise legal power independent of political influence; and
(4) statutory decision-makers may have little experience with legal reasoning, and it can be problematic to expect them to be well-versed in the nuances of statutory interpretation or the application of legal doctrine.

These difficulties have traditionally led the Canadian courts to prefer a 'contextual' approach to deference and a standard of review analysis.

A contextual approach to selecting the standard of review was explicitly articulated by the Supreme Court of Canada as the 'pragmatic and functional approach' in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*.[3] *Pushpanathan* distilled the selection process into a consideration of four factors related to the context of a statutory decision:

(1) the presence or absence of a privative clause or statutory appeal in the governing legislation;
(2) the purpose of the statutory regime and the specific powers in question;
(3) the nature of the question at issue; and
(4) the expertise of the statutory decision-maker relative to the court in relation to the question at issue.

None of these factors were determinative of a standard on their own; however, a reviewing court was to consider the factors collectively and determine the standard of review for a particular decision. The standard of review analysis was not informed by precedent, and thus a reviewing court would consider these factors each time it was tasked with determining the standard of review. Under this approach, even decisions made by the same statutory decision-maker could attract a different standard and thus a different measure of deference from a reviewing court.

A good illustration of how the *Pushpanathan* factors applied in a judicial review concerning a natural resources decision is *ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board)*.[4] In this case, the Supreme Court of Canada selected the standard of correctness (no deference) to review a decision made by the Alberta Energy and Utilities Board, which directed ATCO, a utility company regulated by the Board, to allocate a portion of sale proceeds from an asset sale to ratepayers. The *Pushpanathan* factors, such as the presence of a privative clause in governing legislation and the Board's relative expertise on energy and resources matters, had generally directed reviewing courts to afford significant deference to the Board in prior judicial reviews. However, in this case the Supreme Court concluded the nature of the question before the Board was about its jurisdiction to order an allocation of sale proceeds and thus did not engage in its specialized expertise.[5] The Court interpreted the Board's governing legislation as not providing the Board with the power to order an allocation of sale proceeds,[6] and accordingly, the Court ruled the Board had erred in law and quashed its decision. The *ATCO Gas* decision was criticized as an illustration of how the *Pushpanathan* factors could lead a reviewing court to an outcome which was overly dismissive of regulatory expertise.[7]

In 2008, the *Pushpanathan* 'pragmatic and functional' approach to selecting a standard of review gave way to a framework articulated in *Dunsmuir v New Brunswick*.[8] In *Dunsmuir,* the Supreme Court of Canada attempted to simplify the standard of review selection process by making a series of declarations on the standard of review applicable to certain categories of question decided by a statutory decision-maker.[9] The factors set out in *Pushpanathan* were renamed the 'standard of review' factors, and *Dunsmuir* ruled that it would no longer be necessary to consider each factor in every case. While the Supreme Court suggested it was conducting an overhaul, much of *Dunsmuir* seemed more like a refinement of *Pushpanathan*. Unsurprisingly, significant unrest over selecting and applying the standard of review remained after *Dunsmuir*. For example, in *Canada (Fisheries and Oceans) v. David Suzuki Foundation* the Federal Court of Appeal issued a controversial ruling that the federal Minister of Fisheries and Oceans was not entitled to deference in the interpretation of legislation for which the Minister was responsible for implementing.[10]

The real overhaul on the standard of review came later when the *Dunsmuir* approach evolved into a rebuttable presumption that the standard of review is reasonableness (deference owed) for a statutory decision that involves the interpretation by a decision-maker of their 'home' legislation. After a series of decisions following *Dunsmuir*, the leading authority for the presumption became *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*.[11] In *East Capilano*, the Supreme Court of Canada ruled that the presumption of reasonableness would apply to the interpretation by a decision-maker of their 'home' legislation unless the question: (1) relates to the constitutional division of powers; (2) is a true question of jurisdiction; (3) engages in competing jurisdiction between two or more tribunals; or (4) is of central importance to the legal system and outside the expertise of the statutory decision-maker.[12] This presumption of reasonableness largely displaced the role of contextual factors in selecting the standard of review.

In Supreme Court decisions post-*East Capilano*, majority judgements upheld the presumption of reasonableness, against strong dissents warning that the presumption was not just rebuttable but had become irrefutable because an assessment of expertise had evolved away from actual or demonstrated expertise by the statutory decision-maker and towards a formalistic one based solely on institutional setting or statutory design. These divergences within the Court were articulated alongside spirited debates which fractured over mechanisms for rebutting the presumption of reasonableness, such as true questions of jurisdiction, as well as the need for retaining a contextual approach to standard of review analysis.

Vavilov on Selecting the Standard of Review

The majority in *Vavilov* describes its work as a 'recalibration' of the governing approach to selecting the standard of review.[13] *Vavilov* expands the presumption of reasonableness as applicable to <u>any</u> substantive decision made by a statutory decision-maker (in other words, the presumption is no longer limited to decisions that involve the interpretation by a decision-maker of their 'home' legislation). This blanket presumption applies to the determination of questions of law, fact, or mixed law and fact.[14] Perhaps the most noteworthy change in the law with respect to natural resources, energy and environmental matters, is that *Vavilov* eviscerates expertise as a relevant consideration in selecting the standard of review – a superior court is not to consider the expertise of a statutory decision-maker in its selection of the applicable standard of review.[15]

Vavilov sets out five exceptions to this presumption, where the standard of review will be a standard other than reasonableness, and bundles these exceptions under two categories: (1) a legislature has indicated that a different standard of review should apply to a statutory decision, and (2) the rule of law principles require that a different standard of review should apply to a statutory decision. These two categories are set out below, with some commentary on each of the exceptions included therein.

There are two exceptions to the presumption of reasonableness based on the category of an express intention by a legislature that a different standard should apply. The first is where a legislature explicitly prescribes the standard of review that a superior court must

apply in its review of a statutory decision. Where a legislature prescribes the standard of review, that will be the standard which must be applied by a reviewing court.[16] This situation is not common in Canada; however, as noted below, we could see more of this in relation to natural resources, energy and environmental statutory tribunals going forward.

The second exception under this category is where a legislature provides for a statutory right of appeal to the superior courts in relation to a statutory decision, and the legislature has not prescribed the applicable standard of review, the standard of review is determined in accordance with the principles of appellate review.[17] An example of a statutory right of appeal in a natural resources, energy, and environmental law context is that which applies to decisions made by the Alberta Energy Regulator: "A decision of the Regulator is appealable to the Court of Appeal, with the permission of the Court of Appeal, on a question of jurisdiction or on a question of law."[18]

The principles of appellate review are set out in *Housen v Nikolaisen*.[19] The standard of review on a pure extricable question of law emanating from an administrative decision is correctness.[20] The standard of review on a finding of fact is 'palpable and overriding error',[21] and the standard of review is also 'palpable and overriding error' on a question of mixed fact and law where the legal question is not readily extricable.[22] The *Housen* principles apply regardless of whether the statutory appeal has or does not have a leave requirement.[23]

This category most clearly reflects the renewed emphasis in *Vavilov* on legislative intent, and correspondingly the departure from expertise as a governing factor, in selecting the standard of review. The presence of a statutory right of appeal in applicable legislation means that under *Vavilov,* no judicial deference is owed to certain administrative agencies which have previously enjoyed significant deference from superior courts on determinations of law within their regime based on their relative specialization or expertise in that field. This will be the case for many statutory tribunals in the natural resources, energy, and environmental sectors because their home legislation often includes a statutory appeal process to the superior courts along the lines of that set out above for the Alberta Energy Regulator.[24] The removal of expertise as a fundamental basis for judicial deference is a significant reversal in the jurisprudence, as the minority in *Vavilov* forcefully asserts.[25]

There are three exceptions to the presumption of reasonableness under the 'rule of law' category. The standard of review is correctness in relation to the following questions:

(1) constitutional questions regarding the federal-provincial division of powers, the relationship between the legislature and other branches of the state, the scope of Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*, and other constitutional matters such as when the issue on review is whether a provision of the decision-maker's enabling legislation contravenes the *Charter*;[26]
(2) questions of law which are of central importance to the legal system as a whole because their resolution is of broad applicability and has implications for legislative regimes or the law more generally beyond the legislative framework governing the particular administrative decision-maker under review, and thus requires a single determinative answer;[27]
(3) questions regarding the jurisdictional boundaries between two or more administrative bodies.[28]

These exceptions are more or less adopted from *Dunsmuir*, given that they have been used sparingly since that decision, one would expect these exceptions to the presumption of reasonableness will continue to make rare appearances in the case law. However, the constitutional questions exception will likely apply with some frequency in natural resources, energy and environmental cases where statutory agencies such as the Canada Energy Regulator approve interprovincial pipelines or otherwise consider project applications that implicate constitutional rights of indigenous peoples.

Vavilov on Applying the Standard of Reasonableness

Vavilov's larger impact will likely be in how the standard of reasonableness is applied. However, before getting into the details of this new 'robust' version of reasonableness, it is worth noting that *Vavilov* does not change the law on how a reviewing court should apply the standard of correctness. As summarized in *Dunsmuir*, the correctness standard means no deference is afforded by the reviewing court to the statutory decision-maker:

> When applying the correctness standard, a reviewing court will not show deference to the decision-maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision-maker; if not, the court will substitute its own view and provide the correct answer.[29]

The majority describes its work in *Vavilov* as a 'clarification' of the proper application of the reasonableness standard and accordingly notes that pre-*Vavilov* decisions that address how to apply the reasonableness standard should be read cautiously and considered in light of *Vavilov*.[30] *Vavilov* provides extensive guidance on how a reviewing court should apply the standard of reasonableness, under the overall direction that a reasonable decision is one which exhibits a requisite degree of justification, intelligibility, and transparency.[31] A party challenging the decision must establish that the flaws in the reasoning or outcome are sufficiently central or significant to render the decision unreasonable.[32]

While much of the guidance provided by the majority in *Vavilov* is a compilation of how the standard of reasonableness has been applied in earlier decisions, *Vavilov* does seem to intensify judicial scrutiny on the reasons provided by a statutory decision-maker. In cases where a statutory decision-maker is required (by statute or the common law) to provide reasons for its decision, *Vavilov* confirms that the reasons given by a decision-maker are the primary focus of a reviewing court under a reasonableness review.[33] This focus on reasons, however, applies awkwardly in cases where the law does not require reasons to be provided for a decision (for example, the enactment of subordinate legislation). Here the majority suggests a reviewing court examine the record, other 'relevant constraints', or perhaps simply the outcome of the decision.[34]

Turning to cases where a statutory decision-maker is required by law to give reasons for its decision, the contextual approach established in *Pushpanathan*, and maintained in *Dunsmuir*, is alive and well when it comes to determining whether a statutory decision survives judicial review as a reasonable decision. What it takes to meet the test for

reasonableness will vary based on the legal and factual context for the particular decision under review. A statutory decision cannot be divorced from its institutional context. As the majority puts it: "'Administrative justice' will not always look like 'judicial justice.'"[35] *Vavilov* sets out a long list of relevant contextual factors for consideration in the review of an administrative decision for reasonableness, and what follows is a summary of the key points.

A reasonableness review requires attention to be directed to the specialized knowledge of the statutory decision-maker. A consideration of the relative expertise of a statutory decision-maker, and respect for that expertise in relation to the institutional context of the statutory decision-maker, may provide justification for what would otherwise be seen as shortcomings in reasons given or the outcome of a decision. For example, the application of specialized knowledge may reveal why, particular attention in the reasons is given to some evidence over other evidence, or why the reasons focus analysis on certain issues over others.[36]

Consideration of the institutional context for the decision may provide some additional relevant explanation for a statutory decision that is not apparent in the reasons themselves. However, institutional context cannot serve to remedy non-transparency or a gap of logic in the reasoning process. A reviewing court cannot disregard flawed reasoning by supplementing the decision with reasons which could be offered or relying solely on the outcome of the decision as the basis for a reasonableness review.[37] A statutory decision-maker must demonstrate in its reasons how the evidentiary record was considered, and the decision itself must show how the outcome is justified or supported by the evidence tendered before the decision-maker.[38] Reasons provided must demonstrate that the decision-maker was responsive to, and grappled with, the submissions made by the parties and that the decision-maker addressed the key or central issues raised before it. However, reasons do not have to address each argument made by the parties.[39]

Reasonableness review is not to be conducted as a line-by-line treasure hunt. However, the reasons given by a decision-maker must demonstrate a connection, or a path of analysis, between the evidence and the decision made by the statutory decision-maker. Reasons that merely set out the submissions made by the parties and then immediately arrive at conclusions will rarely be sufficient to demonstrate the path of analysis undertaken by the decision-maker. Similarly, reasons which contain circular analysis, state unfounded generalizations or rely on absurd premises will also be suspect of unreasonableness.[40]

The statutory context for a decision is likely to be the most salient factor to be considered in a reasonableness analysis. The level of assessment on whether a decision is sufficiently justified will vary based on the legislative context for that decision. This context varies from statutory provisions which strictly construe decision-making power to others which provide more open-ended power to decide matters 'in the public interest'.[41] The latter context is commonly set out in natural resources, energy and environmental regulatory regimes. Generally speaking, a reasonable decision is one which is consistent with the statutory grant of power given to the decision-maker.

Vavilov directs special attention to questions of statutory interpretation. A decision-maker who interprets a statutory provision as part of its decision must consider the text, context, and purpose of the provision, particularly where that provision is directly in issue. It is unreasonable for a decision-maker to ". . . adopt an interpretation it knows to be inferior – albeit plausible – merely because the interpretation in question appears to be available and is expedient."[42] A failure by the decision-maker to consider a key element of a disputed statutory provision demonstrates unreasonableness if the omission is of such significance that it leads a reviewing court to question the outcome of the decision.[43]

While statutory decision-makers are not bound by *stare decisis*, the extent to which a particular decision is consistent with prior decisions made by that decision-maker is a relevant consideration in whether a decision is reasonable. Prior decisions relevant to the issue(s) constrain what will constitute a reasonable decision made by the statutory decision-maker. The failure to explain or justify a departure from a precedent or established internal authority concerning the same or similar issue(s) may constitute an unreasonable decision.[44]

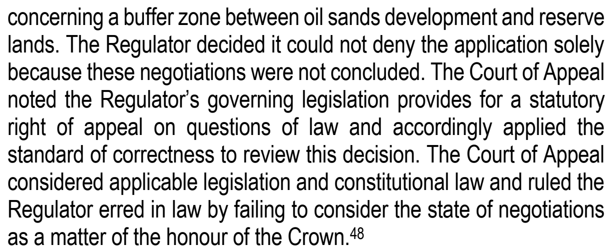
These signposts set out above are a sure sign that the complicated and messy contextual analysis from past days is still alive and well in judicial review. However, *Vavilov* has shifted this analysis away from selecting a standard of review and into the application of reasonableness. There is also a healthy dose of judicial scrutiny embedded in this 'clarified' version of reasonableness. This is further demonstrated by how the majority suggests a reviewing court may not only quash an unreasonable decision but also decline to remit the matter back to the statutory decision-maker in limited cases.[45]

Judicial review of statutory decisions concerning natural resources, energy and environmental matters under *Vavilov*

While we are still just at the beginning of the *Vavilov* era for judicial review, the framework has already been applied in several natural resources, energy and environmental law cases. The standard of correctness has been applied to questions of law decided by specialized tribunals, including the Alberta Energy Regulator and the Nova Scotia Utility and Review Board, where their governing legislation has a statutory right of appeal mechanism. In cases where the standard of reasonableness has been applied, reviewing courts have upheld some decisions and quashed others. Notably, in some cases where the statutory decision has been quashed, the reviewing court has chosen not to remit the matter back to the decision-maker.

In *East Hants (Municipality) v Nova Scotia (Utility and Review Board)* the Nova Scotia Court of Appeal applied the standard of correctness to review a decision of the Board concerning a dispute between a municipality and a developer over a utility matter.[46] The dispute involved questions regarding the jurisdiction of the Board as well as statutory interpretation. The Court of Appeal observed that the Board's governing legislation provides a statutory right of appeal from a decision of the Board, and thus, in accordance with *Vavilov,* questions of law decided by the Board are reviewable on correctness and entitled to no deference from the Court.

In *Fort McKay First Nation v Prosper Petroleum Ltd* the Alberta Court of Appeal applied the standard of correctness to review a decision by the Alberta Energy Regulator to approve an application by Prosper Petroleum for a new oil sands project in northern Alberta.[47] The dispute before the Regulator included the question of whether approval for the project should be delayed in light of incomplete negotiations between Fort McKay and the Province of Alberta



concerning a buffer zone between oil sands development and reserve lands. The Regulator decided it could not deny the application solely because these negotiations were not concluded. The Court of Appeal noted the Regulator's governing legislation provides for a statutory right of appeal on questions of law and accordingly applied the standard of correctness to review this decision. The Court of Appeal considered applicable legislation and constitutional law and ruled the Regulator erred in law by failing to consider the state of negotiations as a matter of the honour of the Crown.[48]

Some of the early judicial review decisions also support the view that the 'clarified' version of reasonableness in *Vavilov* will be more of a searching review than what has previously been the norm in natural resources, energy and environmental law. In *Nation Rise Wind Farm Limited Partnership v Minister of the Environment, Conservation and Parks,* the Ontario Divisional Court quashed a decision by the Minister to reject a wind farm project application.[49] The Minister had rejected the application, reversing a decision made by the Ontario Environmental Review Tribunal, on the basis that the project was likely to cause significant environmental impacts. In support of its ruling that the Minister's decision to reverse the Tribunal was unreasonable, the Court engaged in a somewhat lengthy analysis of applicable statutory provisions and caselaw regarding the authority of the Minister, as well as probing into whether the Minister applied the correct legal test and considered all the relevant evidence.[50] In *Alexis v Alberta (Environment and Parks)* the Alberta Court of Appeal quashed a decision made by a statutory environmental official to not require an environmental impact assessment for a quarry project.[51] The statutory official made this decision on the basis that the governing statutory rules did not require an environmental impact assessment for the project and that she would not be exercising her discretion to request one either. The Alberta Court of Appeal noted the official's decision was short on reasons and then engaged in a lengthy statutory interpretation analysis to conclude the applicable legislation requires an environmental impact assessment for the project.[52] In both of these judicial review decisions, the reviewing court chose not to remit the matter back to the statutory decision-maker. Instead, it granted a substantive remedy: Reinstating the decision made by the Ontario Environmental Review Tribunal in *Nation Rise Wind Farm* and ordering Alberta Environment and Parks to require an environmental impact assessment for the quarry in *Alexis*.

Other decisions, however, demonstrate a more deferential application of the reasonableness standard. As an example, in *Sierra Club of BC Foundation v British Columbia (Environmental Assessment Office)* the British Columbia Supreme Court upheld as reasonable a decision made by a statutory environmental official to exempt two dams from environmental impact assessment requirements.[53] In contrast to the scrutinizing approach reflected in *Alexis*, the *Sierra Club* decision invokes a much more restrained version of statutory interpretation and a willingness by the reviewing court to consider the record before the decision-maker to overcome an absence of reasons.[54]

Conclusion

Despite disagreement and uncertainty over the fundamentals on the standard of review in recent years, the Supreme Court of Canada's 2016 decision in *East Capilano* did simplify the analysis for selecting the standard of review. Even parties seeking to have a statutory decision quashed were likely to concede the deferential reasonableness standard was applicable under the presumption established in *East Capilano*. Accordingly, I think the majority in *Vavilov* overstates the extent of uncertainty and non-coherence in selecting the standard of review post-*East Capilano*.[55] The real problem post-*East Capilano* was uncertainty in applying the standard of reasonableness.[56] At present, it is difficult to envision how *Vavilov* will ameliorate these difficulties. Even the small sample of decisions surveyed here demonstrates the potential for significant variation in how a reviewing court will apply the standard of reasonableness to review natural resources, energy and environmental decisions. Moreover, the application of correctness to review questions of law decided by specialized natural resources, energy and environmental tribunals is almost certain to attract statutory amendments by legislatures seeking to restore a measure of judicial deference to these expert agencies.

Biography of Shaun Fluker

Shaun Fluker is an Associate Professor at the Faculty of Law, University of Calgary. Shaun joined the Faculty of Law in 2007. His legal career started with Parlee McLaws LLP in 1995. He has experience providing legal services in the areas of corporate/commercial, securities, environmental, and administrative law. Shaun has appeared as counsel before all levels of Alberta courts. Shaun was a visiting scholar in residence at the University of Waikato in New Zealand for 6 months during 2014. Shaun also served as the Executive Director of the Faculty's Public Interest Law Clinic, which provides legal services to clients pursuing law reform and litigation strategies in public law and policy. Clients of the Clinic have included individuals, community associations, and public interest groups in a wide range of disputes involving matters such as residential tenancies, animal welfare, resource development, endangered species protection, and environmental impact assessment. Shaun's research is primarily in the following areas: (1) public participation and community engagement with resources and environmental decision-making; (2) access to justice and accountability in energy and environmental law; (3) the implementation of environmental norms in law; and (4) the regulation of environmental markets.

Notes

[1] 2019 SCC 65 [*Vavilov*].
[2] [1979] 2 SCR 227 [*CUPE 1979*].
[3] [1998] 1 SCR 982 [*Pushpanathan*].
[4] 2006 SCC 4.
[5] *Ibid* at paras 22 – 34.
[6] *Ibid* at paras 37-81.
[7] For a debate on this point see Alice Woolley, "'Practical Necessity' or 'Highly Sophisticated Opportunism'? Judicial Review and Rate Regulation after *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*" (2006) 44 Alta L Rev 445; H Martin Kay, "On *ATCO Gas and Pipelines*: A Reply to Professor Woolley" (2007) 45 Alta L Rev 257; Alice Woolley, "The Importance of *ATCO Gas and Pipelines*: A Response to H. Martin Kay" (2007) 45 Alta L Rev 515.
[8] [2008] 1 SCR 190, 2008 SCC 9 [*Dunsmuir*].
[9] *Ibid* at paras 51-61
[10] 2012 FCA 40 at paras 65 – 100.
[11] [2016] 2 SCR 293, 2016 SCC 47 [*East Capilano*].
[12] *Ibid* at paras 22-24.
[13] *Vavilov, supra* note 1 at para 143.
[14] *Ibid* at para 25.
[15] *Ibid* at paras 30, 31.
[16] *Ibid* at para 35.
[17] *Ibid* at para 37.
[18] *Responsible Energy Development Act*, SA 2012, c R-17.3, s 45(1).
[19] [2002] 2 SCR 235, 2002 SCC 33 [*Housen*].
[20] *Ibid* at paras 8, 36.
[21] *Ibid* at para 10.
[22] *Ibid* at para 36.
[23] *Vavilov, supra* note 1 at para 50.
[24] Nigel Bankes, "Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response" (3 January 2020) at 1-7, online (pdf): *ABlawg* <https://ablawg.ca/wp-content/uploads/2020/01/Blog_NB_Vavilov.pdf >[perma.cc/2WGA-CZ82].
[25] *Vavilov, supra* note 1 at paras 230 – 278.
[26] *Ibid* at paras 55 – 57.
[27] *Ibid* at paras 58 – 62.
[28] *Ibid* at paras 63, 64.
[29] *Dunsmuir, supra* note 8 at para 50.
[30] *Vavilov, supra* note 1 at para 143.
[31] *Ibid* at para 99.
[32] *Ibid* at para 100.
[33] *Ibid* at paras 82 – 87.
[34] *Ibid* at paras 136 – 138.
[35] *Ibid* at para 92.
[36] *Ibid* at para 93.
[37] *Ibid* at paras 94 – 97.
[38] *Ibid* at paras 125, 126.
[39] *Ibid* at paras 127, 128.
[40] *Ibid* at paras 102 – 104.
[41] *Ibid* at para 110.
[42] *Ibid* at para 121.
[43] *Ibid* at paras 115 – 124.
[44] *Ibid* at paras 112, 129 – 132.
[45] *Ibid* at paras 139 – 142.
[46] 2020 NSCA 41.
[47] 2020 ABCA 163.
[48] For more detailed commentary on this case see Nigel Bankes, "The AER Must Consider the Honour of the Crown" (28 April 2020) at 1-6, online(pdf): *ABlawg* <http://ablawg.ca/wp-content/uploads/2020/04/Blog_NB_FMFN.pdf > [perma.cc/GH6Q-DS4D].
[49] 2020 ONSC 2984.
[50] *Ibid* at paras 57 – 120.
[51] 2020 ABCA 188.
[52] *Ibid* at paras 35 – 103. Nigel Bankes observes the application of reasonableness by the majority in this decision resembles correctness: See Nigel Bankes, "The Discipline of *Vavilov*? Judicial Review in the Absence of Reasons" (12 May 2020) at 1-5, online (pdf)*: ABlawg* <http://ablawg.ca/wp-content/uploads/2020/05/Blog_NB_Alexis.pdf > [perma.cc/DX8W-UUZ4].
[53] 2020 BCSC 596.
[54] *Ibid* at paras 49 – 53, 65 – 70.
[55] *Vavilov, supra* note 1 at paras 4 – 9.
[56] Shaun Fluker, "The Great Divide on Standard of Review in Canadian Administrative Law" (23 July 2018) at 1-7, online (pdf): *ABlawg* <http://ablawg.ca/wp-content/uploads/2018/07/Blog_SF_CHRC_July2018.pdf> [perma.cc/PMD9-29P4].

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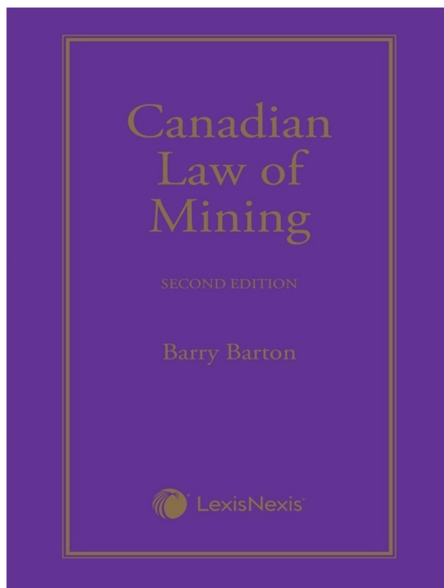

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