

# Reasonableness Review Post-*Vavilov*: An “Encomium for Correctness”,<sup>1</sup> or Deference as Usual?<sup>2</sup>

## Introduction

A significant portion of the majority judgment in *Minister of Citizenship and Immigration v. Vavilov* is devoted to an elaboration of the contours of reasonableness review in the new dispensation. My task this afternoon is to assess how the majority have changed or perhaps refined the methodology of reasonableness review, and to predict what impact this will have on the deference project especially in the context of judicial review of and statutory appeals from tribunals with authority over workplace issues.

Despite the ambitions of the Court’s 2008 judgment in *Dunsmuir v. New Brunswick*,<sup>3</sup> selection of the appropriate standard of review and how to conduct reasonableness review when that is the standard have been major preoccupations of the Supreme Court in judicial review proceedings, and, of necessity, in appellate and even first instance courts across Canada. The lens through which I want to confront the latest attempt to bring order and certainty to this troubled area of law is *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*<sup>4</sup> I see this 2016 precedent as the most important contributor to the Supreme Court’s most peculiar decision to rework the bases of Canadian judicial review law through the trilogy of appeals of which *Vavilov* was ultimately the most critical.

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<sup>1</sup> In *Minister of Citizenship and Immigration v. Vavilov*, 2019 SCC 65, at para, 201, this was how the minority judgment characterized the majority’s standard of review prescriptions, a characterization that not surprisingly the majority rejected: see para. 201.

<sup>2</sup> This paper draws upon material in two other published articles in which I evaluate the impact of *Vavilov*: “Judicial Scrutiny of Administrative Decision Making: Principled Simplification or Continuing Angst?” (2020), 50 *The Advocates’ Quarterly* 423, and “2019 Developments in Administrative Law Relevant to Energy Law and Regulation” (2020) 8:1 *Energy Regulation Quarterly*, online.

<sup>3</sup> 2008 SCC 9, [2008] 1 SCR 190.

<sup>4</sup> 2016 SCC 47, [2016] 2 SCR 293.

*Edmonton East* revealed a growing fissure in the Supreme Court as then constituted<sup>5</sup> between those Justices who favoured what I would describe as a category-based approach to the selection of the appropriate standard to be applied in judicial review proceedings and those who treated the exercise as more contextual and nuanced. At the core of the clash between the two sides were differing conceptions of the weight to be given to the presumption or principle that administrative decision-makers were entitled to deference when engaged in the interpretation of their home, closely connected, or frequently encountered statutes. For both groups, the contested territory was most starkly concretized in the debate over standard of review in situations when review took place in the setting of a statutory appeal as opposed to an application for judicial review.

In *Edmonton East*, the category-based approach cohort triumphed over the contextualists by the slim majority of five to four. However, the contextualists did not go down without a battle, and that obviously did not go unnoticed by the newly-minted Chief Justice, Wagner CJ. It provided what in my view was the most significant stimulus for the *quasi*-legislative exercise that was *Vavilov* and the other two cases in the trilogy.

In this presentation, I will elaborate further on this struggle within the Court and how, in somewhat surprising ways, it played out in *Vavilov*. More specifically, my argument will be that, while the category-based approach prevailed in the new order for the selection of the standard of review, contextualism triumphed in the majority's elaboration of how the reasonableness standard should be applied across a broad swath of situations. My essential thesis is that the terms of that triumph and the enumeration of the various elements that may be

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<sup>5</sup> Three of the Justices who sat on that case have now retired: McLachlin CJ, Cromwell and Gascon JJ. The first two had retired before *Vavilov*, but Gascon J was a member of the majority before he too retired from the Court.

present in varying degrees in the assessment of the reasonableness of administrative decision-making may very well presage the perpetuation of a tendency all too present in post-*Dunsmuir* case law of disguised correctness review. Within the new tent of reasonableness review will be many opportunities for what in reality is non-deferential correctness review. Moreover, even if my characterization of the approach as disguised correctness is too cynical, there are many elements in the majority judgment that provide opportunities for more intrusive review than a genuine commitment to true deference should reflect.

Following the elaboration of the sources in *Vavilov* for my concerns, I will then move to the post-*Vavilov* case law and particularly labour relations precedents with a view to ascertaining whether, in the early going, my fears are playing out in practice.

### ***Edmonton East***

At stake in *Edmonton East* was whether a municipal Assessment Review Board acting under section 467(1) of the *Municipal Government Act*<sup>6</sup> was subject to being set aside for increasing the assessed value of a shopping centre in response to a complaint by the owner of the shopping centre that the assessed value was already too high. Under section 470 of the Act, decisions of the Board could be appealed to the Alberta Court of Queen's Bench with "permission" of that Court on "a question of law or jurisdiction of sufficient importance to merit an appeal." Permission was granted, and in both the Court of Queen's Bench and the Alberta Court of Appeal, on a correctness standard, the Board's decision was set aside and the matter remitted to the Board for a hearing *de novo*.

In the Supreme Court of Canada, in allowing the City's appeal, the bare majority of the Court, in a judgment delivered by Karakatsanis J,

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<sup>6</sup> RSA 2000, c. M-26.

disagreed with the Court below, and held that the standard of review was not correctness but unreasonableness. She then went on to hold that, by reference to the reasonableness standard, the decision could withstand scrutiny and should not be set aside. The minority, in a judgment delivered jointly by Côté and Brown JJ, disagreed on both points: correctness was the appropriate standard of review, and, by reference to that standard, the Board's decision was as a matter of law incorrect.

Methodology or perhaps even principle played a significant role in the varying conceptions between the majority and the minority as to how to engage in standard of review analysis. According to Karakatsanis J, there were powerful precedents which established that reasonableness review of determinations of questions of law and jurisdiction was an appropriate standard even where the legislature had established rights of appeal from administrative decision-maker at least on pure, non-jurisdictional questions of law. The primary determinant for that conclusion was a sense that, when the legislature assigned responsibility for decision-making to an administrative tribunal or agency, that assignment, not only in general but also where there was a right of appeal, had to be read as prevailing over any sense of correctness review that might emerge from the existence of a right of appeal on specific grounds. In such situations, absent more specific standard of review direction from the legislature,<sup>7</sup> the presumption of reasonableness review for "home" questions of law of necessity prevailed. In other words, the entrusting of responsibility to an administrative tribunal or agency was not only an indication of legislative trust in the capacity or expertise of that tribunal or agency but also a conception of mandate that prevailed over other potential counter indicators such as a facially open right of appeal on questions

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<sup>7</sup> Or "unusual statutory language": at para. 34.

of law. Moreover, the entrustment spoke for itself. It assumed expertise and reviewing courts did not need to inquire further as to the reality of expertise. This was illustrated most graphically by the following statement:

However, as with judges, expertise is not a matter of the qualifications of any particular tribunal member. Rather expertise is something that inheres in a tribunal itself as an institution.<sup>8</sup>

Karakatsanis J did recognize that there were situations where the presumption of reasonableness review for the interpretation of home statutes must give way – the four-part<sup>9</sup> *Dunsmuir* list. However, this list was category-based and not in any way dependent on whether access to the court was by way of statutory appeal or judicial review. Moreover, she explicitly stated that the existence of a statutory right of appeal had no claim for admission as an addition to the hallowed categories. In other words, she could readily be interpreted as saying that, unless the question came within one of the four *Dunsmuir* categories, irrespective of context (appeal or review), the presumption of reasonableness review was in effect irrebuttable.

Karakatsanis J also took direct aim at contextualism and the use of contextualism as a basis for mounting arguments to rebut the presumption.

The contextual approach can generate uncertainty and endless litigation concerning the standard of review.<sup>10</sup>

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<sup>8</sup> *Supra*, note , at para. 33.

<sup>9</sup> With *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283, the number of categories appeared to increase to five with the addition of questions of law that could as a matter of first come before both a tribunal or agency, or a court. However, whether this survives *Vavilov* remains uncertain given that it was not mentioned specifically an automatic correctness category.

<sup>10</sup> At para. 35

In sharp contrast, the minority argued that if the presumption of reasonableness review was not in reality a rule subject to four specific exceptions, the true message of *Dunsmuir* was that the primary basis for rebutting the presumption had to be by reference to the four contextual factors or considerations outlined in that case.

An approach to the standard of review analysis that relies exclusively on categories and eschews any role for context risks introducing the vice of formalism into the law of judicial review.<sup>11</sup>

The minority then went on to set out contextual considerations that led them to the conclusion that correctness was the standard of review for the particular question that was subject to judicial review in this case. Those considerations were the precise nature of the relevant appeal provisions (including the legislative instruction as to court's authority on finding reviewable error), the Board's seeming lack of expertise on questions of statutory interpretation, and the importance of uniform interpretations of the particular provision across the many such Boards operating throughout the province.

In a foreshadowing of *Vavilov*, the minority, in defence of contextualism and citing Paul Daly,<sup>12</sup> also went on to state:

Even if the applicable standard of review were reasonableness, it is a contextual analysis – guided by the principles of legislative supremacy the rule of law – that defines the range of reasonable outcomes in any given case.<sup>13</sup>

### **And Along Came *Vavilov* and *Bell Canada***

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<sup>11</sup> At para. 70.

<sup>12</sup> "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness", forthcoming at that point in the McGill Law Journal ((2016), 62 *McGill LJ* 527).

<sup>13</sup> At para. 89.

In the contest between a contextual and a category-based approach to the selection of the standard of review, it is clear that, in *Vavilov*, those supporting the latter triumphed. Henceforth, there was to be a general presumption of reasonableness review subject only to legislative indicators and specifications to the contrary, and the rump of the correctness categories set out in *Dunsmuir*. Indeed, apart from the now-retired McLachlin CJ, the other three judges in *Edmonton East* (Côté, Brown and Moldaver JJ), who argued for a perpetuation of a contextual approach to standard of review selection, switched sides. They signed on to the explicit denunciation of contextualism:

[I]t is no longer necessary for courts to engage in a “contextual inquiry” ... in order to identify the appropriate standard.<sup>14</sup>

However, there was a price to be paid for the support of the three who changed sides and signed on to a category-based approach: the elimination of expertise as a consideration in standard of review selection, and, associated with that, the insinuation of what was in effect a new correctness category.<sup>15</sup> Henceforth, review by way of a statutory appeal route was to be treated as automatically attracting correctness review absent specific legislative signposting of the contrary. It was no longer the case that the assumption of expertise as “inhering” as a consequence of the very creation of administrative decision-making would generally trump the implication of correctness review from the establishing of a right of appeal on law (and jurisdiction). A critical aspect of *Edmonton East* was now rejected.

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<sup>14</sup> At para. 17.

<sup>15</sup> As argued by Professor Finn Makela at the Workshop, another consequence of the rejection of the contextual approach to standard of review selection was the total marginalization of privative clauses, one of the traditional contextual indicators or, even earlier, legislative mandating of deferential review. This is acknowledged by the majority at para. 49, and criticized by the minority at para. 248. There is also a certain irony in the rejection as no longer relevant of a legislative indicator such as a privative clause (unless, I suppose, it is one that displaces or modifies the *Vavilov* categories), and the extent to which the majority’s position on statutory appeals is based on a theory of statutory intention derived from **any** legislated form of review by way of statutory appeal.

Indeed, it might be said that those three judges got more than they had been wanting or asserting in *Edmonton East*. Their argument there was not for an almost invariable state of correctness review for appeals on questions of law (and jurisdiction). Rather, it was more restrained: the presumption of reasonableness review could be displaced or rebutted in the context of statutory appeals by reference not just to the very creation of that statutory appeal but other contextual factors (as in *Edmonton East* itself.) Now, as a result of *Vavilov*, in and of itself, the existence of a statutory right of appeal would generally be sufficient to require correctness review of pure questions of law.

This was simply more than two of the *Edmonton East* supporters of a category-based approach to standard of review selection could bear: Abella and Karakatsanis JJ. As opposed to Gascon and Wagner JJ, for the other two remaining majority Justices in *Edmonton East*, their commitment to a category-based approach could not countenance the change to the standard applicable in review by way of statutory appeal. By in effect placing that species of review in the ranks of near automatic correctness review and dismissing any sense of expertise as a countervailing factor, for Abella and Karakatsanis JJ, the new majority had overstepped the mark. A category-based approach was needed but the in effect creation of this new category of correctness review for questions of law was not acceptable and amounted to a betrayal of the deference project.

The exclusion of expertise, specialization and other institutional advantages from the majority's standard of review framework is not merely a theoretical concern. The removal of the current "conceptual basis" for deference opens the gate to correctness review. The majority's "presumption" of deference

will yield all too easily to justifications for a correctness-oriented framework.<sup>16</sup>

Indeed, it is this aspect of *Vavilov* that attracted the most criticism at least initially. There were recent precedents aplenty in the Supreme Court itself in which reasonableness was held to be the presumptive standard of review of questions of law even in the context of a statutory appeal. The majority were giving up on *stare decisis*. That aside, the legislative creation of statutory appeals, according to these criticisms, had to be read in a broader context. Agencies and tribunals still represented a legislative choice of decision-making function. They were therefore generally entitled to respect or deference when subjected to review by way of appeal even on pure questions of law. This transcended any possible argument for correctness review based simply on the legislative creation of a route to the courts by way of appeal rather than judicial review.

Of course, in all of this, there is a sense that the Court may have thrown the baby out with the bath water. There is no imperative that everything has to be either contextual or categorical with nothing in between. As illustrated by the dissenting judgment in *Edmonton East*, the *Vavilov* majority, while generally rejecting a contextual approach to standard of review, could have made an exception for statutory appeal situations and allowed for contextual assessment of how such provisions should be read for standard of review purposes.

Nonetheless, it has to be said that, while nigh-on universal correctness review for questions of law on statutory appeals **might** have the merit of simplicity of application, it will certainly have the impact of eliminating deferential review on questions of law across a broad range of tribunals and agencies as amply illustrated by *Vavilov*'s companion

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<sup>16</sup> At para. 239.

case, *Bell Canada*, which, as opposed to *Vavilov*, originated in a statutory appeal. Also, when it is realized that this change embraces some of the country's most highly specialized regulatory agencies (such as the various resource regulation boards), there has to be considerable doubt as to the wisdom of the Supreme Court moving in such a stark or absolutist manner to a regime of correctness review.<sup>17</sup>

This dramatic exception aside, however, it is difficult to see how on the standard of review selection process, the majority judgment in *Vavilov* will contribute to a diminution in the application of deferential reasonableness standards to administrative decision-making. The four *Dunsmuir* categories of automatic correctness review have been reduced to three with the elimination of the true question of jurisdiction category. Beyond that, there is nothing in the judgment to encourage an expansion in the scope of the category of "general questions of law of central importance to the legal system as a whole." As for "questions regarding the jurisdictional boundaries between two or more administrative bodies", the terms in which it is described in *Vavilov* is instructive. It is a rare category and is restricted to situations where

... one administrative body has interpreted the scope of its authority that is incompatible with the jurisdiction of another.

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<sup>17</sup> I leave out of consideration for current purposes whether the civil standard of palpable and overriding error for questions of fact or mixed fact and law, which now also applies in the context of statutory appeals, will turn out to be more or less deferential than the standard of reasonableness applicable to such determinations under common law judicial review principles. However, I would point out the argument advanced by Linda Rothstein at the Workshop that review of questions of fact and mixed law and fact by reference to the standard of "palpable and overriding error" may be more deferential than the judicial review standard of reasonableness. Ms. Rothstein presented this argument from the perspective of the review of professional disciplinary decisions and citing *Al-Ghamdi v. College of Physicians and Surgeons of Alberta*, 2020 ABCA 71, and I also wonder whether the Supreme Court's setting aside of a finding of professional misconduct on a reasonableness standard in *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 SCR 772, might provide indirect support for her argument. Would the Law Society's holding have had a better prospect of survival under a "palpable and overriding error" test? I have also omitted any discussion of the contentious issue of whether there is any room for deference to an administrative decision maker's procedural rulings and rules. The majority deals with this matter cursorily and, in my view, inconclusively at paras. 76-77.

In one sense, this might be seen as a conclusion to a challenge rather than a category of challenge, but the fact remains that it has been a rarely deployed correctness category.

As for constitutional questions, the majority reiterates the accepted position that correctness is the appropriate standard of review.<sup>18</sup> However, in one of the more opaque paragraphs in the majority judgment,<sup>19</sup> the Court appears to recognize that there is still life left in *Doré v. Barreau du Québec*<sup>20</sup> and its recognition that there is room for deference in challenges to the exercise of powers which engage or trigger *Charter* rights and freedoms.

It is also the case that the whole of the Court rejected the argument that a new correctness category should be recognized:

[L]egal questions regarding which there is persistent discord or internal disagreement within an administrative body leading to legal incoherence.<sup>21</sup>

Some critics<sup>22</sup> have also questioned the Court's eschewing of expertise as a factor in the selection of the standard of review as in effect precluding a reviewing court from considering (as in the minority judgment in *Edmonton East*), a **lack of expertise** as an indicator of correctness review. In immigration and correctional settings particularly, it is argued that front line officials and indeed those higher up in the bureaucratic structure may not be deserving of deference or respect with respect to their determinations of questions of law and, even beyond this, questions of mixed law and fact affecting the exercise of their discretionary powers. To those critics, the generality of the

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<sup>18</sup> At paras. 55-56.

<sup>19</sup> Para. 56.

<sup>20</sup> 2012 SCC 12, [2012] 1 SCR 395.

<sup>21</sup> At para. 71.

<sup>22</sup> See the powerful presentation at the Workshop by Professor Sharry Aiken.

majority's commitment to a deferential standard will in effect increase or reaffirm inappropriately the contexts in which reasonableness is the standard of choice.

More generally, in adopting a categorical approach, the Court has in fact taken the application of reasonableness review beyond being simply a presumption. While it is still expressed in those terms,<sup>23</sup> it is far better characterized as a general rule subject to limited exceptions:

Reasonableness is the standard of review except where the legislature has enacted a different standard or provided for review by way of statutory appeal, or the matter comes within one of presently three correctness categories.

### **The Story Does Not Stop There!**

The *Vavilov* majority obviously stopped short of going as far as Abella J. had advocated in 2016 in *Wilson v. Atomic Energy of Canada Ltd.*<sup>24</sup>: the adoption of a single standard of reasonableness. However, other than the controversial terrain of review in statutory appeals, reasonableness review has now come as close as it ever has to being the common denominator across a broad swath of Canadian judicial review. In any assessment of what this means for deference, close attention to the badges of unreasonableness was now demanded. Indeed, the standard of review selection principles having been identified, including the exclusion of contextualism in standard of review selection, the *Vavilov* majority then moved to a detailed elaboration of the various considerations that it saw as being potentially relevant to any assessment of the reasonableness of a decision.

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<sup>23</sup> At para. 16.

<sup>24</sup> 2016 SCC 29, [2016] 1 SCR 770.

Five times<sup>25</sup> in the majority judgment, it is insisted that reasonableness review is a “robust” form of review. One reading of that is that it is an instruction to reviewing courts not to shy away from close scrutiny of the decision under review. Deferential reasonableness review should not be equated with subservience. Moreover, considering the majority’s general abandonment of a contextual approach to standard of review selection, the following statement is especially critical:

Reasonableness review is both robust and responsive to context.<sup>26</sup>

This sense that contextualism was not in fact dead and buried but simply relocated had also emerged earlier in the judgment in the specific context of the initial discussion of the role of expertise:

However, we are not doing away with the role of expertise in administrative decision-making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.<sup>27</sup>

At this juncture, it is appropriate to recall what Karakatsanis J. had to say about contextualism in *Edmonton East*:

The contextual approach can generate uncertainty and endless litigation concerning the standard of review.<sup>28</sup>

Are we meant to take it from *Vavilov* that contextualism, when removed as a factor in standard of review selection and relocated in the domain of reasonableness assessment, is a far more easily applied approach, and less productive of uncertainty and endless litigation? Can

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<sup>25</sup> At paras. 12, 13, 67, 72 and 138.

<sup>26</sup> At para. 67.

<sup>27</sup> At page 31.

<sup>28</sup> At para. 35

it be asserted confidently that contextualism will be much more comfortable in its new home? And, in that different realm, what impact will it have in terms of a deferential approach to the conduct of judicial review?

My own sense is that the answers to these questions can not come close to a satisfactory answer in the abstract but are inextricably tied to the particular contextual factors that are part of the brave new world of post-*Vavilov* contextual reasonableness review.

### Reasons and Reasonableness

Where an administrative tribunal is obliged to provide reasons, the *Vavilov* majority is clear that reviewing courts must focus on the reasons provided. In a sense, this is a contextual consideration and one which underscores a commitment to deference. Where reasonableness is the standard, it is not the role of the reviewing court to first ask how it would have decided the relevant issue. Rather, the reviewing court should “focus on whether the applicant has demonstrated that the decision is unreasonable.”<sup>29</sup> And, the principal lens through which that exercise should take place are, if available, the administrative decision-maker’s reasons.

Interestingly, the majority in part justifies this approach on the basis of respect for “the specialized expertise” of the administrative decision-maker.<sup>30</sup> Almost immediately in the section on “Performing Reasonableness Review”, expertise has risen from the ashes of its treatment as irrelevant to the determination or choice of the appropriate standard of review. It also surfaces again in the elaboration of how reviewing courts should scrutinize reasons in responding to assertions of unreasonableness. Administrative decision-makers may

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<sup>29</sup> At para. 75. See also para. 84.

<sup>30</sup> *Ibid.*

demonstrate through their reasons an entitlement to respect by reason of their “institutional expertise and experience.”<sup>31</sup>

None of this presents an obvious threat to deference; indeed, it seemingly reenforces the Court’s commitment to reasonableness review as a vehicle for true deference. The one point in this initial discussion at which there is a possible retreat from previous patterns of reasonableness review lies in the majority’s reinterpretation of *Dunsmuir*’s statement to the effect that reasonableness review should be conducted by reference

... both to the process of articulating the reasons and to the outcomes.<sup>32</sup>

According to the majority, at least where reasons are legally required, that statement should no longer be read as permitting a reviewing court to uphold a decision simply on the basis of the outcome:

In short, it is not enough for the outcome of the decision to be *justifiable*. Where reasons for a decision are required, the decision must be *justified*, by way of those reasons, by the decision-maker to those to whom the decision applies.<sup>33</sup>

There is no doubt that this generally closes the door to the sustaining of decisions by way of reconstructing from the outcome a defensible rationale for the decision. However, my sense is that this did not occur all that often, and, in any event, such salvage exercises were not so much based on considerations of earned deference as on a sense that remissions for reconsideration should be avoided where possible.

On the other hand, the *Vavilov* majority has set out a template for assessing the adequacy of reasons that can be interpreted as much

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<sup>31</sup> At para. 93.

<sup>32</sup> *Dunsmuir*, at para. 47.

<sup>33</sup> At para. 86

more insistent on the quality of reasons, and, in particular, their internal logic and consistency, as well as responsiveness to the submissions and arguments that have been advanced. This may well create a more interventionist environment.

Indeed, Steven Barrett, in his presentation at the Workshop, discussed the recent Divisional Court judgment in *Scarborough Health Network v. Canadian Union of Public Employees, Local 5852*.<sup>34</sup> His argument was essentially that, in setting aside an interest arbitration award as unreasonable, the Divisional Court had failed to have regard to the peculiarities of interest arbitration. It has *quasi*-legislative characteristics, characteristics which do not lend themselves to reasons in a *Vavilovian* sense nor indeed, on occasion, often on consent of the parties, to any reasons. The Court's failure to grasp this led to a judgment that was insufficiently deferential to the nature of the process and the justification of the award provided by the Board of Arbitration.

### Contextual Reasonableness

Let me now move to the various contextual considerations that the *Vavilov* majority identified as relevant to the assessment of the reasonableness of decisions.

Here, the starting point is paragraph 89 where the majority reassert that "reasonableness remains a single standard" and that

... elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case.

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<sup>34</sup> 2020 ONSC 4577.

This is what it means to say that “[r]easonableness is a single standard that takes its colour from the context” ....

Here is not the place to debate at length the proposition that reasonableness remains a single standard. Suffice it to say, by reference to just one of the contextual factors recognized by the majority at paragraph 106 (“the potential impact of the decision on the individual to whom it applies”), that it seems to be splitting hairs to say that where courts talk about varying levels of intensity and margins of appreciation in that context, they are not effectively applying varying standards of reasonableness.

In paragraph 106, the majority sets out a non-exclusive list of considerations which, with varying levels of significance depending on the context, may operate as constraints on an administrative decision-maker:

... the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision-maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies.

In the balance of this section, I will examine four pressure points that I see as arising out of the majority’s elaboration of the contours of these various contextual factors. More specifically, I will outline the possible ramifications for a deferential approach to review in the majority’s conception of how to conduct reasonableness review.

## 1. The Governing Statutory Scheme

In their discussion of both standard of review selection and the conduct of reasonableness review, the majority strenuously repudiates the concept of true questions of jurisdiction, once the prime indicator of correctness review. However, in what is a very puzzling statement, while discussing the governing statutory scheme as a contextual factor, the majority states:

Although a decision-maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision-maker must properly justify that interpretation. Reasonableness review does not allow administrative decision-makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it.<sup>35</sup>

First, it is hard to see how this statement is in any sense a contextual factor bearing on **how** to conduct reasonableness review. Despite its location under that heading, the initial sentence locates it as an exception to deferential reasonableness review. Thus, in reality, the majority is positing a new correctness category more properly located in the standard of review selection section of their judgment. Secondly, as the minority argue convincingly,<sup>36</sup> this is nothing more than a reinsinuation of a form of jurisdictional review, a concept that, in the very same paragraph, the majority had explicitly repudiated. Thereafter, the majority's response to the minority's criticism or concerns is scarcely illuminating:

[T]his does not reintroduce the concept of "jurisdictional error" into judicial review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision-makers.

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<sup>35</sup> At para. 109.

<sup>36</sup> At para. 285.

Even conceding that it might be an “obvious and necessary constraint”, the whole concept of a decision-maker exercising powers or authorities that it was not granted by statute is no more nor less than an accepted definition or conception of a true question of jurisdiction. Indeed, the confusion is perpetuated in the next paragraph. At one point, there is a suggestion that administrative decision-makers will in some circumstances be entitled to deference with respect to their interpretations of the scope of their authority. However, the discussion concludes with the following statement:

It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

Moreover, in *Bell Canada v. Canada (Attorney General)*,<sup>37</sup> the proceeding heard along with *Vavilov*, albeit in the context of a statutory appeal on questions of law and jurisdiction, the majority judgment again deploys language that is very much the currency of jurisdictional review. The issues raised are described as those of “authority”<sup>38</sup> and the “limits of the CTCRC’s statutory grant of power.”<sup>39</sup> The judgment even goes so far as to describe the appellants’ argument as “primarily jurisdictional.”<sup>40</sup>

It now remains to be seen how lower courts respond to arguments alleging this rebranded species of error and urging correctness review. And, of course, it is also the case that the drawing of jurisdictional

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<sup>37</sup> 2019 SCC 66.

<sup>38</sup> At para. 35.

<sup>39</sup> *Ibid.*

<sup>40</sup> At para. 33.

boundaries between two or more administrative bodies<sup>41</sup> remains one of the categories of correctness review.<sup>42</sup>

## 2. Questions of Law for Which There is Only One Correct Answer

In the very same paragraph, the majority insinuates a concept already familiar to the realm of reasonableness review: questions that may support “only one ... interpretation.” This resurfaces in the majority’s discussion of the principles of modern statutory interpretation in the form of a question where there is

... room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue.<sup>43</sup>

Generally, in such situations, having identified such a question, the reviewing court should quash any contrary determination rather than quashing and remitting the matter to the administrative decision-maker.

Certainly, I cannot quarrel with the majority’s prescription of the normal remedial consequences flowing from the reviewing court’s finding of such an error. Nonetheless, there must be considerable concern about the reach of this category of question (or contextual consideration).

The text for this lesson is to be found in the concurring judgment of Nadon JA, in *Bell Canada v. 7122591 Canada Ltd.*,<sup>44</sup> citing the extra-judicial writings of his fellow Justice of Appeal, Stratas JA, to the effect

... that in most cases, there is usually only one possible reasonable interpretation of the legal provisions in issue. ... Because in most

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<sup>41</sup> For a post-*Vavilov* labour relations example, see *Casavant v. British Columbia (Labour Relations Board)*, 2020 BCCA 159. However, for a more limited view of the scope of this “exception”, see *United Food and Commercial Workers Union of Canada, Local 175 v. Silverstein’s Bakery Ltd.*, 2020 ONSC 5649, at para. 19.

<sup>42</sup> *Vavilov*, at paras. 63-64.

<sup>43</sup> At para. 124.

<sup>44</sup> 2018 FCA 174, at paras. 194-96.

cases there are no multiple possible answers with regard to the meaning of legislation, a reasonable interpretation must be correct. If it is not correct, it surely must be unreasonable because Parliament did not intend courts to sanction incorrect interpretations of its legislation.

The message of this extract, if implemented in practice, is that there will be few questions of statutory interpretation that will attract deference. The situations where statutory provisions are sufficiently ambiguous to admit of more than one meaning will be very limited, and review of the interpretation of statutes will almost invariably be on *de facto* correctness basis.

While seemingly not going as far as Nadon JA and stating that most questions of statutory interpretation admit of only one reasonable or feasible answer, Stratas JA, in his judgments, describes the process of interpretation as involving a search for “the authentic answer”. Indeed, what started out as a term that he deployed in a civil action where correctness was the automatic standard in an appeal from a judgment of the Federal Court,<sup>45</sup> he now also uses it in the context of judicial review proceedings.<sup>46</sup> While he admits that the search for “the authentic meaning” may not always result in the discovery of the treasure trove, there is a sense that, in the subjection of the administrative decision maker’s rulings to the modern principles of statutory interpretation, the truth in the form of “the authentic meaning” will generally emerge. The very term “**the** authentic answer” can be seen as suggestive of a world of largely single correct answers to issues of statutory interpretation. Seek and you shall find.

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<sup>45</sup> *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 FCR 174, at para. 50.

<sup>46</sup> See eg *Hillier v. Canada (Attorney General)*, 2019 FCA 44, at paras. 25-26 and 38, and, very recently, *Canada (Attorney General) v. Kattenburg*, 2020 FFCA 164, at para. 30, with reference to the application for judicial review in that case.

In what may be the most critical domain for the continued credibility of reasonableness review, it also remains to be seen how lower courts will interpret and apply this aspect of the majority judgment in *Vavilov*. How great will be the tendency of the courts below to treat questions of statutory interpretation as admitting of only one necessarily correct answer?

In this regard, it will also be imperative to have regard to the majority's insistence that administrative decision makers engage in interpretation by reference to the modern principles of statutory interpretation, and the triple pillars of "text, context and purpose."<sup>47</sup> How will reviewing judges respond to the majority's imperative that

... the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision?<sup>48</sup>

For those concerned about preservation of a deferential approach to tribunal or agency interpretations of statutory provisions, much will depend on whether, other indicators in the majority judgment to the contrary, lower court judges take this as an authorization, if not a directive for close parsing of the administrative decision-maker's identification and application of each of those three elements. Indeed, it is a question that may also be relevant to an assessment of decision makers' interpretations of the terms of contracts and, for this audience, collective agreements in particular. Substitute for the modern principles of "statutory" interpretation, the modern principles of "contract" interpretation, and the same concerns may be relevant.

### 3. Persistent Discord

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<sup>47</sup> At para. 118.

<sup>48</sup> At para. 120.

As noted already, the majority rejected the argument put by the *amici curiae* that there should be a new correctness category where there was “persistent discord” on questions of law in an administrative decision-maker’s decisions. The majority also accepted that there was no formal principle of *stare decisis* in the manner of courts applicable within administrative decision making.<sup>49</sup> However, the majority did acknowledge that an unexplained or inexplicable departure from “longstanding practices or established internal decisions” could be a factor in the determination of whether a decision was unreasonable.<sup>50</sup> There is also a rather general admonition that, if everything else has failed to resolve a problem of “persistent discord”,

... it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.<sup>51</sup>

To the extent that these situations are truly a derogation from normal deferential scrutiny, I have no problem. First, these are not situations that are likely to occur all that often. Secondly, they both, though in somewhat different ways, involve a self-inflicted loss of an entitlement to deference. To appropriate a civil law term, they may be seen as amounting to “frauds on the law.”<sup>52</sup>

#### 4. Impact of the Decision on Affected Individuals

Similarly, I have little problem with the majority’s position that the conduct of reasonableness review should consider the nature of what is at stake. According to the majority, where the impact of a decision on an individual’s rights and interests are severe, reasonableness should

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<sup>49</sup> At para. 131.

<sup>50</sup> *Ibid.*

<sup>51</sup> At para. 132.

<sup>52</sup> While admittedly in a different context, see the judgment of Beetz J, for the Supreme Court of Canada, in *Syndicat des employés de production du Québec et de l’Acadie v. Canada Labour Relations Board*, [1984] 2 SCR 412, at pp. 420-21.

require more in the way of “responsive justification”,<sup>53</sup> a justification that includes grappling with the consequences of any decision that would be “particularly severe or harsh”<sup>54</sup> for an affected party.

For these purposes, the majority identified as examples

... decisions with consequences that threaten an individual’s life, liberty, dignity or livelihood.<sup>55</sup>

And, of course, as acknowledged by the majority,<sup>56</sup> decisions with respect to Canadian citizenship.

To the extent that the listed interests engage *Charter, Canadian Bill of Rights*, and other constitutional rights such as those of indigenous peoples as enshrined in section 35 of the *Constitution Act, 1982* and elsewhere, the more detailed explication of how this will work in practice will probably have to await the reevaluation that the majority eschewed in *Vavilov*: the scope for reasonableness review when constitutional rights and freedoms are in play and the continued legitimacy of the approach in *Doré v. Barreau du Québec*.

However, what is clear is that the majority does not conceive of outcomes that are “particularly severe or harsh” as being confined to constitutionally protected interests. Consequently, independently of any reevaluation of *Doré* and its successors, occasions will undoubtedly arise in employment settings where the methodological details will need to be worked out.

That may well involve a consideration of what tests or standards of reasonableness best reflect the direction pointed to in *Vavilov*: a hard look doctrine, more intensive scrutiny, a narrower margin of

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<sup>53</sup> At para. 133

<sup>54</sup> At para. 134.

<sup>55</sup> At para. 133.

<sup>56</sup> At para. 191.

appreciation, *etc.* However, of greater concern to judicial review of tribunal decisions implicating the workplace is whether this might be interpreted as a factor that points to more intense reasonableness scrutiny in every instance simply by reason of the fact that decision-making which engages employment interests or livelihood of necessity demands judicial recognition of or regard to this category. Viewed in isolation, it could represent a real threat to deference in workplace settings.

### **Conclusions Based on Analysis with Particular Reference to Employment Related Decision-Making**

It may be a trifle too simplistic to describe the principal effect of *Vavilov* as being the transfer of contextual-based assessment from the selection of standard of review to the evaluation of the reasonableness of decisions. Nonetheless, viewed in that light, questions are immediately raised about the whole purpose of the *Vavilovian* exercise, at least in terms of the simplification of choice and application of standard of review. This reconfiguration endeavour was premised explicitly on dissatisfaction with *Dunsmuir* and its progeny, and an unsatisfactorily realized contextual approach to standard of review selection. However, if indeed the application of the four *Dunsmuir* contextual factors at the selection of standard stage was as problematic as the *Vavilov* majority would have it, it is hard to believe that greater certainty will arise in the evaluation of the reasonableness of decisions by reference to the even larger palate of contextual factors that are the legacy of *Vavilov*. I also see this difficulty as being compounded by the structure of the “Performing Reasonableness Review” portion of the majority judgment. With respect to most of the contextual factors, the judgment takes the form of analysis characterized by “On the one hand but, on the other”, leaving it to lower courts to work out how those two

hands are to harmonize in any particular assessment of the reasonableness of a decision under review.

More specifically, in terms of a deleterious reduction in the extent of judicial deference to administrative decision makers, I have three major concerns:

- (1) The lack of nuance in the majority's imposition of an unwavering standard of correctness review for all questions of law when review is being conducted in the context of a statutory appeal;
- (2) The degree of enthusiasm for the category of questions of law for which there is only one correct answer; and
- (3) The threat to genuine deferential review posed by the way in which the majority set up the intersection between the modern principles of statutory interpretation and the reasoning processes of administrative decision-making.<sup>57</sup>

It is, however, important to evaluate the potential impact of these concerns by reference to how the Court actually conducted review in *Vavilov*, *Bell Canada*, and, another case, decision in which was released the day after *Vavilov* and *Bell Canada*: *Canada Post Corp. v. Canadian Union of Postal Workers*, a workplace-based application for judicial review.

#### 1. Statutory Appeals

As already outlined, there seems little doubt that the advent of automatic correctness review for questions of law (and jurisdiction) that will apply in the setting of statutory appeals will have a significant

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<sup>57</sup> 2019 SCC 67.

impact and in effect eliminate<sup>58</sup> deference in those contexts.<sup>59</sup> Decisions that previously would have survived reasonableness scrutiny will now be more exposed.

As various commentators have pointed out, exhibit 1 supporting this proposition is almost certainly the *Vavilov* companion judgment: *Bell Canada v. Canada (Attorney General)*. Those commentators argue that the CTRC's decision would have passed muster by reference to the previously applied reasonableness standard.<sup>60</sup> Putting it another way, the dissenting judgment, that applied a reasonableness standard, would have been the judgment of the Court. Indeed, Professor Paul Daly makes the same point with respect to the recent judgment of the Manitoba Court of Appeal in *Manitoba (Hydro-Electric Board) v. Manitoba (Public Utilities Board)*.<sup>61</sup>

As the context of both these judgments suggests, somewhat surprisingly, the major impact of this sea change will be felt by regulatory agencies, both economic and sectoral, that have historically been afforded a wide margin of appreciation for their decisions. Given that most, if not all judicial review of Labour Boards and labour arbitrations takes place in the context of applications for judicial review, this will be of little moment for those decision-makers. However, while I do not pretend to have conducted complete research,

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<sup>58</sup> See, however, the judgment of Swinton J for the Ontario Divisional Court in *Planet Energy (Ontario) Corp. v. Ontario Energy Board*, 2020 ONSC 598, at para. 30, in the context of a statutory appeal from the Ontario Energy Board:

While the Court will ultimately review the interpretation of the Act on a standard of correctness, respect for the for the specialized function of the Board still remains important.

<sup>59</sup> For early but very insightful commentary on this matter, see Nigel Bankes, "Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response", *Ablawg*, January 3, 2020.

<sup>60</sup> See e.g. Paul Daly, "Rates and Reserves: *Manitoba (Hydro-Electric Board) v. Manitoba (Public Utilities Board)*" *Administrative Law Matters* (blog), October 13, 2020.

<sup>61</sup> 2020 MBCA 60. See also Patrick Duffy, "*Manitoba Hydro v. Manitoba Public Utilities Board: Reduced Rates for Indigenous Peoples Overruled*" (2020) 8(2) *Energy Regulation Quarterly* (online).

there are administrative tribunals that engage workplace settings and employment arrangements that will be subject to the new regime. The decisions of professional disciplinary tribunals are frequently subject to review by way of appeal rather than under an application for judicial review. Moreover, as exemplified by section 37(1) of the *Alberta Human Rights Act*,<sup>62</sup> human rights tribunals may also be subject to a right of appeal.

## 2. A Single Correct Answer

With one exception, the Supreme Court of Canada has yet to explore the ramifications of *Vavilov* in other contexts. The one exception is *Canada Post Corp. v. Canadian Union of Postal Workers*, delivered the day after *Vavilov*, and involving an application for judicial review of a decision of an appeals officer of the federal Occupational Health and Safety Tribunal. At stake was whether Canada Post had complied with its safety inspection obligations under the *Canada Labour Code*, a matter that, in this case, was contingent on the interpretation of a specific provision.

Rowe J delivered the judgment of the majority, and, in general, provides a model of the approach that a genuinely deferential reasonableness review required. In particular, in accordance with the dictates of *Vavilov*, Rowe J based his assessment on the reasons provided by the Appeals Officer.<sup>63</sup> In so doing, he explicitly recognized the dangers of not allowing reasonableness review to morph into disguised correctness especially in the context of reviewing the Appeals Officer's engagement with the terms of the relevant statutory provision.

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<sup>62</sup> RSA 2000, c. A-25.5.

<sup>63</sup> For a subsequent lower court reasons-focused assessment of the reasonableness of a decision in an employment benefits context, see the judgment of Swinton J for the Ontario Divisional Court in *Radzevicius Estate v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2020 ONSC 319.

What was, however, surprising, indeed disturbing was the approach taken by the minority judgment delivered by Abella J (with Martin J concurring). In the dissenting judgment, there was little reference to the reasons of the Appeals Officer, on the one hand, and, on the other, a readiness to see the contrary interpretation as

... the only one that is true to the purpose of [the provision] in general and the safety inspection provision in particular.<sup>64</sup>

Given that, as of the day previously, *Vavilov* had become the law of the land, the least one would have expected particularly of a supporter not just of deference to expertise but of *stare decisis*, was greater attention to the actual decision under scrutiny.

### 3. Deference to Statutory Interpretation

Reverting to the majority judgment in *Vavilov*, it might be that, given the intensity of the majority's analysis of the relevant statutory provisions, there is an argument to be made that it too provides yet another example of disguised correctness review. For my part, I do not think that such a criticism is warranted.

First, the majority's evaluation of the reasonableness of the decision is rooted in both the Registrar's admittedly brief reasons and the analyst's longer memorandum on which the Registrar relied. This lives up to the expectations generated earlier in the judgment that the starting or focal point for the conducting of truly deferential reasonableness review should be the reasons provided by the decision maker.

Secondly, the majority, throughout its reasonableness assessment, incorporated a number of what it had earlier characterized as relevant contextual factors: the failure of the Registrar to respond to relevant

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<sup>64</sup> At para. 80.

arguments advanced by *Vavilov*; <sup>65</sup> as seen already, the importance of Canadian citizenship; <sup>66</sup> the cursory nature of the Registrar's attention to the critical issue of statutory interpretation, <sup>67</sup> compounded by limitations in the analyst's interpretive exercise; <sup>68</sup> and insufficient attention to the legislative history of that provision and its international law backdrop including misreadings of or disregard for relevant Federal Court jurisprudence, resulting in the adoption of a new interpretation. <sup>69</sup> For the majority judges, all these missteps coalesced to justify the conclusion that the Registrar's decision was "overwhelmingly" contrary to the intention of Parliament in enacting the particular provision. <sup>70</sup>

What I believe emerges from this analysis is the proposition that, even where there are reasons, reasonableness review may at least on occasion require intensive delving into the merits of a decision. Such deep probes do not necessarily point to disguised correctness review or an abandonment of deference. Nonetheless, at least in terms of my starting thesis, there is a point to be made from the majority's conducting of reasonableness review in *Vavilov*. As the majority acknowledged the unreasonableness assessment was the outcome of "[m]ultiple legal and factual constraints ... interact[ing] with one another."<sup>71</sup> In *Vavilov*, some of those contextual factors were process in nature, others bore on substance, and, one at least, a combination of process and substance. For me, that raises the question posed at the outset: Is this smorgasbord of contextual reasonableness factors going to be any more productive of certainty than the rather narrower range

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<sup>65</sup> At para. 172.

<sup>66</sup> At para. 192-93.

<sup>67</sup> At para. 172.

<sup>68</sup> At paras. 174-76.

<sup>69</sup> At paras. 177-78 and 192.

<sup>70</sup> At para. 194.

<sup>71</sup> At para. 194.

of contextual considerations previously deployed in the selection of an appropriate standard of review?

Let me conclude with a brief discussion of the judgment of the Court of Appeal of Newfoundland and Labrador in *International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.*<sup>72</sup> At issue here was judicial review of a labour arbitration award in which it was alleged that the award denying a grievance from a refusal of employment should be set aside by reason of the arbitrator's ruling with respect to the scope of the duty to accommodate to the point of undue hardship found in the province's *Human Rights Act*.

A majority of the Court of Appeal rejected the argument that the question raised was, in terms of *Vavilov*, a question of law of central importance to the legal system as a whole and, as such, subject to correctness review. As a result, the standard of review was by default that of reasonableness. Interestingly, the majority judgment set the scene for an assessment of the reasonableness of the arbitrator's ruling on the duty to accommodate by reference to the line of Supreme Court of Canada's precedents establishing the appropriate test. It then concluded that, by reference to that test and the arbitrator's core reasons, the arbitrator had not conducted the legally correct inquiry. He had failed to "complete" the analysis that was required by the legal principles established by the Supreme Court of Canada, and the decision was therefore "unreasonable."

I have no quarrel with the outcome in this case. However, it does illustrate the proposition that, where, as in *Vavilov*, the contextual factor is relevant common law (as reflected in judicial interpretation of a statutory provision), the reasonableness evaluation will in fact be the

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<sup>72</sup> 2020 NLCA 20

correctness of the administrative decision-maker's appreciation of that common law. It is not truly deferential reasonableness review albeit that the judicial assessment may (and indeed, should) pay heed to the administrative decision-maker's articulation of the reasons for decision. In effect, there will no longer be any room for asserting the right of administrative decision-makers to claim an entitlement to assert the reasonableness of an alternative interpretation in the face of authoritative judicial holdings to the contrary.

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