Vavilov Update – Question Remains: Is it good for local governments?

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Standard of Review

- The “standard of review” refers to the level of scrutiny to which a court will subject a challenged decision made by a statutory decision-maker
  - Reasonableness vs. Correctness

- The effect of *Vavilov* is that there is now a presumption standard of **reasonableness** review subject to a few exceptions:
  - where there is a statutory appeal clause or legislated standard of review; and
  - where “the rule of law demands correctness”

Rule of Law Exception

- Three “rule of law” categories that attract correctness standard of review:
  - constitutional questions;
  - general questions of law of central importance to the legal system as a whole; and
  - questions regarding the jurisdictional boundaries between two or more administrative bodies

Reasonableness Review

A “reasonableness review” includes:

- a deferential standard, as opposed to a correctness standard;
- justification, transparency, and intelligibility;
- a focus on the decision that was actually made;
- looking to the reasons that were offered by the decision-maker; and
- where reasons are not required, looking to the record and the outcome

Reasonableness Review

A decision that is transparent, intelligible and justifiable in relation to the relevant factual and legal constraints that bear on it:

- statutory scheme
- statutory or common law
- principles of statutory interpretation
- evidence before the decision-maker
- submissions of the parties
- past practices and decisions
- impact of the decision on the affected individual

1193652 B.C. Ltd. v. New Westminster (City), 2021 BCCA 176

- Business amendment bylaw to regulate renovictions
- Whether City's decision that it had authority to enact bylaw under s. 8(3)(g) [*health, safety and protection of persons or property*] and s. 8(6) [*business*] of *Community Charter* was reasonable
- Landlord argued City lacked authority because exhaustive scheme regarding rent control and evictions in *Residential Tenancy Act*

1193652 B.C. Ltd. v. New Westminster (City), 2021 BCCA 176

- Landlord argued presumption of reasonableness review rebutted based on exceptions in *Vavilov:* "general questions of law" and "jurisdictional boundaries"

- Court of Appeal found:
  - Reasonable review applied
  - City's interpretation it had authority was reasonable
  - Interpretation was consistent with text, context and purpose of *Community Charter* and principle of subsidiarity

Minster Enterprises v. Richmond (City), 2021 BCCA 226

- Supreme Court found building inspector's decision unreasonable that building permit had expired because no work beyond site preload within 180 days of permit issuance
- Preloading was an essential part of the construction process and fell within bylaw definition of "construction"
- "Irrational" to expect owner would do expensive preload if BP could later be denied
- No reasons provided for BP cancellation – focus on outcome

Minster Enterprises v. Richmond (City), 2021 BCCA 226

- Court of Appeal: Examining text, context and purpose of bylaw, City's interpretation reasonable and correct – rejects Supreme Court view only one reasonable interpretation of bylaw available
- Supreme Court failed to consider bylaw provision that permit valid beyond 180 days only if there was construction "pursuant to applicable permit" – no BP required for preloading
- City's Bulletin on Permit Expiry: No attempt to create binding law. Rather, showed consistency of City interpretation
- Opportunity to have referenced Bulletin as "reasons"

1909988 Ontario Limited v. North Cowichan (Municipality), 2021 BCCA 414

- Council confirmed Director of Planning's refusal to issue a development permit for motorsports speedway based on use not permitted under zoning bylaw

- Previous Director of Planning had issued a development permit for same use on adjacent lands

- Applying principle in *Vavilov*, that when a decision-maker departs from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure, the Supreme Court found Council's decision to be unreasonable

1909988 Ontario Limited v. North Cowichan (Municipality), 2021 BCCA 414

- Court of Appeal found Supreme Court erred in characterizing Council's decision as a departure from longstanding practices or established internal authority

- Whether a decision-maker is subject to factual or jurisprudential constraints requires close attention to context

- In the context, the Court found there was no longstanding practice of the Municipality on the question whether the use was permitted in the applicable zone
  - No internal directives or statements of policy on point
  - Only one prior decision inconsistent with Council's decision

The Architectural Institute of British Columbia v. Langford (City), 2021 BCCA 261

- Court of Appeal upholds Supreme Court granting of declaration that it was unreasonable to issue BP for building exceeding 470 m^2 threshold under *Architects Act* requiring design by architect
- Building Bylaw provided that Building Inspector "may refuse" to issue BP where proposed work does not comply with Building Code or any enactment respecting health or safety and design by registered professional may be required
- Court of Appeal agrees with Supreme Court that *Architects Act* is an enactment respecting health or safety

The Architectural Institute of British Columbia v. Langford (City), 2021 BCCA 261

- Not a rational or acceptable outcome that a municipal BP could be issued for building designed in non-compliance with *Architects Act*
- Act's safety standard constrains building inspector discretion
- On statutory interpretation *Vavilov* instructs reviewing court not to undertake *de novo* interpretation asking itself what is correct decision
- Given entire statutory context, including permissive *Community Charter* provisions re: design by registered professionals, was compliance with *Architects Act* the only reasonable interpretation?
- CA decision difficult to reconcile with *1120732 BC v. Whistler* (2020 CA)

O.K. Industries Ltd. v. District of Highlands, 2021 BCSC 81

- O.K. Industries obtained permit under *Mines Act* to operate a quarry
- District indicated proposed activities may require permits or approvals under tree bylaw, soil bylaw, blasting bylaw, building bylaw, zoning bylaw, and OCP
- When O.K. industries began cutting trees on property, District advised that a permit is required under tree bylaw and to cease activities without a permit
- O.K. Industries argued various District bylaws not applicable to its activities authorized by quarry permit

O.K. Industries Ltd. v. District of Highlands, 2021 BCSC 81

- Preliminary issue whether "decision" made subject to judicial review
- With respect to standard of review, Court found the "jurisdictional boundaries" exception applied
- Court concluded:
  - Province has exclusive jurisdiction over quarries
  - District's bylaws are inapplicable to activities authorized by a quarry permit that fall within the definition of "mine" or "mining activity" under the *Mines Act*
  - District's jurisdiction is re-engaged when the quarrying activities are complete

Curran v. Victoria (City), 2021 BCSC 1552

- Owner's challenge to denial of business licence for short-term rental business dismissed
- Licence inspector's rejection based on zoning bylaw non-compliance – short-term rental not permitted in self-contained dwelling unit
- Owner requests reconsideration by Council – rejected with brief comments by mayor indicating reason was zoning bylaw violation
- Owner argues Council's reasons inadequate under *Vavilov* standard – unintelligible and fail to set out how or why the decision was made
- Court holds reasons not required

Curran v. Victoria (City), 2021 BCSC 1552

- S. 60(5) *Community Charter* requires reasons (if requested) by licence inspector for refusing licence application but no comparable statutory requirement that Council provide reasons on reconsideration
- Pre-*Vavilov* case law: Council decision-making by vote not suited to providing reasons – reasons of individual council members may vary
- "Record" on review comprised of submissions before Council
- Outcome reasonable as "defensible in terms of the facts and the law"
- Reasonable to conclude short-term rental of self-contained suite not compliant with pre-2017 bylaw – not a lawful conforming use

English v. Richmond (City), 2021 BCCA 442

- Building inspector denied a building permit for a cannabis production facility in the ALR based on his interpretation of ALR Regulation as time-limited with respect to all structures
- Supreme Court overturned the building inspector's decision, finding that it was based on an unreasonable interpretation of ALR Regulation
- Court was "…unable to find, with reference to the words of the regulation alone, that the Building Inspector's interpretation…is obviously wrong"
- After considering the "context and purpose" of the regulation, it became clear that there was "a single reasonable interpretation of this statutory provision"

English v. Richmond (City), 2021 BCCA 442

- Court of Appeal agreed building inspector's interpretation of ALR Regulation was "not obviously wrong" but when considered in light of its contextual constraints, "it is not an interpretation that is demonstrably harmonious with the text, context and purpose"
- A single reasonable interpretation emerges from the review
- However, further assessment and interpretation is needed whether structure is in fact a "base consisting entirely of soil" within meaning of ALR Regulation
- Court does not have technical expertise to conduct assessment so application for a building permit must go back to the building inspector for further consideration

Questions/Discussion