S.C.C. File No. 39340

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

BETWEEN:

LAW SOCIETY OF SASKATCHEWAN

APPELLANT
(Respondent)

- and -

PETER V. ABRAMETZ

RESPONDENT
(Appellant)

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF SASKATCHEWAN, LAW SOCIETY OF ALBERTA, LAW SOCIETY OF MANITOBA, COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO, COLLEGE OF NURSES OF ONTARIO, ONTARIO COLLEGE OF PHARMACISTS AND ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO, FEDERATION OF LAW SOCIETIES OF CANADA, ALBERTA SECURITIES COMMISSION AND BRITISH COLUMBIA SECURITIES COMMISSION, BARREAU DU QUÉBEC and CANADIAN ASSOCIATION OF REFUGEE LAWYERS

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FACTUM OF THE INTERVENER ATTORNEY GENERAL OF SASKATCHEWAN

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This appeal is an opportunity to provide a more consistent and predictable approach to reviewing administrative decisions for procedural fairness.

2. This Court's decision in *Vavilov*[1] accomplished two things. First, it clarified the approach to determining the appropriate standard of review, establishing a presumption that the standard is reasonableness. Second, it provided a roadmap for how to apply the reasonableness standard.

3. The first aspect has no application to procedural fairness issues. As *Vavilov* appropriately recognized, the standard of review analysis applies only to the substantive merits of the decision.

4. However, the second aspect of *Vavilov* is relevant to procedural fairness issues.

5. In Saskatchewan's view, the question is not whether deference can apply in the review of procedural fairness issues, but how. Courts would benefit from updated guidance on how to analyze whether a particular decision was fair.

6. Saskatchewan submits that the roadmap established in *Vavilov* can be usefully translated to review of procedural fairness issues, including delay.

7. In this case, the proposed framework would begin by examining the procedures actually selected by the Appellant Law Society. The Court should not create its own yardstick for what constitutes delay amounting to an abuse of process. Rather, it should examine each of the Law Society's procedural choices with "respectful attention",[2] seeking to understand the reasoning process followed by the Law Society in adopting its chosen procedures.

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[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*].

[2] *Vavilov* at para 84.

PART II – POSITION OF THE ATTORNEY GENERAL OF SASKATCHEWAN

8. Saskatchewan takes no position on the merits of this appeal, including whether there was delay amounting to an abuse of process. Rather, its submissions will focus on the proper approach to reviewing issues of procedural fairness, including, but not limited to, delay.

PART III – ARGUMENT

A. The Standard of Review

9. In *Vavilov*, this Court clarified that procedural fairness issues do not require a standard of review analysis.[3]

10. This clarification makes sense. Procedural fairness issues have long been recognized as an awkward fit with a standard of review analysis.[4] Rather, the ultimate question is whether the decision making process was fair.

11. Despite this Court's pronouncement in *Vavilov*, confusion on this point persists.

12. In *Abrametz*, the Court of Appeal held that delay amounting to abuse of process is "a question of law, whether in and of itself as a question of central importance to the legal system or because it is a matter of procedural fairness", and therefore reviewable for correctness. [5]

13. The Saskatchewan Court of Appeal is not alone in its approach. Many other appellate courts have continued to apply a correctness standard of review to procedural fairness issues, even after *Vavilov*.[6]

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[3] *Vavilov* at para 23; see also para 16.

[4] See *e.g. Eagle's Nest Youth Ranch Inc. v. Corman Park (Rural Municipality #344)*, 2016 SKCA 20 at para 20; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paras 54-55.

[5] *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81 at para 105 [*Abrametz*].

[6] *South East Cornerstone School Division No. 209 v. Oberg*, 2021 SKCA 28 at para 33; *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission)*, 2021 BCCA 67 at para 57; *Baron Real Estate Investments Ltd. v Edmonton (City)*, 2021 ABCA 64 at para 17; *6586856*

14. On the other hand, as noted by the Appellant, courts have often afforded deference to administrative decision makers on their application of the *Blencoe* principles.[7] It is unclear whether this approach will continue in a post-*Vavilov* administrative world.

15. To remove any lingering doubt, this Court should reiterate that the standard of review analysis does not apply to procedural fairness issues. Instead, the question a court should ask is whether the decision was made fairly in the circumstances.

B. A Modern Approach to Review of Procedural Fairness

16. This appeal is an opportunity to provide guidance on how to review administrative decisions for procedural fairness.

17. Saskatchewan submits that the approach to review for procedural fairness should be informed by the approach to substantive review established in *Vavilov*.

18. The rule of law does not create a hierarchy between procedural fairness and substantive errors. Courts must supervise for both types of error, and supervision is equally important in both contexts. It would be of little comfort to a litigant to be told that a court safeguarded their procedural rights while rubber-stamping the decision maker's analysis of their substantive concerns.

19. Indeed, deference is granted on substantive issues that are extremely important to the individual. On an application for *habeas corpus*, the lawfulness of the detention will

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Canada Inc. (Loomis Express) v. Fick, 2021 FCA 2 at para 60; *Girouard v. Canada (Attorney General)*, 2020 FCA 129 at para 38.

[7] Appellant's Factum at para 24.

depend, in part, on an assessment of "reasonableness".[8] Similarly, the *Doré* framework involves a measure of deference in the context of balancing *Charter* rights.[9]

20. Fortunately, as this Court recognized in *Vavilov*, affording deference to a decision maker "is not incompatible with the rule of law".[10] Review for reasonableness is an approach "meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process". It is not a "rubber-stamping" process – it remains a robust form of review.[11]

21. If, as this Court has confirmed, deference on substantive issues is consistent with the rule of law, then there is no principled reason that deference cannot be incorporated into review for procedural fairness.

22. Procedural fairness issues do not engage the rationale for correctness review that was articulated in *Vavilov*. Whether a tribunal has acted fairly in the specific circumstances is not a general question of law of central importance to the legal system that would require "a single determinate answer".[12] Indeed, even if the appellate standards of review applied to procedural fairness issues, the issue of whether a particular procedure resulted in unfairness would often be a question of mixed fact and law.

23. Given the vast breadth of administrative decision makers, it is essential that the "concept of procedural fairness [remains] eminently variable."[13] What constitutes procedural fairness will depend on the context of the administrative scheme and the facts of each case.

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[8] *Mission Institution v. Khela*, 2014 SCC 24 at paras 52-53.

[9] *Doré v. Barreau du Québec*, 2012 SCC 12 [*Doré*]. *Doré* was not altered by *Vavilov*: see *Vavilov* at para 57.

[10] *Vavilov* at para 32.

[11] *Vavilov* at para 13.

[12] *Vavilov* at para 62.

[13] *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at p. 682, as cited in *Vavilov* at para 77.

24. Legislatures frequently prescribe procedural requirements, including hearing formats,[14] disclosure obligations,[15] as well as timelines for commencing proceedings,[16] conducting hearings,[17] and rendering decisions.[18]

25. Where the legislature has not prescribed procedural requirements, the implication is that it intended to provide the decision maker with flexibility to choose its procedures.

26. Currently, the content of the duty of fairness is decided by reference to the well-known *Baker* framework. The fifth *Baker* factor incorporates a degree of deference into determining the content of the duty of fairness.[19]

27. In *Baker*, this Court recognized that other factors may also be important, "particularly when considering aspects of the duty of fairness unrelated to participatory rights."[20]

28. The content of the duty of fairness does not determine whether delay in a given case amounts to an abuse of process. That situation is governed by *Blencoe*.

29. Both *Baker* and *Blencoe* were decided over 20 years ago, prior to the sea changes brought about by *Dunsmuir*[21] and *Vavilov*. Lower courts would benefit from clarification on how *Baker* and *Blencoe* interact with *Vavilov*.

30. The contextual factors considered in *Baker* and *Blencoe* have some parallels to the former contextual analysis of standard of review, which was conclusively rejected by this Court

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[14] See *e.g. The Securities Act, 1988*, SS 1988-89, c S-42.4, s. 9; *The Saskatchewan Assured Income for Disability Regulations, 2012*, RRS c S-8 Reg 11, ss. 39(9), 39(9.1), 39(9.2), 39(9.4), 39(9.5), and 39(9.6).

[15] See *e.g. The Correctional Services Regulations, 2013*, RRS c C-39.2 Reg 1, ss. 60 and 61.

[16] See *e.g. The Provincial Sales Tax Act*, RSS 1978, c P-34.1, s. 43.3; *The Victims of Crime Act, 1995*, SS 1995, c V-6.011, s. 17.4(1).

[17] See *e.g. The Correctional Services Regulations, 2013*, RRS c C-39.2 Reg 1, ss. 42 and 59.

[18] See *e.g. The Saskatchewan Employment Act*, SS 2013, c S-15.1, ss. 4-7(1) and 6-116(1); *The Correctional Services Regulations, 2013*, ss. 47, 48, 49, 74 and 75.

[19] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 27 [*Baker*].

[20] *Baker* at para 28.

[21] *Dunsmuir v New Brunswick*, 2008 SCC 9.

in *Vavilov*. As this Court recognized, the contextual analysis "proved to be unwieldly and offered limited practical guidance for courts attempting to assess an administrative decision maker's relative expertise",[22] thereby undermining access to justice.[23]

31. For similar reasons, *Baker* and *Blencoe* may not fully achieve the objectives articulated by this Court in *Vavilov*. Saskatchewan submits that the legal tests provided by those cases offer limited practical guidance for how to determine whether a specific procedural decision is fair. As a result, it is difficult for litigants and decision makers to predict whether a given procedure (or timeline) will withstand judicial scrutiny.

32. Often, it is inefficient to place the emphasis of review on the preliminary exercise of determining the content of the duty of fairness. Ultimately, the important question is whether the procedure actually chosen was fair. This question will be the focus of Saskatchewan's proposed framework.

C. The Roadmap

33. Following *Vavilov*, it may be more appropriate to recognize that fairness, like reasonableness, "remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court."[24] However, whether a particular decision is fair "will always depend on the constraints imposed by the…context of the particular decision under review." [25]

34. In *Vavilov*, this Court provided significant and valuable explanations on how to conduct substantive review for reasonableness:[26]

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[22] *Vavilov* at para 28.
[23] *Vavilov* at para 21.
[24] *Vavilov* at para 89.
[25] *Vavilov* at para 90.
[26] *Vavilov* at paras 73-142.

(a) "A reviewing court must begin its inquiry into the reasonableness of a decision "by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion". [27]

(b) Where formal reasons are not provided, the decision maker's reasoning may be apparent from the record and context. If it is not, the analysis will necessarily focus on the outcome rather than the reasoning process. Review of the latter type is no less robust, but simply "takes a different shape". [28]

(c) Judges "should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons". This process may reveal that "an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision". [29]

(d) Reasons must be read "in light of the history and context of the proceedings in which they were rendered" – including, for example, "the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body". [30]

(e) The burden is on the party alleging unreasonableness to show "sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency". [31]

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[27] *Vavilov* at para 84.
[28] *Vavilov* at paras 136-138.
[29] *Vavilov* at para 93.
[30] *Vavilov* at para 94.
[31] *Vavilov* at para 100.

(f) Unreasonableness may be established by showing either "a failure of rationality internal to the reasoning process" or that the decision is "untenable in light of the relevant factual and legal constraints that bear on it".[32]

35. A similar roadmap would be useful in the context of procedural fairness issues, including, but not limited to, issues of delay.

36. Saskatchewan submits that the framework for substantive review can be translated to the procedural fairness context in the following manner:

(a) A reviewing court should begin its inquiry into procedural fairness by examining each of the decision maker's procedural choices with respectful attention, seeking to understand why the decision maker proceeded as it did. In the present case, the Court would consider why the Law Society made each of its specific procedural choices, such as the decision to impose an interim suspension on Mr. Abrametz, or the decision to bifurcate its investigation of tax evasion from the charges that had already been brought.

(b) Where formal procedural rulings are not made, the rationale for the chosen procedure may be apparent from the record and context. The decision maker may also be permitted to explain the record and respond to issues raised for the first time on judicial review.[33] Where the decision maker's reasoning is not apparent, the reviewing court's analysis will necessarily focus on the result of the procedural choice, rather than the reasoning process behind it.

(c) Judges should be attentive to the application by decision makers of specialized knowledge of the administrative regime in which they operate. A procedure that might be puzzling or counterintuitive on its face might accord with the practical realities of the relevant administrative regime, and may represent a reasonable approach given the consequences and the operational impact of the procedural choices. As argued by the Intervener Ontario Health Colleges, delay is more

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[32] *Vavilov* at para 101.

[33] *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at para 68.

common in investigations that relate to alleged sexual abuse, due to complainants' reluctance to report and their need for greater accommodations in order to participate in the process. Furthermore, as noted by the Intervener Law Society of Manitoba, professional regulators may occasionally encounter emergency situations that require redeployment of their finite resources.

(d) Procedural choices should be assessed in light of the history and context of the proceedings in which they were rendered – including, for example, the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that inform the decision maker's procedure, and the procedures that have been employed in similar situations in the past. For example, a certain level of delay may be justified if it was caused by adjournment requests from the affected individual. Conversely, the same degree of delay may be unfair if the individual had repeatedly expressed an urgent need to proceed promptly due to personal prejudice.

(e) The burden is on the party alleging unfairness to show sufficiently serious shortcomings in the procedure such that it cannot be said to satisfy the duty of fairness.

(f) Unfairness can be established by showing either unfairness internal to the procedures chosen or that these procedures are unfair when viewed in light of the relevant factual and legal constraints that bear on them. For example, a decision not to hold an oral hearing would certainly be unfair if the decision maker's enabling statute required oral hearings. Alternatively, the same decision may be unfair if the legislation does not require an oral hearing, but the affected individual is unable to meaningfully participate through written submissions.

37. Saskatchewan submits that this proposed framework would respect the legislative delegation of procedural choices (including procedural timelines) to decision makers, improve predictability and consistency, and ultimately promote access to justice.

PART IV – COSTS

38. The Intervener Attorney General of Saskatchewan does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of September 2021.

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PART VII – TABLE OF AUTHORITIES & LEGISLATION

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