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Writing Reasonable Decisions Without a Checklist

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Outline

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- “I’m writing for a tribunal, not a court – do I have to write like a judge?”
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How Courts Review Tribunal Decisions, and the role of Reasons and Reasonableness

"[T]he relationship between the state and the individual must be regulated by law."
Reference re Secession of Quebec, [1998] 2 SCR 217 at para 71.

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Why is the “Standard of Review” such a difficult issue?

Selecting the appropriate “standard of review” reflects the effort to reconcile the tension between:

- the intention of the legislature to appoint a particular decision-maker, (**the foundational constitutional principle of democracy**), and
- the **foundational constitutional principle of the rule of law** and the constitutional role of the courts.

See *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para. 27.

How do courts review tribunal decisions?

- In 2019, the Supreme Court released its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*.
- This decision was most important
  a) for giving guidance on determining the ***standard of review*** – which refers to the degree of deference courts should show to the decisions of administrative bodies, and
  b) for giving guidance on **how courts should apply a standard of "reasonableness."**

Photo: https://thewalrus.ca/five-supreme-court-cases-that-could-reshape-canadian-law/

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Selecting the Standard of Review Post-Vavilov

1) The presumptive standard of review (for substantive issues) is reasonableness.

2) The presumption can be rebutted in the following circumstances:

(in summary form only)

(a) When legislative intention demonstrates a different standard of review

- the statute expressly prescribes a standard (not common) or provides a right of appeal (quite common).

(b) When the rule of law requires correctness

- some constitutional questions;
- general questions of law of central importance to the legal system as a whole;
- jurisdictional boundaries between two or more administrative bodies.

Why are reasons important?

Providing reasons is consistent with an “ethos of justification”, where the rule of law requires the exercise of public power to be justified in terms of rationality and fairness – Justice Beverley McLachlin (as she then was).

“The Role of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1999) 12 Canadian Journal of Administrative Law and Practice 171 at 174.

Why are reasons important? (cont'd)

Reasons:

- ✓ justify the decision in an understandable manner;
- ✓ encourage more careful decision-making that provides a rationale that is defensible in respect of the facts and law;
- ✓ facilitate meaningful judicial review;
- ✓ disclose expertise, experience, and specialized knowledge that a reviewing court should respect, and
- ✓ illustrate the outcome is also reasonable when more than one reasonable result is possible.

See Colleen M. Flood & Paul Daly, eds, *Administrative Law in Context*, 4th ed, (Toronto: Emond Montgomery Publications, 2022) at 97-98.

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Why is reasonableness important?

- To state the obvious – to survive appeal or judicial review -- a decision must be reasonable.
- **If the decision is unreasonable, it is also incorrect!** A reasonable decision might still be incorrect, but an unreasonable decision will certainly be incorrect.
  - see *e.g.*, *Attorney General of Ontario v Information and Privacy Commissioner of Ontario and Canadian Broadcasting Corporation*, 2024 SCC 4 at para. 16.
- A review for "reasonableness" is concerned with the existence of **justification, transparency and intelligibility**. Does the decision fall within **a range of defensible outcomes?**
  - *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47.

Justification, Transparency and Intelligibility

- **Justification –** the need for the decision-maker to provide a rational basis for their decision, including coherent and logical reasoning.
- **Transparency –** requires the decision-making process to be conducted in a manner that allows a reviewing court to see how the decision was reached – including clear reasons for decision.
- **Intelligibility –** means the decision must be understandable and make sense to an informed observer.

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“I’m writing for a tribunal, not a court – do I have to write decisions like a judge?”

It’s about substance, not style

- When the standard of review is reasonableness, the courts want to defer to the tribunal, since it’s the legislature’s choice of decision-maker (and this would be consistent with the foundational principle of democracy).
- The courts don’t want to interfere unless the rule of law demands it because the decision isn’t justified.
- **Therefore, there’s no need to write like a judge – as long as the decision is justified**.

Justified, not just justifiable

At the same time, it is important to appreciate that it is not enough for a court to be satisfied that the **outcome** of the decision is justified or justifiable.

The decision **itself must justify the outcome to those subject to it**. See *Vavilov,* at para. 86:

> …[I]t is not enough for the outcome of a decision to be ***justifiable***. Where reasons for a decision are required, the decision must also be ***justified***, by way of those reasons, by the decision maker to those to whom the decision applies …. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis. [Italics in original, underlining added.]

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Per Justice Danyliuk, decisions don't need to be formal or elaborate, but they need to be justified:

I fully appreciate these are summary hearings, most often held with self-represented parties. I do not expect the parties to be Perry Mason, nor the hearing officers to render decisions akin to those of the Supreme Court of Canada. But out of basic fairness, both the litigants and a reviewing court must be able to understand the hearing officer's path of reasoning.

Lavendar v Saskatoon Real Estate Services Inc., at para 20, referring to hearings before an Office of Residential Tenancies hearing officer.

Is there a “checklist” for writing reasonable decisions?

Vavilov, for the majority: There is no checklist for reasonableness review

- Although there are specific elements that can be considered when considering the reasonableness of a decision, they "are not a checklist" and should not result in "line-by-line" reasonableness review (see paras. 106-07 and 145).
- **Instead, these are contextual considerations that should be taken together to determine whether a decision is justified or whether they may cause a court to lose confidence in the outcome** (paras 106-07).

Form and Detail Can Be Flexible

Reasons need not "include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred."

- See *Vavilov*, at para. 91, quoting the Court's earlier decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15.

- ✓ Focus on justification, not perfection.
- ✓ Respond to arguments, statutory provisions, and jurisprudence **central** to justifying the decision.

Form and Detail Can Be Flexible (cont'd)

Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge …. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons…. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

- *Vavilov*, para 92

Form and Detail Can Be Flexible (cont'd)

"Administrative decision-makers are not required to engage in a formalistic statutory interpretation in every case…" and written reasons may "look quite different from that of a court".

- *Vavilov*, para 119.

What makes a decision unreasonable?

Fundamental flaw #1: A lack of internally coherent reasoning

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Internally Coherent Reasoning

Reasonableness review is not a “line-by-line treasure hunt for error” but there may not be fatal flaws in the overarching logic, or an irrational chain of analysis.

Fatal flaws include:

- ✓ conclusory reasons;
- ✓ logical fallacies such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise: the decision doesn’t “add up”
  - *Vavilov,* at paras. 102-104.

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What are “conclusory reasons”?

Vavilov at para. 102:

> Reasons that “simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion” will rarely assist a reviewing court in understanding the rationale underlying a decision and “are no substitute for statements of fact, analysis, inference and judgment”: R. A. Macdonald and D. Lametti, “Reasons for Decision in Administrative Law” (1990), 3 *C.J.A.L.P.* 123, at p. 139

Yeoman v Universal Realty Ltd., 2024 SKKB 101

- A tenant brought a statutory appeal under *The Residential Tenancies Act, 2006* [RTA].
- The hearing officer had determined that the tenant had overheld and that an Order should be made to place the Landlord in possession.
- The appeal was allowed on the grounds of inadequate reasons.

Yeoman v Universal Realty Ltd., 2024 SKKB 101

- Justice Danyliuk stated that the decision gave him “no idea” of the evidence or arguments” that had been made. This is unacceptable, because it is like a high-stakes poker game (the tenant’s shelter). “Someone is deciding who wins the pot, but no cards have to be shown. The ‘house’ is saying ‘Trust me, I’ll tell you when you win’. Or lose.” (paras 13-14)
- This concern is not new – various judges have been ruling on the inadequacy of similar decisions by hearing officers and unfairness that flows from them for some time, to no avail. “This is unacceptable. This has to stop.” (para 16).

Yeoman v Universal Realty Ltd., 2024 SKKB 101

25 I repeat what I noted at para. 4 of *Lucier* [*v Saskatoon Real Estate Services Inc.*, 2023 SKKB 259]:

> [4] ... I fully appreciate these are summary hearings. Hearing officers are not expected to write *War and Peace* on every matter heard. Still, sufficient reasons must be articulated to let the parties know why they won or lost, and to permit meaningful appellate review. See *R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869.

Yeoman v Universal Realty Ltd., 2024 SKKB 101

29 Members of this Court have previously indicated that compliance with the doctrine of providing adequate reasons is not going to be onerous for hearing officers in most cases. The evidence and arguments heard should be summarized. The hearing officer should state which evidence is accepted or rejected, and why. The hearing officer should delineate any factual findings made. The hearing officer should apply the law to that factual matrix and come to transparent conclusions which explain to the litigants why the decision is as it is, and which permit meaningful appellate review.

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Yeoman, para 29 – a quasi-checklist?

- ✓ The evidence and arguments heard should be summarized;
- ✓ the decision should state which evidence is accepted or rejected, and why;
- ✓ the decision should delineate any factual findings made;
- ✓ the decision should apply the law to that factual matrix; and
- ✓ come to transparent conclusions which explain to the litigants why the decision is as it is, and which permit meaningful appellate review.

Yeoman v Universal Realty Ltd., 2024 SKKB 101

In addition to inadequate reasons overall, an additional standalone ground for overturning the decision was s. 70(6) of the RTA, which states:

> **70**(6) After holding a hearing pursuant to this section, a hearing officer may make any order the hearing officer considers **just and equitable in the circumstances**, including all or any of the following: […][emphasis added]

The hearing officer said only the following about this provision:

> [9] Section 70(6) requires that I consider whether it is just and equitable to issue an order for possession. The landlord has complied with the Act, and there is no evidence of bad faith on the part of the landlord. I am satisfied that an order for possession accords with justice and equity.

Yeoman v Universal Realty Ltd., 2024 SKKB 101

Justice Danyliuk stated that this paragraph of the decision is similar to the “lip service” to this statutory requirement that the Court has seen from other hearing officers. It lacks any “actual, meaningful analysis” (para. 40) but seems to be a “rote statement” (para. 41).

It also makes an error of law when it implies that it us up to the tenant to prove bad faith (para. 42).

The hearing officer “failed miserably at providing cogent reasons” for why granting the relief requested was just, or equitable (para 54.).

Yeoman v Universal Realty Ltd., 2024 SKKB 101

This and similar decisions have also been the subject of academic criticism – see Adam P. Zajdel, "A Trail of Just and Equitable Breadcrumbs in ORT Eviction Decisions: A Case Comment on *Lavendar v Saskatoon Real Estate Services Board"* (2024) 87:2 *Saskatchewan Law Review*.

The author points out that a decision that fails to conduct a justice and equity analysis is "easily appealable". Accordingly, even if one party fails to appear at the hearing, the other party would be well-advised to urge hearing officers to consider this issue and to offer adequate reasons (*ibid* at 109).

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What makes a decision unreasonable?

Fundamental flaw #2: a failure to justify in the context of legal and factual constraints

Factual and Legal Constraints
(And remember – this is not a checklist)

- ✓ 1.The governing statutory scheme
- ✓ 2. Other statutory or common law
- ✓ 3. Principles of statutory interpretation
- ✓ 4. Evidence before the decision maker
- ✓ 5. Parties' submissions
- ✓ 6. Past practices and past decisions
- ✓ 7. Potential impact on individual to whom the decision applies

1. The governing statutory scheme

"As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given…" (*Vavilov*, at para. 108).

- Statutory restrictions on the exercise of discretion must be complied with.
- Conversely, "where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion" (*ibid*).

2. Principles of statutory interpretation

- A court shouldn't "ask itself what the correct decision would have been" *(Vavilov,* para. 116).
- Decision-maker should apply "modern principle" and have regard to "text, context and purpose" (para. 118).
- Omissions not fatal unless the omitted aspect causes reviewing court to lose confidence in the outcome (para 122).

Vavilov turned on the reasonableness of an interpretation

- Alexander Vavilov was born in Canada in 1994. While living with his parents in the United States in 2010 under the surname “Foley” he (and his brother) learned his parents were Russian spies when the FBI arrested them.
- The Registrar cancelled Vavilov’s citizenship because even though he was born in Canada his parents were neither citizens nor permanent residents and were employed by the Russian government.

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ISSUE:

Was it reasonable for the Registrar to find that Vavilov’s parents had been “other representatives or employees in Canada of a foreign government” within the meaning of s. 3(2)(a) of the Citizenship Act?

Vavilov turned on the reasonableness of an interpretation

- If s. 3(2)(a) is read in isolation the Registrar's interpretation (based on a report prepared by a junior analyst) could be reasonable. However, this ignored the immediate statutory ***context*****.**
- Section 3(2)(c) provided "clear support for the conclusion that all of the persons contemplated by s. 3(2)(a) — including those who are "employee[s] in Canada of a foreign government" — must have been granted diplomatic privileges and immunities in some form" (para. 76).
- The analyst also ignored principles of customary international law (with which Canadian legislation is presumed to comply with), did not consider Parliament's ***purpose*** for enacting the section, **and did not respond to Mr. Vavilov's submissions on this issue.**

3. Other statutory or common law;

- Generally, an administrative decision-maker must apply applicable statutory and common law. Court precedents on the issue in dispute will be a constraint on what is considered reasonable.
- Any departure from binding precedent must be adequately explained – e.g. if the court's interpretation wouldn't work in the administrative context.
- Sometimes it will be reasonable to adapt a common law or equitable doctrine to a particular administrative context.

4. Evidence Before the Decision Maker

- “The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them.” (para. 126)
- The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it *(ibid).*

5. Parties' Submissions

[127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. …. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually ***listened*** to the parties. [emphasis in original]

- This does not require a decision maker to respond to every argument or line of analysis because this would have a "paralyzing effect" (para. 128).
- At the same time, drafting reasons with care can alert the decision maker to gaps or flaws in reasoning (para. 128).
- Recall that in *Vavilov* a failure to respond to central submissions played a role in the finding of unreasonableness. See also the later decision of *Mason v Canada (Citizenship v Immigration)*, 2023 SCC 21 at paras 86-97 (the Immigration Appeal Decision failed to consider important submissions relating to the statutory context).

6. Past Practices and Past Decisions

- Not every inconsistency threatens the rule of law (para. 129).
- Where a decision-maker departs from longstanding practices or established internal authority it bears the justificatory burden (para. 131).
- Therefore, departure from established practice or internal authority cries out for *justification*.

7. Impact of the Decision on the Individual

- Central to justification is the perspective of the individual or party over whom authority is being exercised *(Vavilov,* para. 133).
- The "principle of responsive justification" applies to decisions including those that threaten an individual's life, liberty, dignity or livelihood *(ibid*).
- The reasons "must reflect the stakes" *(ibid*). This was underlined in the Supreme Court's later decision in *Mason* at para 81 (deportation from Canada would have serious consequences).
- This element played a role in *Yeoman*, since the judge observed at para. 15 that this was "…a quasi-judicial hearing involving a matter as essential as shelter. Food, clothing, shelter - the essentials for civilized people to live. That the stakes are high for tenants on these appeals is beyond dispute."

Conclusion

To write a reasonable decision, <u>there's no need</u>:

- to write like a judge
- for a checklist
- to respond to every argument

Reasonable decisions:

- will be justified
  - based on logical and rational reasoning; and
  - in light of legal and factual constraints;
- will be responsive to central arguments and the impact of the decision;
- should be checked for justification, transparency and intelligibility.

Thank you!

Questions?