YOUNG ANDERSON
BARRISTERS & SOLICITORS

VAVILOV UPDATE

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Alyssa Bradley & Barry Williamson

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I. INTRODUCTION

Last seminar we discussed *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 in detail, where the Supreme Court of Canada re-visited the standard of review analysis that applies to every statutory decision, including those made by local governments.[1] Well, another year has gone by and it has been a busy year in court for local governments making sense of *Vavilov*. This paper will discuss the continuing effects of *Vavilov* and recent cases applying *Vavilov* in the local government context in British Columbia.

II. THE EFFECT OF VAVILOV

As previously discussed, the first significant effect of *Vavilov* is that it changed the legal landscape regarding jurisdictional questions. Prior to *Vavilov*, local government decision-makers were generally not granted deference by the courts on their interpretation of statutory provisions defining the limits of their authority or their interpretation of their bylaw provisions. *Vavilov* expressly states that there is now a presumption in favour of a reasonableness standard and that jurisdictional questions are no longer a distinct category attracting a correctness standard. Subject to a few narrow exceptions, this means that, on judicial review, a court will defer to a local government's interpretation of the statutory or bylaw provisions relevant to legal determination at issue in the proceedings, so long as that interpretation is reasonable. The burden is on the person challenging the decision to show that the decision was unreasonable.

Vavilov indicates that the presumption that reasonableness should be the standard upon which a court reviews an interpretation relied on by an administrative decision-maker can be rebutted in only two circumstances: (1) where there is a statutory appeal clause or legislated standard of review present in the statute; and (2) where "the rule of law demands correctness". There are three "rule of law" categories that still attract correctness review: (1) constitutional questions; (2) general questions of law of central importance to the legal system as a whole; and (3) questions regarding the jurisdictional boundaries between two or more administrative bodies.

The second significant effect of *Vavilov* is the content of the reasonableness standard. *Vavilov* indicates that a decision is reasonable if it is transparent, intelligible and justifiable in relation to the relevant factual and legal constraints that bear on the decision. *Vavilov* noted it is well established that reasons are not required for all decision-makers. Whether reasons are required

[1] For a detailed discussion of Vavilov, please refer to Young Anderson's 2020 seminar paper "Vavilov: Is It Good For Local Governments?" prepared by Gregg Cockrill, Alyssa Bradley & Nick Falzon

will impact how a court conducts reasonableness review. If reasons are required, the court must look to both the decision-making process as well as its outcome. Where there is no right to reasons, *Vavilov* directs the court to look to both the record and the outcome. The Court in *Vavilov* specifically acknowledged that certain decision-making processes do not easily lend themselves to producing a single set of reasons such as when a local government passes a bylaw.

The cases below illustrate how the courts have recently applied *Vavilov* to local government decision-making.

III. VAVILOV'S APPLICATION TO LOCAL GOVERNMENTS

A. Exceptions to Reasonableness Review and Reasonableness of Statutory Interpretation to Enact Business Bylaw to Regulate "Renovictions"

In *1193652 B.C. Ltd. v. New Westminster (City)*, 2020 BCSC 163; affirmed 2021 BCCA 176, the City of New Westminster had enacted a business amendment bylaw to regulate residential tenancy evictions for the purpose of renovations, commonly known as "renovictions". The central issue was whether the decision of the City, that it had the statutory authority to enact the bylaw pursuant to s. 8(3)(g) [the authority to regulate in relation to health, safety or protection of persons or property in relation to certain matters] and s. 8(6) [the authority to regulate in relation to business] of the *Community Charter*, was reasonable. A landlord, 1193652 B.C. Ltd., challenged the bylaw arguing that the City lacked the jurisdiction to legislate regarding residential landlord tenant evictions because the Legislature intended to create an exhaustive scheme to govern rent control and evictions in the *Residential Tenancy Act*.

The Supreme Court applied a standard of review of correctness citing older case law. Nonetheless, the Supreme Court found that the City had the statutory authority to enact the bylaw. On appeal, 1193652 acknowledged that *Vavilov* held that the standard of review is now presumed to be reasonableness but argued that the presumption of reasonableness review was rebutted based on the exceptions established in *Vavilov*: (1) general questions of law of central importance to the legal system as a whole; and (2) questions regarding the jurisdictional boundaries between two or more administrative bodies.

With respect to the "general questions of law" exception, 1193652 argued that the legal question for review is whether a municipality may use its delegated authority to legislate in a matter the Legislature intended to be exhaustively governed by a provincial scheme and that question is of fundamental importance and broad applicability that requires a single determinate answer. The Court of Appeal disagreed stating at para 47 and 48:

> In Vavilov, the Court gave examples of general questions of law that could not be resolved by applying a reasonableness standard because the decision would have legal implications for a wide variety of other statutes and the proper functioning of the justice system… However, the Court stressed "the mere fact

> that a dispute is 'of wider public concern' is not sufficient for a question to fall into this category—nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue"…
>
> In my view, the question of whether the *Community Charter* authorizes municipalities to enact bylaws that protect tenants from renovictions even though the *Residential Tenancy Act* regulates landlord-tenant renovictions may well be a matter of wide public concern, but it is not a general question of law of central importance to the legal system as a whole. Rather, it is a specific question of statutory interpretation concerned solely with the legislative schemes established in the *Community Charter* and the *Residential Tenancy Act*. This question does not engage any larger principle or subject matter that transcends the schemes at issue…

With respect to the "jurisdictional boundaries" exception, 1193652 argued that the question for review related to the jurisdictional boundaries between two competing administrative bodies, being the City and the provincial Residential Tenancy Branch. The Court of Appeal rejected this argument as well stating at para. 56:

> To repeat, the question for review in this case is whether the Community Charter authorized the City to enact the Impugned Bylaw to protect tenants from renovictions even though the Residential Tenancy Act regulates landlord-tenant renovictions. This is a jurisdictional question, which, pursuant to Vavilov, would ordinarily be presumptively subject to a reasonableness standard. In answering the question, the City was required to interpret the provisions of its enabling statute, the *Community Charter*, and, in doing so, to consider the *Residential Tenancy Act* scheme for regulating renovictions. However, it was not required to decide a particular dispute between opposing parties and no other competing administrative body might have had jurisdiction to determine its authority to enact the Impugned Bylaw.

The Court of Appeal therefore applied a reasonableness standard of review to the City's conclusion that it had the statutory authority to enact the bylaw. The Court acknowledged that on reasonableness review, it is not the role of the courts to interpret the legislation and decide if the bylaw is within the City's statutory authority. That approach would be contrary to *Vavilov*. Rather, the courts' role is to review the City's decision to enact the bylaw together with the underlying reasoning and decide if the decision was reasonable. The Court further acknowledged that reasons would not be given in this type of case. With respect to matters of statutory interpretation, however, the interpretation of a provision must be consistent with the text, context and purpose of the provision.

1193652 argued that it is not the court's task to interpret s. 8(6) and s. 8(3)(g) of the *Community Charter* "in first instance" and determine whether those provisions can bear an interpretation capable of supporting the bylaw. Rather, the determinative factor is the Legislature's intention to create an exhaustive scheme to regulate residential rent control and evictions in the *Residential Tenancy Act*. The Court of Appeal rejected this approach stating at para. 76:

> In my view, the City's decision to enact the Impugned Bylaw was based on a reasonable interpretation of its statutory authority under ss. 8(6) and 8(3)(g) of the *Community Charter*… [A]s the [Supreme Court] concluded, the City's decision that it had the authority to enact the Impugned Bylaw was grounded in and consistent with the text, context and purpose of its enabling statute, the *Community Charter*.

The Court found the City's interpretation was also consistent with the principle of subsidiarity. Under that principle, the level of government closest to the subject matter may choose to respond to local needs by introducing complementary legislation in an area of jurisdictional overlap. The Court noted that the City had a long-standing concern with the need to preserve affordable rental housing and had recently become concerned with an increased risk of renovictions in its community. The Court further noted s. 10 of the *Community Charter* contemplates overlapping municipal and provincial jurisdiction by providing that a municipal bylaw is inconsistent with a provincial enactment only if it requires contravention of that enactment. The Court therefore dismissed 1193652's appeal.

The result in this case may have been the same no matter what standard of review was applied. However, the case is a good illustration of how the court is to apply *Vavilov* in matters of statutory interpretation and a local government's interpretation of its statutory authority to enact a particular bylaw in an area of jurisdictional overlap with the province.

B. Reasonableness of Statutory and Bylaw Interpretation Regarding Building Permit Expiry and Commencement of "Construction" Under Building Bylaw

The decision in *Minster Enterprises Ltd. v. City of Richmond*, 2020 BCSC 455; appeal allowed 2021 BCCA 226, (and its companion case *Yu v. City of Richmond*) turned on the reasonableness of the City building inspector's interpretation of building bylaw provisions relating to the expiry of building permits. The Supreme Court found the decision of the building inspector, that a building permit had expired for failure to commence "construction", to be unreasonable. The petitioner planned to build a 15,000 square foot residence on lands within the Agricultural Land Reserve. A geotechnical report recommended removing the topsoil beneath the house footprint, followed by placement of permanent compacted structural fill and a temporary cover of preload sand. Building permits were issued on September 17, 2017. The permits were to expire in 180 days if there had been no construction activity. The start of excavation was put off until early 2018. Placement of the permanent structural fill commenced on March 1, 2018. Before the preload was added, the permits were extended on the petitioner's application until

September 17, 2018. The petitioner's geotechnical engineer recommended the preload be left in place until at least November 2018. After confirming construction of the building had not commenced, the City's building inspector wrote the petitioner on September 17, 2018 stating the City considered the permits to have expired as no construction related to the permits had commenced.

On the petitioner's application for judicial review of the permit expiration, the parties agreed that on the court's guidance in *Vavilov*, the building inspector was not required to provide reasons and therefore the court would review the record and the larger context of the decision to determine whether the outcome was reasonable. The case turned on the reasonableness of the building inspector's interpretation of the building bylaw. The Supreme Court emphasized the broad definition of "construction" in the bylaw:

> Construct/Construction means to build, erect, install, repair, alter, add, enlarge, move, locate, relocate, reconstruct, demolish, remove, <u>excavate</u> or shore. [emphasis added]

The Supreme Court concluded that the City's interpretation, that the removal of topsoil and placement of the permanent structural fill and preload did not constitute "construction", was unreasonable as these were necessary steps in the construction process "and expressly and implicitly contemplated in the issuance of the building permit upon receipt of the geotechnical report". Central to the Court's reasoning was the inclusion of "excavate" in the definition of construction. In respect of the context and purpose of the bylaw, the Court rejected the City's argument that there was nothing to prevent an owner from preloading before applying for a building permit if there was a concern the process would extend beyond six months. The Court observed that the process of excavating, preloading and compacting with mounds of sand five metres high on a large building footprint was "an expensive and extensive process" which a landowner would not reasonably embark on if a building permit could later be denied. The Court concluded that the building inspector's decision rested "ultimately on an untenable distinction between physical construction and site preparation that is not borne out by the text, context, or purpose of the Building Bylaw".

The City was successful on appeal. The Court of Appeal found that the City's interpretation of the building bylaw provision was reasonable. While the City accepted that excavation and other soil densification activities fell within the definition of construction, the critical question, which the Supreme Court's analysis failed to confront, was whether the construction had been pursuant to, or in accordance with, a building permit. The language of the bylaw permit expiration section provided that:

> 5.10.1 Subject to the provisions of section 5.11, a building permit … expires and is invalid and of no force or effect when:
>
> (a) to the knowledge of the appropriate inspector, construction … <u>pursuant to the applicable permit</u> has not commenced within 180 days of the date the permit was issued [emphasis added]

The building bylaw also required a building permit only for construction "of a building or structure" and made no mention of soil densification process measures requiring a building permit.

From the standpoint of the text, context and purpose of the bylaw, the Court of Appeal agreed with the City's interpretation as being consistent with each. Thus, the Supreme Court was found to have erred in assessing as unreasonable the City's textual interpretation. The Court's error was in relying only on the expansive definition of "construction", without factoring in, first, the definition of "building permit" as only authorizing construction "regulated by" the bylaw and, second, the wording in s. 5.10.1 that it was only construction "pursuant to the applicable permit" that had to be commenced within 180 days of permit issuance.

As for the context and purpose of the bylaw, the Court of Appeal found the bylaw statement that it applied to construction "of a building or structure" and that the first mandatory inspection under the bylaw was for the forms for footings and foundations (that is, after any soil compaction process had been completed), supported the reasonableness of the City's interpretation; it was consistent with the aim of ensuring permit holders were committed to completing approved projects within a reasonable time.

The Supreme Court's response to the City's submission, that an owner could commence preloading a site before applying for a building permit if the owner was concerned the preload process could extend beyond 180 days, was that this was an "irrational" expectation. In the Supreme Court's view, it was not reasonable for an owner to embark on the lengthy and expensive preload process in advance, where the building permit might ultimately be denied. The Court of Appeal regarded this approach as falling into the error described in *Vavilov* of a reviewing court conducting its own interpretation of the enactment and measuring the City's interpretation against it. The Supreme Court considered the City's interpretation could result in unfairness to owners and arguably imposed its own view on substantive policy fairness in substitution.

The *Minster/Yu* decision is first and foremost a reminder of what *Vavilov* requires of reviewing courts conducting a reasonableness review of a bylaw or statutory interpretation of a decision-maker. Restraint and deference are required. Courts must resist the temptation to substitute their own interpretation of an enactment under the guise of the court finding that its interpretation was the only one, and that another, alternative interpretation could not reasonably be applied.

The decision also provides a hint about how the initial decisions of statutory decision-makers can be better supported in anticipation of a challenge on judicial review. The City's building department, several months before the expiration of the permits in question, had issued a bulletin dealing with expiry and extension of building permits which clearly stated that construction activity did not include soil preparation works or pre-loading. The bulletin was not cited in any of the building inspector's communications with the owners regarding the expiration of the permits. While the owner was given the opportunity to present evidence that

construction had commenced before the 180-day expiration period, and the building inspector communicated his subsequent decision that the permit(s) had expired, the rationale supporting this conclusion was not articulated. Both parties, and the Court, treated the case as one where no reasons had been provided by the decision-maker, and none were required.

The guidance from *Vavilov* is that where reasons are required, not only must the outcome be justifiable, the decision must also be justified by way of the reasons. However, where no reasons are required, and none are provided, the court's focus is on whether the decision "is in some respect untenable in light of the relevant factual and legal constraints." The Supreme Court rejected the City's argument that its interpretation of the bylaw was supported by the bulletin. In its view, the City could not take advantage of a policy that came into existence 16 years after the bylaw was enacted and was formulated by staff, without being voted on by Council as a formal amendment. It would undermine the rule of law to permit the decision-maker to interpret the enactment based on "changing policies" of staff.

The Court of Appeal concluded the Supreme Court had misinterpreted the City's use of the bulletin. It agreed with the City that the bulletin was not advanced as being binding law. Rather, its relevance was to the reasonableness of the City's interpretation by demonstrating its consistency with the rationale communicated to the public by the department. While the City ultimately derived some benefit in the case from the bulletin, arguably there was a missed opportunity to provide better support for the building inspector's decision that the permit had expired due to lack of "construction".

In this respect, while the petitioner agreed before the Supreme Court that the building inspector was not required to provide reasons, it argued that the actual rationale for the City's decision was undermined by the fact that reasons were not provided. In retrospect, had the building inspector referred to the statement in the bulletin that pre-loading was not considered to be "construction" when communicating the decision that the permit had expired, that may well have strengthened the City's position by explicitly providing reasons that would be consistent with the interpretation of the provision advanced before the Court.

C. Departing from Previous Decision Regarding a Development Permit and Reasonableness of Bylaw Interpretation of Permitted Uses in Zoning Bylaw

In *Municipality of North Cowichan v. 1909988 Ontario Limited*, 2020 BCSC 1666; appeal allowed 2021 BCCA 414, North Cowichan Council, on reconsideration, confirmed the Director of Planning's refusal to issue a development permit for a motorsports speedway on the grounds that the use was not permitted under the Municipality's zoning bylaw. The Municipality's previous Director of Planning had issued a development permit for the same use in relation to an identically zoned portion of adjoining land. 1909988 sought judicial review of Council's decision.

Applying the 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. The Supreme Court found that neither Council's decision nor the record provided the justification *Vavilov* requires for a change in direction from the previous decision of the Director of Planning. Council's decision was quashed and remitted back to Council for reconsideration.

The Municipality appealed arguing that the Supreme Court erred in its application of *Vavilov*. The Court of Appeal agreed finding that the Supreme Court erred in characterizing Council's decision as a departure from longstanding practices or established internal authority. The Court noted that whether a decision-maker is subject to factual or jurisprudential constraints requires close attention to context. In the context of this case, the Court found there was no longstanding practice on the part of the Municipality on the question whether the use was permitted in the applicable zone under the zoning bylaw. The Court noted there were no internal directives or statements of policy on point and there was only one prior decision inconsistent with Council's decision. The Court concluded that *Vavilov* does not support the imposition of a justificatory burden in the absence of a demonstrated deviation from historical practices or decisions. This was not such a case that engaged the justificatory burden *Vavilov* contemplates.

Council gave no reasons when it confirmed the Director of Planning's decision to refuse the development permit. This is not surprising as there is no requirement in the *Local Government Act* to provide reasons for refusing to issue a development permit. Since reasons were not required, the Court of Appeal looked to both the record and the outcome. The Court concluded from the text, context and purpose of the zoning bylaw, Council could reasonably have decided that the proposed use of 1909988's lands was not permitted in the applicable zone under the Municipality's zoning bylaw.

Of note, the Court of Appeal did not say that the previous Director of Planning's decision was unreasonable. Rather, the Court found that Council's decision was not an unreasonable interpretation of the uses permitted in the applicable zone under the zoning bylaw. This is consistent with *Vavilov* that there can be more than one reasonable interpretation of a bylaw.

D. Building Permit Issuance under Building Bylaw and Compliance with Architects Act

In *The Architectural Institute of British Columbia v. Langford (City)*, 2020 BCSC 801; appeal dismissed 2021 BCCA 261, the Court of Appeal upheld the decision of the Supreme Court to grant a declaration that Langford's issuance of a building permit was unreasonable as the permit drawings were prepared by an unlicensed person, not an architect. The *Architects Ac*t requires that buildings over 470 m^2 gross area must be designed by an architect. The Architectural Institute took exception to the issuance of a building permit for a residential/commercial strata complex that exceeded the 470 m^2 gross floor area threshold. It argued that the requirement in the *Architects Act* that certain types of buildings must be designed by architects was a legislatively imposed public safety standard, and that it was unreasonable to issue a building permit in contravention.

Some local governments require as a condition of building permit issuance that plans must be prepared by an architect in circumstances where the *Architects Act* requires it. However, Langford was one of a number of local governments that did not insist on compliance with the *Architects Act* when issuing a building permit. Section 2.3.9 of the City's building bylaw provided that the building inspector "may refuse to issue any permit" where the proposed work "does not comply with the Building Code, a City bylaw … or any enactment respecting health or safety." Section 2.3.6.1(a) of the bylaw provided that the building inspector may require design and field review by a registered professional (which term includes an architect) where, in the opinion of the building inspector, the size or complexity of the building warranted it.

No reasons were given explaining the building inspector's interpretation of the bylaw and the statutory scheme and why the building permit should be issued. This was not surprising as one would not expect reasons when a permit was issued. In accordance with the guidance from *Vavilov* where reasons were not provided by the decision-maker, the reviewing court focuses on the outcome, examines the decision as a whole and considers whether a decision-maker's interpretation of a statutory provision is consistent with the text, context and purpose of the provision at issue and whether that leaves room for more than one reasonable interpretation of the statutory provision.

The Supreme Court accepted that the *Architects Act* was an enactment respecting health or safety on the basis of earlier decisions that found the purpose of the *Architects Act* was ensuring public safety. It was therefore open to the building inspector to exercise the discretion under s. 2.3.9 of the building bylaw to refuse to issue a building permit where the proposed work did not conform with the *Architects Act*. However, the building inspector's affidavit indicated that the City had not interpreted the bylaw's reference to an "enactment respecting health and safety" as a reference to the *Architects Act*. The Supreme Court commented as follows:

> It is not a rational or acceptable outcome that a municipal building permit could be issued for a building which has been clearly designed in contravention of a relevant provincial statute respecting health and safety.

The decision to issue the permit without considering the *Architects Act*, as an enactment respecting health or safety was "inconsistent with the legal constraints imposed on him by the governing statutory authority". Likewise, the Supreme Court concluded that the building inspector's failure to exercise his discretion under s. 2.3.6.1 of the bylaw to require design and field review by an architect or other professional due to the size or complexity of the building was unreasonable. The Court was critical of the building inspector's failure to explain in his affidavit why he did not consider the involvement of an architect was warranted.

The City's position on appeal was that the Supreme Court erred in rejecting as unreasonable the City's position that the bylaw reference to "enactment respecting health or safety" did not include the *Architects Act*. The Supreme Court was also said to have erred in finding that it was not a rational or acceptable outcome that a municipal building permit could be issued for a building that was designed in contravention of the *Architects Act*. The City's argument was that the *Architects Act* regulated people (whether an architect had to be involved in the design and planning of specified buildings), whereas the City's building bylaw regulated building construction. If the Legislature had intended that municipalities were required to take into account the provisions of the *Architects Act* when exercising their building regulation authority, one would have expected there to be some reference in the *Community Charter* to the *Architects Act*.

The Court of Appeal agreed with the Supreme Court that the requirement in the *Architects Act* that certain buildings must be designed by an architect, was a public safety standard set by the Legislature. The issue, as framed by the Court of Appeal, was whether this mandatory legislative safety standard operated as a constraint on the exercise of the building inspector's discretion, irrespective of the bylaw's terms. While the Court conceded that it would have been "helpful" if the *Community Charter*'s provisions dealing with building regulation authority were cross-referenced, the absence of any reference to the *Architects Act* in the *Community Charter* did not negate its effect as a constraint on building officials. The Court noted that the "presumption of coherence" supported the conclusion the statutes were drafted with one another in mind, so as to produce a "coherent and consistent treatment of the subject". In the result, the Court of Appeal endorsed the Supreme Court's conclusion that there was no reasonable, alternative interpretation available to the City's building inspector; it would not have been a rational or acceptable outcome that a municipal building permit could be issued for a building designed in contravention of the *Architects Act*.

The result in the *Langford* case is a noteworthy contrast to the Court of Appeal's decisions in both the *New Westminster* "renoviction" case and *1120732 BC Ltd. v Whistler (Resort Municipality)*, 2020 BCCA 101. In the *New Westminster* case, the Court of Appeal deferred to the City's legislative decision and rejected the discredited "occupied field" argument that the City lacked authority to regulate in an area also covered by the *Residential Tenancy Act*. The landlord contended that the *Residential Tenancy Act* operated as a specific statutory constraint on New Westminster's authority to regulate in respect of businesses and the health, safety or protection of persons or property. In the *Langford* case, the City's authority to regulate in relation to building construction was not under challenge. However, the *Architects Act*, again

not cross-referenced with the *Community Charter*, was found to be a statutory constraint on the exercise of the City's building regulation authority. One might have thought that one of the reasonable interpretations of the *Architects Act* was that while it was always open to the Architect's Institute to pursue proceedings against persons who were not architects who designed buildings in contravention of the *Architects Act*, it did not impose a mandatory burden on municipalities to, in effect, enforce the *Architects Act*, by not accepting plans that should have been prepared by Institute members.

In the *Whistler* case, the Court of Appeal found it would have been reasonable for Whistler to have concluded it had the power to enact the subject bylaw on any one of three distinct bases. But in the *Langford* case the legislation did not confer municipal power; rather it acted as a constraint on how a municipal authority could be exercised. The Court's path of reasoning is understandable, but if reasonableness review requires that a decision-maker's interpretation of its statutory authority is entitled to deference, why should not the same deference be afforded to the decision-maker's interpretation of a purported statutory constraint on that authority?

E. No Requirement for Reasons from Council where None Previously Existed Regarding Short-Term Rental Business Licence Refusal Under Business Bylaw

In *Curran v. Victoria (City)*, 2021 BCSC 1552, the owner challenged Victoria Council's decision, on reconsideration of the decision of the licence inspector, to deny a short-term rental business licence under the business bylaw. At the end of the reconsideration hearing the mayor spoke briefly, outlining that the decision to deny the licence was based on the rental premises being a two-bedroom suite with its own kitchen. No other council member was recorded as having spoken to the motion that was passed to deny the reconsideration request and uphold the licence inspector's decision to deny the short-term rental business licence. The owner argued that the reasons for the decision were inadequate as the mayor's comments did not set out how or why the decision was made and failed to consider important elements of the factual and legal background relating to the short-term rental of the suite in question. In support of this argument, the owner relied on a judicial review of a Residential Tenancy Branch arbitrator's decision and on *Vavilov*'s general principles regarding the importance of reasons in satisfying the "justification, transparency and intelligibility" standards for administrative decision makers.[2]

[2] The argument based on *Vavilov*'s principle approach putting "reasons first" was always going to be an uphill battle given that *Vavilov* also includes an explicit acknowledgement that certain decision-makers, and explicitly mentioning municipal councils, render a decision by holding a vote, a process at odds with producing a single set of reasons.

The Supreme Court rejected the attempt to analogize the reconsideration process before Council to the quasi-judicial adjudication of the tenancy arbitrator. Both the relevant statutory provisions and the nature of Council's decision-making process led the Court to conclude that there was no requirement to provide reasons in support of the reconsideration decision. In essence, whatever *Vavilov* says about the significance of reasons, it does not translate to a requirement to provide reasons where the statute or common law does not require them.

The applicable statutory provision, s. 60(1)(b) of the *Community Charter*, provides that the licensing official must give written reasons, on request, in the case of a refusal to approve a business licence application. The right, under s. 60(5) to request council reconsider the refusal of a business licence does not make any reference to council being obligated to provide reasons on a reconsideration decision. The Court reasoned that "had the legislature intended that Council provide reasons for its decision, it would have expressly indicated so in s. 60." Accordingly, the duty to provide reasons applied only to the "first-instance decision maker", the licence inspector, as provided for in s. 60(1)(b).

The Court also found support for the conclusion that Council was not obligated to provide reasons from a number of pre-*Vavilov* decisions, including the decision of the Court of Appeal in *Maple Ridge (District of) v. Thornhill Aggregates Ltd.*, [1998] BCJ No. 1485. The *Thornhill* case stands for the proposition that council's reasons cannot be determined from its vote, as the reasons why each particular council member may vote for or against a motion may be different from those of their fellow council members. As neither Parliament nor a provincial legislature could be required to give reasons, so too a municipal council cannot be compelled to state reasons for its decision. Significantly, this proposition applies even in the face of a bylaw or statutory provision that purports to impose a requirement to provide reasons on a council.

Having concluded that Council was not required to provide reasons for rejecting the owner's reconsideration request, the Court had to consider whether the outcome – rejection – was "defensible in terms of the facts and the law." The written submissions before Council from the owner and the Manager of Bylaw and Licencing Services addressed the issue of whether the owner had established a non-conforming short-term rental use prior to a 2017 change in zoning regulations restricting short-term rentals. The Manager's submission was that the owner's short-term rental use did not comply with the pre-2017 regulations allowing up to two rooms in a single-family dwelling to be used for transient accommodation. However, the short-term rental had been provided in a separate, self-contained secondary suite/dwelling unit. On that basis, the Court was satisfied that on the record before Council on the reconsideration hearing, it was reasonable for Council to conclude that transient accommodation was not a lawful non-conforming use for which a short-term rental business licence could be issued.

F. "Decisions" and Exceptions to Reasonableness Review Regarding the Applicability of Bylaws to Activities Subject to a Quarry Permit under *Mines Act*

In *O.K. Industries Ltd. v. District of Highlands*, 2021 BCSC 81, O.K. Industries Ltd. obtained a permit from the inspector of mines under the *Mines Act* to operate a quarry on its property within the District. Shortly after, the District, through staff and legal counsel, expressed the view in correspondence to O.K Industries that some of the potential activities on the property may require permits or approvals from the District under the District's tree bylaw, soil bylaw, blasting bylaw, building bylaw, zoning bylaw, official community plan and s. 489 of the *Local Government Act*. O.K. Industries began cutting trees on its property without a tree cutting permit. The District's bylaw enforcement officer sent an e-mail to O.K. Industries advising that a permit is required under its tree bylaw for certain tree cutting activities on the property and attached a document described as a "Cease Work Order". O.K. Industries sought judicial review challenging the District's view and seeking declarations regarding the applicability of various District bylaws to O.K. Industries' activities authorized by the quarry permit.

A preliminary issue was raised whether the District had made a "decision" that could be subject to judicial review. Based on the facts of the case, the Supreme Court found that the District had made a "decision" regarding the applicability of the District's bylaws to O.K. Industries' activities that could be subject to judicial review. That decision is somewhat puzzling as it is not clear what "statutory power" as defined in the *Judicial Review Procedure Act* the District was exercising in simply sending correspondence to O.K. Industries indicating that certain permits or approvals may be required under the District's bylaws, in particular in respect of bylaws other than the tree bylaw. It is also inconsistent with the Court of Appeal's decision in the *Whistler* case mentioned above, where a similar argument was rejected that Whistler had exercised a "statutory power" by Whistler's legal counsel sending a letter expressing the view that the operators of tourist accommodation businesses were in contravention of Whistler's bylaws and demanding that the operators cease operating their businesses without a business licence.

With respect to the applicable standard of review, the Supreme Court found that the "jurisdictional boundaries" exception to the presumption of reasonableness review applied such that the standard of review of correctness applied. The Court stated at para. 191:

> I conclude that the dispute between the parties is one where the petitioner alleges the respondent has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of the provincial government's authority pursuant to the *Mines Act* and in a manner that is inconsistent with the applicable common law principles articulated by Madam Justice Smith in *Cobble Hill*. I find that the rule of law requires this Court's intervention.

Since this case, as discussed above, the Court of Appeal in the *New Westminster* case rejected a similar argument that this exception applied finding that no other competing administrative body had jurisdiction to determine the City's authority to enact the bylaw at issue. If a local government's decision whether it has the statutory authority to enact a particular bylaw is subject to reasonableness review, it is not clear why a local government's decision whether a particular bylaw applies to a particular activity would also not be subject to the same standard.

The Supreme Court concluded that the various bylaws of the District are inapplicable to O.K. Industries' activities on the property authorized by a quarry permit to the extent those activities fall within the definition of "mine" or "mining activity" under the *Mines Act*. The Court based its decision entirely on the Court of Appeal's decision in *Cowichan Valley Regional District v. Cobble Hill Holdings*, 2016 BCCA 432. In *Cobble Hill*, the Court found that a regional district's zoning bylaw was unenforceable in respect of mine reclamation activities at a quarry site. The Court concluded that *Cobble Hill* established the broad proposition that the province has "exclusive jurisdiction over the operation of quarries", specifically to the exclusion of any local government regulation. The Court stated the District's jurisdiction to regulate the use of O.K. Industries' property through its bylaws is re-engaged when the quarrying activities are complete.

The application of an "occupied fields" approach by the Court of Appeal in *Cobble Hill* and the Supreme Court in this case to infer exclusive provincial jurisdiction from the fact that mines are dealt with by the province in the *Mines Act* and other provincial enactments is also inconsistent with the approach taken by the Court of Appeal in the *New Westminster* case as well as the scheme of the *Community Charter*, including s. 10 which specifically contemplates overlapping municipal and provincial jurisdiction. This decision is currently under appeal.

IV. CONCLUSION

It has indeed been a busy year for local governments in court making sense of *Vavilov*, with many matters requiring resolution by the Court of Appeal (and more to come). Hopefully as the caselaw develops in this new legal landscape over the next few years, the goal in *Vavilov* to bring clarity and consistency to the applicable standard of review and the content of the reasonableness standard will be achieved.

NOTES