DEFERENCE OR PREFERENCE? THE ROLE OF DECISION-MAKER EXPERTISE WHEN REVIEWING FOR CORRECTNESS

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The Supreme Court has ushered in a new era of Canadian administrative law with the comprehensive Vavilov decision. Vavilov has elevated statutory appeal clauses, which has resulted in the application of the not-so deferential correctness standard of review wherever an administrative decision-maker, subject to a statutory appeal, is answering a question of law. Formerly, these decision-makers often enjoyed review on the deferential standard of reasonableness, even on questions of law, due in large part to the judicial recognition of the institutional expertise inhered in many administrative tribunals. This paper sets out to answer the question of whether courts are free to ignore decision-maker expertise when reviewing decisions on the standard of correctness; it's a matter of deference or preference. Correctness review is inherently non-deferential as there can only be one "correct" answer. If a decision-maker fails to reach the "correct" answer, no amount of expertise can save the incorrect decision. However, this doesn't mean that expertise has no role at all. Ultimately, expertise may lead a court to prefer the decision-maker's position, but it cannot result in a court deferring to it.

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Introduction

The subject matter expertise of various administrative decision-makers has enjoyed a predominant position within the halls of deference in Canadian administrative law since at least the introduction of the not-so pragmatic and even-less functional approach,[1] spurred on by subsequent cases such as *Pezim,*[2] and cemented in *Dunsmuir* and its successive jurisprudence.[3] However, the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration v Vavilov* necessitates a reconsideration of that position.[4] Due in large part to the changes ushered in by *Vavilov* with regard to statutory appeal clauses, many decision-makers, formerly afforded a degree of deference due in part to their institutional expertise, find themselves subject to an exacting standard of correctness where their expertise likely plays a much smaller role. That said, *Vavilov* does not change how we should conceive of decision-maker expertise, nor does it change how it factors in once a reviewing court finds itself in the "bucket" of correctness review, it merely removes it from the standard of review analysis.

Correctness review is inherently non-deferential; the reviewing court has the power to substitute its own views for those of the decision-maker below. Therefore, as a matter of law, a court reviewing an administrative decision on the standard of correctness must conduct a fulsome analysis of the legal question; however, this does not mean it must ignore decision-maker expertise: it's simply a matter of preference and not deference. This paper discusses the meaning of correctness review and where expertise can fit into that analysis. *Vavilov* has changed much, but much has remained the same, and in that regard certain pre-*Vavilov* cases are helpful to properly situate decision-maker expertise within correctness review. Ultimately, the reviewing court must decide on a case-by-case basis whether, and to what extent, expertise may help it determine the correct outcome.

The impact of *Vavilov*

Vavilov has, in many ways, simplified the process for determining the applicable standard of review; this is particularly true where the legislation incorporates a right of appeal. In such cases, the appellate standards articulated in *Housen* will apply.[5] This means correctness for questions of law and palpable and overriding error for questions of fact, or mixed questions with no extricable legal principle. In situations where there

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[1] *U.E.S., Local 298 v Bibeault,* [1988] 2 SCR 1048, [1988] SCJ No 101 (QL); *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, [1998] SCJ No 46 (QL).

[2] *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557, [1994] SCJ No 58 (QL).

[3] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

[4] 2019 SCC 65, [2019] SCJ No 65 (QL) [*Vavilov*].

[5] *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*]; *Vavilov, supra* note 4 at para 17.

is an extricable legal issue, correctness will apply.[6] The majority justifies this position by couching it in terms of institutional design, stating:

> Where 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.[7]

The effect of this new mechanism is that decisions, from various administrative bodies, that would have been afforded some degree of deference under the *Dunsmuir* framework due to their subject-matter expertise, are now reviewed on the exacting standard of correctness.[8] This was clearly a live issue in *Vavilov¸* although one the majority mostly sidesteps.[9] The issue features heavily in the concurring reasons delivered by Justices Abella and Karakatsanis. The Justices write "the majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers" and "the majority's reasons strip away deference from hundreds of administrative actors subject to statutory rights of appeal."[10]

Although *Vavilov* has changed how the standard of review is selected by elevating statutory appeal clauses, it does not fundamentally alter the meaning of "expertise", nor how it would or would not factor into correctness review. The majority is relatively silent on this point. Notably though, expertise remains important when conducting the substantive reasonableness review – and in that sense it operates much as it did.[11]

Abella and Karakatsanis JJ are not alone in their critique; noted administrative law professor Paul Daly express a similar point "…the *Vavilov* framework leads occasionally to unusual consequences. Some tribunals previously considered to be expert will be due less deference than decision-makers whose claim to expertise is much less compelling."[12] This is so, at least in part, because under the contextual approach, decision-makers with subject-matter expertise should have had that expertise considered when the reviewing court was deciding on the applicable standard of review. That said, many decision-makers would often be reviewed for

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[6] *Housen, supra* note 5.

[7] *Vavilov, supra* note 4 at para 36.

[8] *Dunsmuir, supra* note 3.

[9] See *Vavilov, supra* note 4 at paras 42–44.

[10] *Ibid* at paras 199, 230.

[11] *Vavilov, supra* note 4 at para 303.

[12] Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) at 30, online: *University of Ottawa – Common Law Section Working Paper* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3519681> [Daly, Working Paper].

reasonableness irrespective of whether they actually possessed the impugned expertise.[13] Regardless, courts were deferential to a decision-maker with claimed expertise that was subject to review on certain questions of law, such as the interpretation of their home statute or legal questions that are closely related to the decision-makers purpose, by applying the standard of reasonableness.[14] Now, those questions will invariably be decided on the correctness standard, at least where there is a statutory appeal clause.[15]

One might ask how *Vavilov* then represents such a marked departure from the *status quo,* if deference to expertise were *required* on correctness review. As I expand upon below, the answer is that deference to expertise cannot, as a matter of law, be a necessary or mandatory component of a properly conducted correctness review; although, it may yet serve a purpose. That said, the end result is what Justices Abella and Karakatsanis fear: certain expert decision-makers will have their expertise cast asunder as a result of statutory appeal clauses.

Where correctness and expertise intersect

To begin, it is helpful to properly articulate what is meant by correctness review. Although now in disfavour, the ever-faithful *Dunsmuir* provides an excellent summary:

> […] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.[16]

In this passage, Justices Bastarche and LeBel make clear that correctness review is a review devoid of deference. Indeed, this must be the case, as its very nature, i.e. what

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[13] See The Hon Joseph T Robertson, Q.C., "Identifying the Review Standard for Administrative Decisions 'Deference in a Nutshell: Sort of!'" (Paper delivered at the Mid-Winter Meeting of CBA-NB Branch, 6 February 2016), online: <ciaj-icaj.ca/wp-content/uploads/documents/2016/07/r61.pdf?id=7486&1602002382> [Robertson].

[14] See *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals,* 2011 SCC 59, [2011] 3 SCR 616, where a labour arbitrator modified the common law of estoppel and the Supreme Court determined the arbitrator was not bound by common law nor equitable principles "in the same manner as courts of law." The Court determined these arbitrators are sufficiently expert to develop legal doctrines in their field and will be reviewed on reasonableness when they do. See para 26 of Robertson, *supra* note 14*,* for Justice Robertson's take on this outcome.

[15] See Daly, Working Paper, *supra* note 12 at 8–9 for examples of some of the tribunals now entitled to less deference.

[16] *Dunsmuir*, *supra* note 3 at para 50.

is the *correct* answer to a certain question of law, requires a definitive answer. There is no sliding scale of correctness in which there exists multiple *correct* answers. There are good reasons for this, the role of reviewing courts "is to delineate and refine legal rules and ensure their universal application."[17] The simple fact that a reviewing court is free to substitute their views for the views of the decision-maker below best exemplifies the non-deferential nature of correctness review.

Turning now to the treatment of expertise in previous jurisprudence, further support can be found for the idea that, in a post-*Vavilov* era, expertise does not inherently play a role in correctness review. The Supreme Court has often teetered on the meaning of expertise in the administrative context, as the *Vavilov* majority recognized,[18] and how that expertise should inform the review process. Pre-*Dunsmuir* expertise was not treated as being absolute, "[i]nstead, whether a decision-maker had greater expertise than the reviewing court was assessed in relation to the specific question at issue."[19] This approach was abandoned and replaced with a modern concept that expertise "simply inheres in an administrative body by virtue of the specialized function designated for it by the legislature."[20] The majority in *Edmonton East* echoed this approach,[21] although it was explicitly rejected by Justices Cote and Brown in their dissent;[22] and it is fair to say, in light of *Vavilov,* the dissent carried the day on this point.

In any event, the treatment of expertise in the contextual approach was such that, if the decision-maker under review claimed expertise, that expertise was indicative that the legislature intended for deference and the presumption of reasonableness to apply.[23] This conclusion only follows if it was understood that correctness review need not be deferential to a decision-maker's expertise. Why else would expertise militate towards the reasonableness standard if not because the alternative, i.e. correctness, does not respect legislative intent that requires deference to institutional expertise?[24]

As an example, consider a scenario where one panel of an expert tribunal, whose enabling legislation includes an appeal clause, interprets a provision of that tribunal's home statute a certain way, and another panel of the same tribunal interprets

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[17] *Housen, supra* note 5 at para 9; See also *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895 at para 27, citing *Dunsmuir, supra* note 3 at para 60 [*McLean*].

[18] *Vavilov, supra* note 4 at para 27.

[19] *Ibid.*

[20] *Ibid* at para 28.

[21] *Ibid* at para 33.

[22] *Ibid* at para 88.

[23] See *ibid* at paras 24–25.

[24] See generally Robertson, *supra* note 13, for a discussion of the deference doctrine, but specifically Justice Robertson's discussion of conflicting tribunal outcomes at paras 63–66.

it in a conflicting manner. Both interpretations are owed deference, and under the pre-*Vavilov* approach, a reviewing court would not be permitted to resolve the conflict by applying the correctness standard because the decision-maker was owed deference as a result of their expertise. This allows two conflicting interpretations to exist based on the existence of decision-maker expertise, which is permissible if the standard is reasonableness.[25] Post-*Vavilov,* in the same scenario just described, the standard of review will be correctness, since the tribunal is subject to an appeal clause. The reviewing court cannot defer to both interpretations, unlike on reasonableness review; it must prefer one interpretation over the other, since the existence of two conflicting interpretations is antithetical to the concept of correctness.

The above leads to the inexorable conclusion that, as a matter of law, proper correctness review cannot require deference to a decision-maker. When undertaking a correctness review, the reviewing court must reach its own conclusions on the legal question, which necessarily entails considering the relevant substantive law and deciding on its *correct* interpretation. On correctness review, that interpretation cannot depend on whether the decision-maker below was expert or not. This would create a sliding scale of correctness, where on one end we have outcomes which are correct substantively, in the reviewing courts estimation; and, on the other end, we have outcomes which may be correct only by virtue of the decision-maker's expertise and not the reviewing courts reasoned estimation. This variant of correctness is little more than a disguised reasonableness review, which has been implicitly rejected in the past,[26] and is one of the aspects of correctness that differentiates it from reasonableness. There can be only one *correct* answer, whereas there can be many *reasonable* ones.

As an example, in *McLean v British Columbia (Securities Commission),* Justice Moldaver rejected the argument that the Securities Commission was inexpert in the interpretation of a limitation period within its home statute and thus the applicable standard was correctness.[27] Instead, he determined that reasonableness applied and stated:

> "…the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* – not the courts – to make. Indeed, the exercise of that interpretive discretion is part of an administrative decision maker's "expertise."[28] [emphasis in original]

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[25] See *Domtar Inc. v Quebec (Commission d'appel en matière de lésions professionnelles),* [1993] 2 SCR 756, [1993] SCJ No 75(QL), where the Supreme Court recognized that tribunal expertise supersedes the need for consistency.

[26] See *Maritime Broadcasting System Ltd v Canadian Media Guild*, 2014 FCA 59 at para 60, [2014] FCJ No 236(QL) [*Maritime Broadcasting*].

[27] *McLean*, *supra* note 17 at paras 25–33.

[28] *Ibid* at para 33.

Where the legislature intends for the decision-maker to have the final word on legal questions, there can be more than one *reasonable* answer, as was the case in *McLean*. Where the legislature intends the courts to have the final word on legal questions, the only appropriate answer is the *correct* one. This stratification of roles is evident in light of the *Vavilov* majority's treatment of appeal clauses:

> "In the past, this Court has looked past an appeal clause primarily when the decision maker possessed greater relative expertise — what it called the "specialization of duties" principle in *Pezim*, at p. 591. But, as discussed above, the presumption of reasonableness review is no longer premised upon notions of relative expertise. Instead, it is now based on respect for the legislature's institutional design choice, according to which the authority to make a decision is vested in an administrative decision maker rather than in a court. It would be inconsistent with this conceptual basis for the presumption of reasonableness review to disregard clear indications that the legislature has intentionally chosen a more involved role for the courts. Just as recognizing a presumption of reasonableness review on all questions respects a legislature's choice to leave some matters first and foremost to an administrative decision maker, departing from that blanket presumption in the context of a statutory appeal respects the legislature's choice of a more involved role for the courts in supervising administrative decision making."[29]

This cuts both ways; if the presumption of reasonableness is premised on respect for the legislature's institutional design, and the legislature's intent where there is a statutory appeal is to involve the court, the court cannot be beholden to the relative expertise of the decision-maker when exercising that role.

So, what's left for expertise?

After reading the foregoing section it would be understandable if a reader were to conclude that *Vavilov* had sounded the death knell for expertise when there exists a right of appeal. But first, consider again the Supreme Court's description of correctness in *Dunsmuir,* cited above;[30] correctness review entails no deference to the decision maker's reasoning process, but it does not necessitate the decision-maker's position is to be ignored entirely. Professor Daly, in *A Theory of Deference,* comments that the "application of a standard of review of correctness then, is not an open invitation to judicial imperialism. Reviewing courts may have the final word, but its content will in part be a product of the pronouncements of the delegated decision-maker."[31] This is a natural consequence of a system where reviewing judges rely, in part, on the submissions of the parties before them. The distinction, as this paper

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[29] *Vavilov, supra* note 4 at para 46.

[30] See *Dunsmuir, supra* note 3 at para 8.

[31] Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012) at 139.

posited in the beginning, is that *Vavilov* has relegated the role of expertise on correctness review to one of preference over deference. A reviewing judge may *prefer* the position of an expert tribunal, but they are not bound to *defer* to it as a matter of law. To defer is to accept a position the reviewing court may not agree with, whereas to prefer is to positively accept the position of the decision-maker as providing guidance as to the correct legal outcome.

At first glance this may seem a distinction without a difference, but there is a nuanced difference. As has been explained above, correctness cannot, as a matter of law, include deference. Justice Stratas makes this point quite clear in *Maritime Broadcasting System Limited v Canadian Media Guild* stating:[32]

> […] I do not see Justice Evans as advocating a new standard of review, alongside correctness review and reasonableness review, called "respectful correctness" or "correctness with a degree of deference." *Dunsmuir* simplified the standard of review to two categories – a non-deferential one called correctness and a deferential one called reasonableness – and there is no room for us to introduce a new third one. Nor do I see Justice Evans as applying the correctness standard that is understood in the cases. Correctness review has always been review without any deference. "Correctness with a degree of deference" is a *non-sequitur*. It would be like describing a car as stationary but moving.[33] [emphasis added.]

If we were to indulge an interpretation of the jurisprudence on this issue which required deference to decision-maker expertise on correctness review, it would constitute an error of law whenever a reviewing court did not explicitly consider that expertise at the outset or explain why the court is more expert than the decision-maker, thus justifying court intervention. That would improperly limit the discretion of the reviewing court to conduct a wholesome correctness review. Indeed, this may inadvertently restore the "pragmatic and functional" approach through the backdoor, by requiring the reviewing court to weigh its subject matter expertise against that of the decision-maker below, albeit at the merits stage of the analysis. On the contrary, expertise as a matter of preference allows the reviewing court to consider the decision-maker's position alongside the position advanced by the other parties to the hearing, as well as the court's own interpretation. The distinction is that it is not bound to weigh the position of the expert decision-maker any differently than it treats other argument. This treatment of expertise can be differentiated from that on reasonableness review. The *Vavilov* majority makes clear that a properly conducted reasonableness review "should respect administrative decision makers and their specialized expertise, [and] should not ask how [the reviewing court] themselves would have resolved an issue…"[34] Therefore, a reviewing court that disregards expertise on reasonableness

[32] *Maritime Broadcasting, supra,* note 26.

[33] *Ibid* at para 60 where Justice Stratas is discussing *Re: Sound v Fitness Industry Council of Canada,* 2014 FCA 48 at para 42, [2015] 2 FCR 170.

[34] *Vavilov, supra* note 4 at para 75.

review can be said to have committed an error; whereas one that disregards it on correctness review cannot.

Some pertinent cases

Although there is very little jurisprudence on this issue which is available post-*Vavilov,* some of the older cases from a previous era in administrative law are instructive. One such case is *Northwood v British Columbia,* where Lambert JA dealt with the jurisdiction of the Forest Practices Board to release a report, which came down to a matter of statutory interpretation for which the standard of review was correctness.[35] Before deciding that the report fell within the Board's discretion, Justice Lambert described the process of correctness review:

> […] Almost all arguments about statutory interpretation in this Court, and indeed arguments about many other questions, consist of reasoned thinking supporting one view or the other. In the end, the judges tend not to say that one argument is correct and the other incorrect. They say that they adopt, accept, or prefer one argument to the other and give their opinions accordingly. <u>So, in the end, it is possible to give one argument greater weight than another in deciding which to prefer</u>. If an argument is made that deference on the interpretation of the statute should be given to those who are experts in its functioning, that does not mean that the standard of "correctness" is being abandoned. What it means is that deference is being given through acceptance of one of the arguments, which, in turn, <u>may decide</u> the balance between the competing arguments, in relation to applying the standard of "correctness". In such a situation, neither of the competing arguments need be categorized as "wrong", <u>but only one of them is preferred</u>. That one, but not the other one, then meets the standard of "correctness". And that argument <u>may be supported by, among other points, a degree of deference</u> to the opinion of the tribunal whose jurisdiction is in issue.[36] [emphasis added]

The use of the term "deference" in this passage is noteworthy. To the extent that Justice Lambert conceives of "deference", in the sense of the word as its used to connote some mandatory consideration,[37] it would conflict with Justice Stratas in *Maritime Broadcasting* as there is no "correctness with a degree of deference".[38] Regardless, it

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[35] *(Forest Practices Board)*, 2001 BCCA 141, [2001] BCJ No 365 [*Northwood*].

[36] *Ibid* at para 36.

[37] And this may indeed be what Justice Lambert means if we consider his comments in para 38 where he states "[…] it is my opinion that even on a "correctness" standard of review, very considerable deference ought to be given to the Forest Practices Board in choosing which of two "reasonable" arguments is to be preferred, where both arguments depend on an assessment of the intention of the Legislature[…]" It should also be noted that Justice Hall concurred in result, though made a point of repudiating Justice Lamberts comments on this issue, *ibid* at para 46. Respectfully, if this is the case, Justice Lambert is wrong in his analysis of this point, at least in light of now further developed jurisprudence.

[38] See *Maritime Broadcasting, supra* note 26 at para 60.

is possible to read them congruently once we consider the overall passage: Justice Lambert's use of the words "may" and "prefer", and the intent of the holding. The crux of the point made in *Northwood* is that certain decision-makers possess expertise in the interpretation of their enabling legislation, and by extension, discerning what their own purpose and function ought to be.[39] A reviewing court would be remiss to ignore that expertise entirely in their deliberation of the issue, although ultimately, the reviewing court itself *may* decide to afford it more weight, or, it *may* not.

There is at least one post-*Vavilov* case dealing directly with this issue: *Planet Energy (Ontario) v Ontario (Energy Board),* written by Justice Swinton for a unanimous panel of the Divisional Court.[40] *Planet Energy* was an appeal from a decision of the Ontario Energy Board, which found the appellant had contravened certain provisions of the *Energy Consumer Protection Act.*[41] The appellant maintained the Board had no jurisdiction to impose a sizeable administrative penalty due to the expiry of a limitation period.[42] The appellant argued the interpretation of the limitation provision was a pure question of law and the standard of review was correctness.[43] Justice Swinton rejected this argument, preferring to characterize it as a mixed question, and she also stated that ignoring the Boards expertise was a flaw in the appellants position.[44] On the applicability of expertise, Justice Swinton writes the following "[…] the Board is an expert and highly specialized tribunal that can assist the Court in the exercise of statutory interpretation by providing context and a consideration of the impact of various interpretation."[45] Notably, the limitation issue was not argued before the Board, and so the Court was being asked to consider it without it having been raised before the Board.[46] That said, "the impact of various interpretations" is only relevant insofar as it may frustrate the purpose of an Act, but that remains a question to be answered by courts, not decision-makers.

Ultimately, Justice Swinton declines to decide the issue, preferring instead to have the Board adjudicate the matter first. She writes the following:

> While the Court will ultimately review the interpretation of the Act on a standard of correctness, respect for the specialized function of the Board still remains important. One of the important messages in *Vavilov* is the need for the courts to respect the institutional design chosen by the Legislature when it has established an administrative tribunal (at para. 36). In the present case,

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[39] *Northwood*, *supra* note 35 at para 43.

[40] 2020 ONSC 598, [2020] OJ No 442(QL) [*Planet Energy*].

[41] *Ibid* at paras 1, 8–9 (Swinton J outlines the contravention of SO 2010, c 8, O Reg 389/10).

[42] *Planet Energy*, supra note 40 at para 2.

[43] *Ibid* at para 26.

[44] *Ibid*.

[45] *Ibid*.

[46] *Ibid.*

> the Court would be greatly assisted with its interpretive task if it had the assistance of the Board's interpretation respecting the words of the Act, the general scheme of the Act and the policy objectives behind the provision.[47]

Importantly, Justice Swinton reserves the discretion to decide the issue for the court. Insofar as Justice Swinton is holding the court would benefit from the Board's decision on the limitation issue, and not that they are bound to defer to it, this represents a coherent application of the spirit of the *Vavilov* decision.

Finally, *Borgel v Paintearth* is one example where a court seems to have used expertise, in the spirit as set out in *Vavilov,* in their application of the correctness standard.[48] In contrast with *Planet Energy,* where the court addresses expertise within correctness review head on, the court in *Borgel* considered the decision-maker's position in the context of a fulsome correctness review. In *Borgel,* the Alberta Court of Appeal determined that an interpretation of "municipality" in the *Municipal Government Act,* by the Subdivision and Development Appeal Board, was correct.[49] In doing so, the court conducted its own statutory interpretation and considered excerpts from the Alberta Hansard alongside the interpretation advanced by the Board below by echoing the Board's reasons as well as similar interpretations by other tribunals that deal with the *Act*.[50]

Conclusion

The Supreme Court in *Vavilov* simplified the standard of review selection process, but in doing so, the Court signaled a marked departure from the *status quo* for many decision-makers, who are subject to statutory appeal clauses, because their decisions on questions of law are now reviewed for correctness. Many of those decision-makers have considerable expertise in their respective realms that would have previously seen them reviewed for reasonableness. Although Justices Abella and Karakastanis are right to note this represents, in some respects, a move away from deference for administrative decision makers, it does not mean their expertise is automatically irrelevant on correctness review.

Put simply, reviewing courts are free to consider the position of a decision-maker below in a way that entails a recognition of that decision-maker's subject-matter expertise, if it so exists. In fact, if the decision maker is uniquely expert in the subject-matter then due consideration should be given to their position and, in certain cases, an explanation of why that position was rejected, or why it was accepted, may be warranted. However, the reviewing court is still bound to undertake its own analysis

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[47] *Ibid* at para 31.

[48] *(Subdivision and Development Appeal Board)*, 2020 ABCA 192, [2020] AJ No 549(QL) [*Borgel*].

[49] *Ibid* at paras 23–24.

[50] *Ibid* at paras 19–23.

of the legal question and provide a reasoned response. Where the question of law is one of statutory interpretation, the reviewing court is required to apply the modern approach from *Rizzo* and conduct a wholesome analysis of the issue therein;[51] it should not automatically *defer* to decision-maker's analysis, but it may well *prefer* that analysis to alternative ones. *Borgel* and *Planet Energy* are helpful illustrations of this process in action.[52] So, in the end, it would not be an error for a reviewing court to disregard the decision-maker's position or expertise and to do exactly what it is empowered to do: substitute the decision-maker's views for its own. But it may also account for any institutional expertise and weigh it accordingly.

[51]*Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27, [1998] SCJ No 2(QL).

[52] *Borgel*, *supra* note 48 at para 24.