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The Standard of Review and the Duty to Consult and Accommodate Indigenous Peoples: What is the Impact of *Vavilov*? Part 1

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Case Commented On: *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#)

This is a two-part post that examines the potential impact of *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#) on the Crown’s duty to consult and accommodate (DTCA) Indigenous peoples. Part 1 deals with statutory rights of appeal. Part 2 deals with applications for judicial review. Other ABlawg contributors have touched on related questions; Nigel Bankes’ “[Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response](#)” is particularly relevant, as is Shaun Fluker’s post “[Vavilov on Standard of Review in Canadian Administrative Law](#).”

The Supreme Court’s decision in *Vavilov* (and the *Vavilov*-trilogy as a whole) was intended by the Court to provide much needed clarity to Canadian administrative law. The impact of the decision is clear: it has been cited by no fewer than [1500](#) lower court decisions in less than a year. Despite the Court’s attempt at comprehensive refinement of the doctrine, however, *Vavilov* left considerable uncertainty concerning the applicability of the new rules in the context of the Crown’s DTCA Indigenous peoples. Two things lead to this uncertainty. *Vavilov* changes the standard of review analysis in two kinds of cases: (1) where a court reviews an administrative decision under a statutory appeal mechanism, and (2) where a court reviews an administrative decision through an application for judicial review. The first uncertainty arises in relation to statutory appeals. Under *Vavilov*, the standard of review on statutory appeals follows the case law on appeals: questions of law will generally be reviewed on a correctness standard and questions of fact or mixed fact and law will be reviewed on the palpable and overriding error standard (*Vavilov* at para 37; *Housen v Nikolaisen*, [2002 SCC 33 \(CanLII\)](#)). In the context of the DTCA, uncertainty attends the application of this framework, as it appears to secure greater judicial deference to decision-makers on issues of fact and mixed fact and law. Because of this, it appears to be possible for a legislature to ensure greater judicial deference for executive action (such as ministerial decisions) where it anticipates issues with the DTCA through the inclusion of a statutory right of review. This seems contrary to *Vavilov*’s reasoning that statutory appeals are indications that the legislature prefers less, rather than more, deference. It is not clear that the court contemplated this possibility and, if so, whether it considered it an acceptable consequence of the doctrinal refinement.

The second area of uncertainty is where applications for judicial review are at issue. *Vavilov* held that, in applications for judicial review, courts ought to employ a presumption of reasonableness. This presumption is rebutted only where certain constitutional questions are concerned. The

Court wrote: “[q]uestions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in reviewing such questions” (*Vavilov* at para 55). The uncertainty here, at least insofar as the DTCA is concerned, is twofold. First, it is not clear what is meant by “the scope of Aboriginal and treaty rights.” On its face, it is difficult to read this as including the DTCA. The DTCA arises when the Crown contemplates action that may impact such rights, but is not usually framed as a “right.” Yet, the alternative is that the *Vavilov* court was silent on the matter. If we resolve this in a way that preserves the conventional approach to the standard of review in DTCA cases, in which courts have tended to see questions of scope as reviewable on a correctness standard and questions of adequacy and process of consultation on a reasonableness standard, another ambiguity arises: is this approach consistent with the reasoning in *Vavilov*, in particular the reasons for the existence of a “constitutional exception”? Few lower court cases have yet addressed the issue. The most prominent to do so to date is the decision of *Coldwater First Nation v Canada (Attorney General)*, [2020 FCA 34 \(CanLII\)](#). *Coldwater* considered whether the Crown’s consultation and accommodation of Indigenous peoples was sufficient to allow it to proceed with development of the TransMountain Pipeline Expansion project. There the court read “aboriginal and treaty rights” as synonymous with the DTCA without discussion of the uncertainties outlined here. In this two-part post, we take up these questions and suggest some ways courts may consider the impact of *Vavilov* on the standard of review in DTCA cases. This post deals with statutory appeals. Part two takes up applications for judicial review and addresses *Coldwater* in greater depth.

DTCA Pre-*Vavilov*

Before assessing the potential impact of *Vavilov*, we should outline the pre-*Vavilov* doctrine. Though ambiguities and inconsistent language have at times introduced a lack of doctrinal clarity, generally courts have held that questions of trigger and scope – that is, whether there is a duty to consult in a given case and, if so, what level of consultation is required – are reviewable on a correctness standard, while adequacy of consultation – whether the duty has been sufficiently discharged in a given instance – is reviewable on a reasonableness standard: *Ka’a’Gee Tu First Nation v Canada (Attorney General)*, [2007 FC 763 \(CanLII\)](#) at para 91; *Tzeachten First Nation v Canada (Attorney General)*, [2008 FC 928 \(CanLII\)](#) at paras 23–24; *Nunatsiavut v Canada (Attorney General)*, [2015 FC 492 \(CanLII\)](#) at paras 113–120. In *Ka’a’Gee Tu First Nation*, for example, the Federal Court wrote:

A question as to the existence and content of the duty to consult and accommodate is a question of law reviewable on the standard of correctness. A question as to whether the Crown failed to discharge its duty to consult in making the decision typically involves assessing the facts of the case against the content of the duty. On findings of fact, deference to the decision maker may be warranted. The degree of deference to be afforded by a reviewing court depends on the nature of the question and the relative expertise of the decision maker in respect to the facts. (at para 91)

This approach was adopted on the basis of the Supreme Court’s statements in *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73 \(CanLII\)](#). There, the Supreme Court considered the appropriate standard of review in duty to consult cases, holding that: “[t]he process itself would likely fall to be examined on a standard of reasonableness”, and “[s]hould the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness” (at paras 62–63). Accordingly, “[w]here the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government’s process is unreasonable” (at para 60). While these statements were made in *obiter* and in the absence of specific facts, they have been taken as outlining the largely consensus view outlined above. In our coming post on applications for judicial review, we will have more to say about this consensus view, but understanding this basic framework is sufficient for considering how *Vavilov* may change things for statutory appeals.

***Vavilov* and DTCA Cases: Statutory Appeals**

The *Vavilov* majority interprets the presence of a statutory appeal as an important signal from the legislature: “[w]here a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis” (at para 36).

This means that in statutory appeals, the *Housen* framework, which applies to appeals from lower courts, is to be followed. Compared to the standard of review analysis for judicial reviews, which works as a presumption of reasonableness subject to some potentially complicated exceptions, the *Housen* framework is more streamlined in that it focuses solely on the nature of the question at issue. For questions of pure law, correctness is the standard; for questions of fact or mixed fact and law, the standard is one of palpable and overriding error. Indeed, the statutory appeals that have followed *Vavilov* have shown increased efficiency in arriving at a standard of review because there is less analysis required (see *Fort McKay First Nation v Prosper Petroleum Ltd*, [2020 ABCA 163 \(CanLII\)](#); *Sipekne’katik v Alton Natural Gas Storage LP*, [2020 NSSC 111 \(CanLII\)](#)). In some cases, there is no need to apply different standards of review to issues of fact, law, and mixed fact and law, because the statutory appeal is limited to questions of law alone, as in *Fort McKay First Nation* (see paras 28-29).

The *Vavilov* majority also understands statutory appeal mechanisms to invite *more* scrutiny from courts for administrative decisions as compared to a judicial review application (*Vavilov* at paras 36–37; see also the minority’s critique at para 199). This is often likely to be true, as the correctness standard will apply to questions of law, which would presumptively be reviewed on a reasonableness standard in a judicial review application. We wonder, however, whether the assumption that statutory appeals mean *less deference* will hold in the DTCA context. The application of *Vavilov*’s logic will likely lead to *more deference* in a statutory appeal than it would under a judicial review for DTCA cases where questions of fact and mixed fact and law are subject to appeal (see Paul Daly, “[The Vavilov Framework V: Concluding Thoughts](#)”, (29 December 2019) online (blog): *Administrative Law Matters*). The issues in contention between Indigenous peoples and the Crown in DTCA cases tend to be heavily fact-based. The Crown often concedes that the DTCA has been triggered and even that deep consultation is required; the

dispute is likely to focus on whether the consultation carried out by the Crown met the requirements of deep consultation, or whether a Crown decision has the potential to affect an asserted Aboriginal right (see *Gamlaxyełtxw v British Columbia (Minister of Forests, Lands, & Natural Resource Operations)*, [2020 BCCA 215 \(CanLII\)](#) at para 77). These are likely to be understood as either issues of fact or mixed fact and law, which means that the standard of palpable and overriding error will apply.

The palpable and overriding error standard is probably *more deferential* than the reasonableness standard. In applying the palpable and overriding error standard, the Nova Scotia Supreme Court quoted from *HL v Canada (Attorney General)*, [2005 SCC 25 \(CanLII\)](#), [[2005](#)] [1 SCR 401](#), a decision of the SCC that expounded on the palpable and overriding error standard (*Sipekne'katik* at para 151). In that case, the SCC held that the phrase “palpable and overriding error” is at once an elegant and expressive description of the entrenched and generally applicable standard of appellate review of the findings of fact at trial,” but should not be thought “to displace alternative formulations of the governing standard” (*HL* at para 55). These alternative formulations include a standard of overturning inferences of fact that are “clearly wrong”, or findings of fact that are “unreasonable” or “unsupported by the evidence” (*HL* at para 56, emphasis added). In other words, there is case law to support the claim that the reasonableness standard and the palpable and overriding error standard at least overlap. In a more recent decision, however, the SCC quoted from two appellate decisions to explain the palpable and overriding error standard (*Benhaim v St-Germain*, [2016 SCC 48 \(CanLII\)](#) at paras 38-39). There, the Court quoted Justice Stratas of the FCA, who explained:

Palpable and overriding error is a highly deferential standard of review ... “Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. (*South Yukon Forest Corp. v R*, [2012 FCA 165 \(CanLII\)](#) at para 46)

Notable here is Justice Stratas’s characterization of a “highly” deferential standard. It is hard to know for certain how such a characterization compares *Vavilov*’s conception of reasonableness, which is also deferential, but the language suggests that the palpable and overriding error standard is more deferential than reasonableness. This is confirmed by the SCC’s subsequent quotation in *Benhaim* of Justice Morissette, who held that “a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions” (*JG v Nadeau*, [2016 QCCA 167 \(CanLII\)](#) at para 77). Compare this with *Vavilov*’s description of an unreasonable decision, which might contain “a failure of rationality internal to the reasoning process” or may be “in some respect untenable in light of the relevant factual and legal constraints that bear on it” (at para 101). Indeed, in contrast with the “highly deferential” palpable and overriding error standard, the SCC describes reasonableness review as “a robust form of review” (see Paul Daly, “[The Vavilov Framework II: Reasonableness Review](#)”, online (blog): *Administrative Law Matters*; Shaun Fluker’s ABlawg post, “[Vavilov on Standard of Review in Canadian Administrative Law](#)”). These two descriptions suggest that the standards are not equivalent. The Ontario Divisional Court has warned against the conflation of the standards on two occasions, (*Miller v College of Optometrists of Ontario*, [2020 ONSC 2573 \(CanLII\)](#) at para 79; *Houghton v Association of Ontario Land Surveyors*, [2020 ONSC 863](#)

([CanLII](#)) at para 15), and [some commentators](#) have argued that “when it comes to findings of fact in statutory appeals, it appears likely that they will now be more difficult to overturn.”

It is perhaps puzzling that *Vavilov* seems to maintain that there can be multiple deferential standards when the court in *Dunsmuir v New Brunswick*, [2008 SCC 9 \(CanLII\)](#), did away with the “patent unreasonableness” standard because “any actual difference between them in terms of their operation appears to be illusory” (at para 41). In any event, if the palpable and overriding error is more deferential than the reasonableness standard, and the issues between the parties in a DTCA dispute are likely to centre on questions of fact or mixed fact and law, then the legislature could secure *more* deference for executive decisions in the DTCA context by setting up a statutory appeal instead of leaving those decisions to be challenged in judicial review applications. It likewise leaves it open to a legislature to have the best of all worlds: it could create a statutory appeal on issues of fact and mixed fact and law, to which the palpable and overriding error would apply, while leaving legal questions to be addressed through judicial review, in which the reasonableness standard presumptively applies (thanks to Shaun Fluker for this point). This potentially troubling possibility was not explicitly considered by the majority in *Vavilov*, and so calls out for some more specific analysis from the SCC as to whether such a manoeuvre is permissible given the constitutional interests involved.

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