

## Canadian Labour Law after *Vavilov*

Canada's doctrine of deference to administrative decision-makers was built on foundations provided by labour relations arbitrators and tribunals. With *Vavilov*, however, those foundations have shifted. In the formative years of the Canadian law of deference to front-line labour relations decision-makers could rely on their expertise and privative clauses to provide shelter from judicial oversight. Post *Vavilov*, expertise must be demonstrated – it cannot be presumed – and privative clauses give no special protection to administrative decision-makers, not even in the labour relations area. This foundational shift has serious implications for the Canadian labour relations community: there is now a de facto requirement to provide reasons for decisions; these reasons must be justified in respect of the facts and law, demonstrate the application of expertise and be responsive to the central arguments and evidence; and counsel defending decisions on judicial review cannot invoke background context which is not laid out in the reasons.

In this short article, I lay out the origin story of Canadian administrative law, briefly describe its evolution in the late 20<sup>th</sup> and early 21<sup>st</sup> centuries, describe the key features of *Vavilov* and a post-*Vavilov* decision which illustrates the brave new world of labour relations decision-making.

### I. Labour Relations and the Foundations of Deference in Canadian Administrative Law

In the 20<sup>th</sup> century, the Canadian courts hewed closely to the distinction between jurisdictional and non-jurisdictional error. This distinction was the result of many centuries of development of the so-called prerogative writs – most prominently, certiorari – which were extended, incrementally and organically, to cover various forms of decision-making in the blossoming administrative state. Matters within jurisdiction were the exclusive preserve of the decision-maker, but jurisdictional limits were policed carefully by the courts and sometimes tightly drawn. This point was as true of labour relations decision-makers as of others, as a pair of mid-century cases demonstrates.

*Labour Relations Board v Traders' Service Ltd*<sup>1</sup> is an example of a matter falling within jurisdiction and beyond judicial oversight. A company complained that some employees had been wrongly included in a bargaining unit certified by the British Columbia Labour Relations Board. It was alleged that these employees worked for a different company, albeit one headquartered at the same address and with the same management. On this point, Judson J held, there was no basis for judicial intervention. Determining to which company the employees belonged was the “very subject-matter” of the Board's adjudication and “entirely within” its jurisdiction: “It was for the Board and the Board alone to make the finding on the one issue and this finding is not open to review by the Court”.<sup>2</sup>

Compare, however, *Jarvis v Associated Medical Services Inc.*<sup>3</sup> Here, an employer allegedly dismissed a manager for engaging in union activities. The Ontario Labour Relations Board ordered the employer to reinstate her. Neither the Ontario Court of Appeal nor the majority of the Supreme Court of Canada had great difficulty in striking down the Board's decision. A manager was not an “employee” and the Board lacked jurisdiction to order her reinstatement. This was considered a jurisdictional error and so the courts were able to intervene to correct it.

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<sup>1</sup> [1958] SCR 672.

<sup>2</sup> [1958] SCR 672, 679. One should note, however, that in Judson J's view there was “ample evidence” to support the Board's conclusion and that any other conclusion would have been “surprising” (678).

<sup>3</sup> [1964] SCR 497.

Soon after came *Metropolitan Life Insurance v International Union of Operating Engineers*.<sup>4</sup> In *Metropolitan Life*, the Ontario Labour Relations Board's misinterpretation of the statutory term "members of a trade union" was fatal to the legality of its order certifying the Union as a bargaining agent, notwithstanding the presence of a privative clause. The Court held that the Board had committed a reviewable error of law by misconstruing the statutory language, thus removing the protection of the privative clause:<sup>5</sup>

"In proceeding in this manner the Board has failed to deal with the question remitted to it (*i.e.* whether the employees in question were members of the union at the relevant date) and instead has decided a question which was not remitted to it (*i.e.* whether in regard to those employees there has been fulfilment of the conditions stated above)".<sup>6</sup>

*Metropolitan Life* has been described as (and is widely recognized as) the "high water mark" of "activist" judicial review of administrative action in Canada<sup>7</sup> because it involved close judicial scrutiny of a matter lying within the expertise of a specialized Board which was protected by a privative clause.

The Supreme Court of Canada's administrative law jurisprudence was regularly and roundly denounced by leading commentators, especially for its over-interventionist approach to the review of administrative tribunals, especially labour relations tribunals. These tribunals were invariably staffed by experts – leading members of the bar and academy – who rendered careful decisions in an area that, because of the need to strike a balance between the interests of employers and employed, called for sensitive value judgements. Yet, on the *Metropolitan Life* approach, their decisions were subject to second guessing by judges in judicial review proceedings. In a survey of the Supreme Court of Canada's labour law jurisprudence, a large part of which consisted of judicial review cases, Paul Weiler ventured to suggest "that the tacit assumption concerning Canadian courts, especially among academic commentators, is that the judiciary as a whole is rather unsympathetic to both unions and administrative agencies in their decision-making".<sup>8</sup>

These critiques led, in turn, to the adoption of a deferential approach to judicial review in *Canadian Union of Public Employees v. New Brunswick Liquor Corporation*,<sup>9</sup> a case involving the New Brunswick Public Service Labour Relations Board's interpretation of a prohibition on replacing 'striking employees with any other employee'. Henceforth, where the courts reviewed the decision of specialised administrative tribunals protected by privative clauses, the following question had to be asked: 'was the...interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?'<sup>10</sup> Jurisdiction was not discarded but it soon became clear that on matters central to the mandate of an administrative

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<sup>4</sup> [1970] SCR 425.

<sup>5</sup> *Labour Relations Act* RSO 1960, c 202, s 7(3).

<sup>6</sup> [1970] SCR 425, 435.

<sup>7</sup> John M Evans, Hudson N Janisch, David J Mullan and Richard C B Risk, *Administrative Law: Cases, Text and Materials* 3<sup>rd</sup> ed. (Emond Montgomery: Toronto, 1989) 565.

<sup>8</sup> Paul C Weiler, "The 'Slippery Slope' of Judicial Intervention: the Supreme Court and Canadian Labour Relations 1950-1970" (1971) 9 Osgoode Hall LJ 1, 9.

<sup>9</sup> [1979] 2 SCR 227 [*New Brunswick Liquor*].

<sup>10</sup> *New Brunswick Liquor* at 237.

decision-maker, a ‘manifestly unreasonable’ error would have to be identified in order to justify judicial intervention.<sup>11</sup>

*New Brunswick Liquor* came to be the cornerstone of Canada’s deferential approach, with its formal and substantive reasons for deference: the presence of a privative clause and of specialized expertise. It is impossible to disentangle *New Brunswick Liquor* from the historical treatment of labour relations decision-making in Canadian administrative law. Deference to labour arbitrators and tribunals is part of the origin story of deference, Canada-style. This is not to suggest that deference meant inevitable defeat for those challenging labour relations decisions. But in the area of labour relations, it was particularly difficult to convince courts to intervene.

## II. From *New Brunswick Liquor* to *Vavilov*

The years from *New Brunswick Liquor* from the most recent Canadian judicial review landmark of *Vavilov* were marked by ebbs and flows in Canada’s administrative law.<sup>12</sup>

Roughly speaking, these decades were characterized by the shifts of three fault lines: form and substance; deference and non-deference; and authority and reason.

### a. Form and Substance<sup>13</sup>

The traditional distinction between jurisdictional and non-jurisdictional error is commonly seen as formal in character. It is formal because it sorts decisions into different categories based on the abstract features of the concept of jurisdiction. It does not operate by reference to the contextual considerations presented by individual decisions. This formalism marked the law prior to *New Brunswick Liquor*.<sup>14</sup> In the 1980s, the Canadian law of judicial review continued to have a relatively formal structure: jurisdiction retained a tenacious hold on Canada’s legal imagination; and deference depended in part on a formal feature of decision-making structures, namely the presence of a privative clause. If there was a privative clause, decisions were sorted into the ‘deference’ category.

Expertise, by contrast, was a substantive consideration. Over time, it assumed greater prominence. Indeed, the formalism of the period up to the 1980s was eclipsed by a substantive approach by the end of the 20<sup>th</sup> century. The culmination of the eclipse of formalism occurred in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, where the determination of the standard of review was said to depend on the interaction of four contextual factors: statutory language, expertise, the nature of the question and the purpose of the decision-making function.<sup>15</sup>

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<sup>11</sup> *Syndicat des employés de production du Québec et de l’Acadie v. Canada Labour Relations Board* [1984] 2 SCR 412 at 422.

<sup>12</sup> See e.g. Claire L’Heureux-Dubé, “The ‘Ebb’ and ‘Flow’ of Administrative Law on the ‘General Question of Law’”, in Michael Taggart ed., *The Province of Administrative Law* (Hart, Oxford, 1997), 308.

<sup>13</sup> See generally, David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2002), 27 *Queens L.J.* 445; Paul Daly, “The Unfortunate Triumph of Form over Substance in Canadian Administrative Law” (2012) 50 *Osgoode Hall L.J.* 317.

<sup>14</sup> John M. Evans and Trevor Knight, “Cory on Administrative Law” in Patrick J. Monahan and Sandra A. Forbes eds., *Peter Cory at the Supreme Court of Canada: 1989-1999* (Canadian Legal History Project: Winnipeg, 2001), 71.

<sup>15</sup> [1998] 1 SCR 982.

Substance did not reign supreme indefinitely. In *Dunsmuir v New Brunswick*, the Supreme Court tried to chart a middle course between form and substance. But, in the end, the Court veered back towards formalism.<sup>16</sup> First, the categories of ‘reasonableness review’ and ‘correctness review’ set out in *Dunsmuir* soon ossified.<sup>17</sup> Second, the category of ‘interpretations of a decision-maker’s home statute’ hardened into a presumption of expertise which, a decade after *Dunsmuir* was all but irrebuttable.<sup>18</sup> Context no longer mattered.

From a labour relations perspective these ebbs and flows have had important consequences. The substantive approach occasionally led to the application of correctness review. For example, in *Dayco (Canada) Ltd. v. CAW-Canada*,<sup>19</sup> a consideration of contextual factors justified the Supreme Court in substituting its judgement for that of a labour arbitrator on the issue of whether a promise to pay benefits to retired employees could survive the expiry of a collective agreement. La Forest J noted that the privative clause had only limited scope; made a distinction between labour arbitrators, tasked with resolving discrete disputes between parties, and labour tribunals, which have a more thoroughgoing policy-making role; and noted that the general issue of survival of benefits was well within the ken of the courts. A contextual analysis would not necessarily undermine deference in the labour relations context: note that in a case decided in the same month as *Dayco*, the contextual analysis was held to support deference.<sup>20</sup> The point is simply that one cannot be categorical when analysis is contextual.

More recently, however, the post-*Dunsmuir* formalism redounded to the benefit of labour-relations decision-makers. The best example is perhaps *Quebec (Attorney General) v. Gu  rin*.<sup>21</sup> At issue here was a classic labour arbitration problem. Gu  rin was a radiologist in Quebec. The province had signed an agreement with a body that represents consultant doctors. Provincial legislation provided for the conclusion of such agreements, specifically, that a “dispute resulting from the interpretation or application of an agreement” is a matter exclusively for arbitration. In relevant part, the agreement contained provisions relating to a “digitization fee”, designed to incentivize innovation. Dr. Gu  rin asked an arbitrator to determine that certain radiology clinics fell within the scope of the agreement and were eligible to claim the “digitization fee”. But the arbitrator declined, essentially on the basis that only the parties to the agreement — the province and the federation — had the power to designate laboratories that would be eligible for the digitization fee. The majority took a deferential approach, as “it is well established that the reasonableness standard applies where an arbitrator must determine, by interpreting and applying his or her enabling legislation and related documents, whether a matter is arbitrable”.<sup>22</sup> This notwithstanding the minority’s view that the issue was “clearly jurisdictional”.<sup>23</sup>

#### b. Deference and Non-Deference

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<sup>16</sup> 2008 SCC 9, [2008] 1 SCR 190.

<sup>17</sup> See especially *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 SCR 160, at para. 26.

<sup>18</sup> *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 SCR 654, at para. 41; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 SCR 293, at para. 22.

<sup>19</sup> [1993] 2 SCR 230.

<sup>20</sup> *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 SCR 316.

<sup>21</sup> 2017 SCC 42, [2017] 2 SCR 3.

<sup>22</sup> *Ibid.*, at para. 33.

<sup>23</sup> *Ibid.*, at para. 70.

In terms of the fault line between deference and non-deference, some judges are hostile to deference on questions of law, others much more open to it. Human rights tribunals and economic regulators were often susceptible to intensive judicial review on the basis that they were dealing with questions of law which (at least some) judges preferred to answer authoritatively.<sup>24</sup> The shifts along this fault line manifested themselves most prominently in the selection of the standard of review – the choice between deference and non-deference.

These shifts had some impact on the selection of the standard of review of labour relations decision-makers. As long as labour relations decisions were factually suffused, this fault line was undisturbed, but where matters could be characterized as going to the root of a decision-maker's jurisdiction, as in *Dayco*, some judges were much more willing to intervene on a correctness basis.

This fault line remained after *Dunsmuir*, though few judges found themselves on the non-deference side of the fault line: the minority judges in *Guérin* ploughed a fairly lonely furrow. More representative of post-*Dunsmuir* trends is *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*.<sup>25</sup> Here, the Supreme Court applied reasonableness review to the application of the common law concept of estoppel by a grievance arbitrator, reasoning that labour-relations decision-makers have particular expertise and thus the ability to shape general legal concepts to their own particular ends and, moreover, that such concepts fall to be applied in complex factual settings.<sup>26</sup>

### c. Reason and Authority

The last fault line is between reason and authority. Professor Dyzenhaus has described this as the distinction between “deference as submission” and “deference as respect”.<sup>27</sup> Some judges accord deference and apply deferential standards because there is some **authoritative** basis to do so. Others, though, require a **reasoned basis** to defer in the first place and to uphold a decision.

This fault line overlaps the form/substance fault line to some extent. An authoritative basis for deference is a privative clause. A reasoned basis for deference is the expertise of a decision-maker. For a judge who seeks an authoritative basis for deference, deference is appropriate where a decision-maker can claim authority based on a privative clause. By contrast, a judge seeking a reasoned basis for deference will look to contextual indicators such as expertise to justify according deference to a decision-maker.

But the reason/authority fault line is most keenly felt in judicial assessment of reasons for decision and came to be very important post *Dunsmuir*. In *Dunsmuir*, the Supreme Court held that reasonableness had two aspects: justification, transparency and intelligibility in the reasoning process; and a decision which fell within the range of possible, acceptable outcomes in respect of the facts and the law. What, however, of a decision where the reasoning lacks one or more of the hallmarks of justification, transparency and intelligibility but nonetheless fell within the range? Those on the authority side of the fault line would more readily uphold such a decision: all that matters is that it fell within the range and

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<sup>24</sup> See e.g. *Canada (Attorney General) v. Mossop*, [1993] 1 SCR 554; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 SCR 140.

<sup>25</sup> 2011 SCC 59, [2011] 3 SCR 616.

<sup>26</sup> *Ibid.*, at para. 59.

<sup>27</sup> “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart ed., *The Province of Administrative Law* (Hart, Oxford, 1997), 279.

was taken by the appropriate decision-maker. Whereas on the reason side of the fault line, both the reasons and outcome would have to be read together and defective reasoning could lead to a finding that the decision was unlawful.

In the labour relations area – and, indeed, generally speaking – the most significant post-*Dunsmuir* decision was *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*.<sup>28</sup> The issue here was whether time as a casual employee should, under the collective agreement in place in this case, be counted for the purposes of vacation time once the casual employee became a permanent employee. For a unanimous court, Abella J rejected the proposition that a reviewing court should “undertake two discrete analyses — one for the reasons and a separate one for the result”.<sup>29</sup> Although Abella J characterized her approach as involving an “organic exercise” of reading both the reasons and the result together,<sup>30</sup> she made clear that defective reasoning would be unlikely to justify a court in striking down a decision: on judicial review, the reasons which *could* have been offered to support a decision should be considered;<sup>31</sup> reviewing courts could “look to the record for the purpose of assessing the reasonableness of the outcome”;<sup>32</sup> and judges should be “cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful”.<sup>33</sup> The message for courts reviewing decision-makers was clear: where the decision-maker has the authority to make a decision and its decision falls within the range of reasonable decisions, judges should not intervene even in respect of a misstep in the reasoning. In the labour relations context, this advice was particularly significant. An arbitrator or labour relations tribunal will often have a high degree of background knowledge about the parties, their bargaining and grievance history and contextual information about the industry in question. On the *Newfoundland Nurses* approach, a failure to memorialize all of this background information in a decision would not be a fatal error.

### III. *Vavilov*

The Supreme Court of Canada’s recent decision in *Vavilov v. Canada (Citizenship and Immigration)* has fundamentally altered Canadian administrative law.<sup>34</sup> The majority set out to simplify the law relating to the standard of review and provide guidance on the content of the reasonableness standard.<sup>35</sup> In terms of standard of review, the presumptive standard is reasonableness, with deviations from this starting point possible only in the limited circumstances of a statutory right of appeal, a legislated standard of review or a decision which requires a uniform answer from the courts to uphold the integrity of the legal system. The upshot is that any labour relations decision will almost certainly be reviewed on a standard of reasonableness.

Reasonableness is a deferential standard. But the formulation of reasonableness in *Vavilov* is more demanding than the standard previously applied by the courts. In *Vavilov*, the Supreme Court explained that there are two ways in which a decision may be unreasonable.

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<sup>28</sup> 2011 SCC 62, [2011] 3 SCR 708.

<sup>29</sup> *Ibid.*, at para. 14.

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

<sup>31</sup> *Ibid.*, at para. 12.

<sup>32</sup> *Ibid.*, at para. 15.

<sup>33</sup> *Ibid.*, at para. 17.

<sup>34</sup> 2019 SCC 65.

<sup>35</sup> See generally, Paul Daly, “The *Vavilov* Framework and the Future of Canadian Administrative Law” (2020) 33 C.J.A.L.P. 111.

First, a decision may lack “reasoning that is both rational and logical”,<sup>36</sup> such as reasons which “fail to reveal a rational chain of analysis”, ones which “read in conjunction with the record do not make it possible to understand the decision maker’s reasoning on a critical point”,<sup>37</sup> or ones which “exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise”.<sup>38</sup>

Second, a decision must be “justified in relation to the constellation of law and facts that are relevant to the decision”.<sup>39</sup> While the Supreme Court stated that it would be impossible to “catalogue” all the considerations which will be relevant to the constellation of particular individual cases it nonetheless set out which will “generally be relevant”:

...the governing statutory scheme; other relevant statutory or common law [including international 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.<sup>40</sup>

In what follows, I focus on these legal and factual constraints as elaborated by the Supreme Court in *Vavilov*.

**First**, the decision must be **justified** in light of the legal and factual constraints on the decision-maker. As the Federal Court explained in *Ortiz v. Canada (Citizenship and Immigration)*, whereas previously reviewing courts began with the outcome and then looked back at the reasons, *Vavilov* instructs them “to start with the reasons, and assess whether they justify the outcome”.<sup>41</sup> A decision-maker must therefore explain how its decisions are justified, by laying out the legal framework and the relevant facts before reaching a conclusion which is intelligible in light of the law and the facts. *Newfoundland Nurses* is no longer good law.

**Second**, the decision must be the product of the **demonstrated expertise** of the decision-maker. Prior to *Vavilov*, decision-makers benefited from a thoroughgoing presumption of expertise.<sup>42</sup> A decision-maker must therefore demonstrate that it has applied its expertise, by explaining how its specialized knowledge of the field leads or guides it to the conclusions underpinning its decisions.

Third, the decision must be **responsive** to the central points raised before the decision-maker who must, indeed, grapple with key arguments and evidence. Responsive decisions need not be lengthy. Brief explanations can satisfy the responsiveness requirement, as the Federal Court has explained on several occasions.<sup>43</sup> The Alberta Court of Appeal upheld against a reasonableness challenge a labour relations

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<sup>36</sup> *Vavilov*, at para. 102.

<sup>37</sup> *Vavilov*, at para. 103.

<sup>38</sup> *Vavilov*, at para. 104.

<sup>39</sup> *Vavilov*, at para. 105.

<sup>40</sup> *Vavilov*, at para. 106.

<sup>41</sup> 2020 FC 188, at para. 22.

<sup>42</sup> *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 SCR 293.

<sup>43</sup> *Mao v. Canada (Citizenship and Immigration)*, 2020 FC 542, at para. 49; *Qasim v. Canada (Citizenship and Immigration)*, 2020 FC 465, at para. 42; *Adeleye v. Canada (Citizenship and Immigration)*, 2020 FC 640, at para. 16; and *Singh v. Canada (Citizenship and Immigration)*, 2020 FC 687, at para. 59.

decision which spent only five paragraphs addressing a key issue.<sup>44</sup> But responsive decisions do need to engage with the arguments and evidence.

Boilerplate statements are now treated with suspicion by the courts. For example, the Federal Court concluded in *Osun v. Canada (Citizenship and Immigration)* that a boilerplate comment to the effect that the decision-maker had given a piece of evidence “careful consideration” was insufficient, as the decision lacked an “assessment” of the evidence.<sup>45</sup>

**Four**, there is now a strong requirement of **contemporaneity**. Reviewing courts are, consistent with the majority reasons in *Vavilov*, to refrain from bolstering defective administrative decisions with post-hoc reasoning supplied by the decision-maker in an affidavit,<sup>46</sup> clever counsel at the lectern,<sup>47</sup> or by the reviewing court itself.<sup>48</sup> Reviewing courts are not to conduct a “line-by-line treasure hunt for error”,<sup>49</sup> or reweigh evidence considered by the decision-maker,<sup>50</sup> and should read administrative decisions “with sensitivity to the institutional setting and in light of the record”.<sup>51</sup> But a reviewing court should not “fashion its own reasons in order to buttress the administrative decision”.<sup>52</sup> If justification, responsiveness and demonstrated expertise are not present in the reasons given to the affected individual or parties, a court should ordinarily not permit them to be “coopered up” later on.<sup>53</sup> Courts are no longer able or willing to “infer” that an argument or evidence was considered in the absence of reasons dealing with the argument or evidence.<sup>54</sup>

In terms of the fault lines introduced above, the reasonableness analysis is **deferential** but is **substantive**, not formal and requires a **reasoned basis** for decisions. The consequences for labour-relations decision-makers will be considered in the next section.

#### IV. Labour Relations Decision-making After *Vavilov*

There is something ironic about where deference in Canadian administrative law has ended up. Designed in no small part to take account of the unique position and expertise of labour-relations decision-makers, reasonableness has now evolved into a demanding standard which sits uneasily with some contemporary practices in the labour law field. Where once Canadian administrative law had to adapt to labour relations, now labour-relations decision-makers may have to adapt to administrative law.

Professor Daly has described the *Vavilovian* challenge for labour relations in the following terms:

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<sup>44</sup> *Edmonton (City of) v Edmonton Police Association*, 2020 ABCA 182, at para. 27.

<sup>45</sup> 2020 FC 295, at para. 26.

<sup>46</sup> *Saskatchewan (Energy and Resources) v Areva Resources Canada Inc*, 2013 SKCA 79, at paras. 36, 110.

<sup>47</sup> *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895, at para. 72.

<sup>48</sup> *Agraira*, at para. 58.

<sup>49</sup> *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 SCR 458, at para. 54; *Vavilov*, at para. 102.

<sup>50</sup> *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para. 64; *Vavilov*, at para. 125.

<sup>51</sup> *Vavilov*, at para. 96.

<sup>52</sup> *Vavilov*, at para. 96.

<sup>53</sup> *Canada v. Kabul Farms Inc.*, 2016 FCA 143, at para. 47, per Stratas JA.

<sup>54</sup> *Mattar v. The National Dental Examining Board of Canada*, 2020 ONSC 403, at paras. 51-52.



Labour arbitrators form part of a relatively small community of labour lawyers and activists: union advocates, management advocates and arbitrators (typically drawn from the union or management side). Everyone knows everyone. And they speak a common dialect, not necessarily one the uninitiated will readily understand. Moreover, labour disputes often have a long history, such that those involved typically are intimately familiar with the case at hand. Finally, labour decisions sometimes have to be taken very quickly. When all or some of these factors are in play, the reasons given by a labour law decision-maker may be sparse, bordering on solipsistic.<sup>55</sup>

With tacit knowledge and contextualized appreciation for an area of decision-making no longer enough, on its own, to survive reasonableness review, labour relations decision-makers will have some adapting to do.

The changes wrought by *Vavilov* should not be overstated. Most labour relations decisions will be reviewed on a standard of reasonableness. Reasonableness remains a deferential standard: for every time the majority in *Vavilov* insisted that reasonableness review is “robust”, there is an equal and opposite insistence that the standard must be applied with restraint or respectfully.<sup>56</sup> Decisions which are supported by coherent reasons will be upheld, as they were before; to that extent, “*Vavilov* does not constitute a significant change in the law of judicial review with respect to the review of the reasons of administrative tribunals”.<sup>57</sup> Nonetheless, the requirements of justification, responsiveness, demonstrated expertise and contemporaneity are likely to have teeth in all contexts, including labour relations context. Statements which are “conclusory” are unlikely to satisfy the responsiveness requirement, for instance, the Federal Court of Appeal noted in *Langevin v. Air Canada*, in respect of a decision of the Canadian Industrial Relations Board.<sup>58</sup>

More generally, the analysis in *Scarborough Health Network v. Canadian Union of Public Employees, Local 5852*<sup>59</sup> is instructive. This concerned an interest arbitration, which arose in the context of a merger of hospital units and the constitution of a new bargaining unit. Several outstanding issues relating to a new collective agreement could not be resolved and became the subject of an interest arbitration. The most important issue was wage harmonization. After hearing argument from the union and the employer, the arbitration board determined that it would harmonize like classifications to the higher (highest) of the applicable pre-existing wage rates. The entirety of the board’s substantive analysis of this issue was contained in a single paragraph:

There is a well-established pattern in the hospital sector of post-merger harmonization of wages to the higher rate. This pattern is reflected in numerous voluntary settlements, and Arbitrators have adopted this approach on the basis of replication (See, e.g., *The Niagara Health System and Service Employees International Union, Local 204*, July 5, 2002 (Kaplan) at p. 2-

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<sup>55</sup> Paul Daly, “The Culture of Justification in Contemporary Administrative Law”, (forthcoming in *Supreme Court Law Review*), available on SSRN.

<sup>56</sup> *Canada (Attorney General) v. Zalusky*, 2020 FCA 81, at para. 75 ff, per Gleason JA.

<sup>57</sup> *Radzevicius v. Workplace Safety and Insurance Appeals Tribunal*, 2020 ONSC 319, at para. 57, per Swinton J. See also *Hildebrand v. Penticton (City)*, 2020 BCSC 353, at para. 26; *Teamsters Canada Rail Conference c. Canadian Pacific Railway Company*, 2020 QCCA 729, at para. 13. See e.g. *Air Canada v. Canadian Union of Public Employees, Air Canada Component*, 2020 ONSC 5927.

<sup>58</sup> 2020 FCA 48, at para. 18.

<sup>59</sup> 2020 ONSC 4577.

4, *Participating Hospitals and Canadian Union of Public Employees*, March 4, 2011 (Petryshen), *Trillium Health Partners and CUPE*, December 9, 2015 (Kaplan)). Having reviewed and carefully considered the parties materials and submissions, and on the basis of the principles identified in the opening section of our main local issues award, including my determination of the pay equity jurisdictional argument, I am satisfied that it is appropriate to replicate the established approach to post-merger wage harmonization.

The Divisional Court quashed the arbitration decision as it lacked the attributes of reasonableness.

First, the decision was not **justified**:

There is nothing to show that the Board considered the particular circumstances of this case. There is no analysis of the Hospital's argument that this case is distinguishable from past cases. Past practice may be a relevant consideration, but there is no explanation why past practice, in this case, is so dispositive that other considerations need not be addressed at all.<sup>60</sup>

Second, the decision was not the product of **demonstrated expertise** but was rather based on "conclusory" statements about the factors the arbitration board took into account and the decision it reached: "It does not explain why the Board of Arbitration did what it did".<sup>61</sup>

Third, the decision was not **responsive** to the arguments made, especially the employer's argument that the factual matrix of this case was unusual: "The employer sought evaluation of the particular context of the hospital and the affected employees".<sup>62</sup> Post *Vavilov*, however, judicial review requires reasons which "demonstrate analysis of the submissions and positions of the parties. It is not enough to summarize the parties' positions. Only through reasons can the parties know that the issues of concern to them have been the subject of reasoned consideration".<sup>63</sup>

And, fourth, in view of the **contemporaneity** requirement imposed by *Vavilov*, counsel's attempt to supplement the defective reasons was rejected by the Divisional Court: "It is not a question of whether the decision could be justified on the evidence, but rather whether the decision was justified in the Board's reasons, that is, whether the Board used evidence and analysis to come to a logical, transparent and, thus, reasonable decision".<sup>64</sup>

In general, Lederer J commented, in response to a submission that in interest arbitration the decision is essentially legislative and does not require reasons, *Vavilov* has imposed a new normal:

In an interest arbitration, reasons should be given for decisions that reflect the arguments made by the parties, the interests at stake, and the significance of the issues decided. Reasons may not need to be elaborate or lengthy. Sometimes they may be "very brief". But they must meet the minimum standards of justification, intelligibility and transparency.<sup>65</sup>

*Scarborough* is, of course, only one case. There are other post-*Vavilov* decisions where labour relations decision-makers have survived judicial review. But Lederer J's analysis and firm conclusions demonstrate

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<sup>60</sup> *Ibid.*, at para. 6.

<sup>61</sup> *Ibid.*, at para. 8./

<sup>62</sup> *Ibid.*, at para. 22.

<sup>63</sup> *Ibid.*, at para. 15.

<sup>64</sup> *Ibid.*, at para. 26.

<sup>65</sup> *Ibid.*, at para. 28.

that labour relations decision-makers are no longer the darlings of Canadian administrative law. The fault lines have shifted and they will have to shift with them.

## **V. Conclusion**

In Part I, I laid out the historical basis of deference in Canadian administrative law. The Supreme Court's labour relations jurisprudence was its cornerstone. In Part II, I described the fault lines of deference in Canada, demonstrating how they have shifted over time in respect of form/substance, deference/non-deference and reason/authority. In Part III, I discussed the recent decision in *Vavilov* and noted how it is a game changer in Canadian administrative law, as it imposes new requirements of justification, responsiveness, demonstrated expertise and contemporaneity on decision-makers. Having intimated that these new requirements might pose challenges for labour relations decision-makers, I discussed a key post-*Vavilov* decision on interest arbitration in Part IV. *Vavilov* seems to presage an important shift in Canadian administrative law. Labour relations decision-makers, so used to deference in recent decades, will have to start making greater efforts to justify their decisions, respond to arguments made, demonstrate their expertise and ensure their reasons for decision are thorough at the moment they are delivered.