International Municipal Lawyers Association 2021Virtual IMLA in Canada Seminar

Applying Vavilov Planning Decisions: Lessons Learned

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Today's Menu

- A New Standard of Review
- Assessment and Planning Appeal Board
- Judicial Reviews (4 cases)

Before *Vavilov*

Benevolent Construction Doctrine

Shell Canada Products Ltd. v. Vancouver (City), 1994 CanLII 115 (S.C.C.), see dissent by Justice McLachlin

114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), 2001 SCC 40 (CanLii), par. 23

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), 2004 SCC 19 (CanLII), par 16

2 Stage Analysis

1) Municipal Powers are Interpreted Strictly
   - Courts better poised to determine extent of authority
   - (correctness)

2) Municipal Decisions are Interpreted Broadly
   - Councils are better positioned to decide what is in the best interest of their community
   - (reasonableness)

Minister of Citizenship and Immigration v. Alexander Vavilov, 2019 SCC 65 (*Vavilov*)

Reasonableness Standard

Minister of Citizenship and Immigration v. Alexander Vavilov, 2019 SCC 65 (*Vavilov*)

- Presumption of Reasonableness
  - Outcome
  - Process

Vavilov, par. 82

Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law [...].

Vavilov, par. 83

It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. […].

Vavilov, para. 17

Rebuttal of Reasonableness Presumption

1) Legislature Prescribes standard
2) Rule of Law requires correctness
   - constitutional questions,
   - general questions of law of central importance to the legal system as a whole
   - questions regarding jurisdictional boundaries between two or more administrative bodies

REASONABLENESS

The Flaws

1) Internally Coherent Reasoning

Minister of Citizenship and Immigration v. Alexander Vavilov, 2019 SCC 65

"… the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up". (at par. 104)

REASONABLENESS

The Flaws
2) Legal and Factual Constraints

Minister of Citizenship and Immigration v. Alexander Vavilov, 2019 SCC 65

a) Governing Statutory Scheme
b) Other Statutory or Common Law
c) Principles of Statutory Interpretation
d) Evidence before the Decision Maker
e) Submissions of the Parties
f) Past Practices and Past Decisions
g) Impact of the Decision on the Individual
h) Absence of Reasons

Remedies

The merry-go-round (paras. 140, 142)

Minister of Citizenship and Immigration v. Alexander Vavilov, 2019 SCC 65

- … the administration of justice requires intervention to ensure expedient and cost-effective decision-making
- … An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations…

Assessment and Planning Appeal Board

New Brunswick's Administrative Tribunal

- *Community Planning Act* (S.N.B. 2017, c.19)
- *Assessment and Planning Appeal Board Act* (R.S.N.B. 2011, c.114)
- *Heritage Conservation Act* (S.N.B. 2010, c. H-4.05)

Statutory Appeals in Planning

- Property owner
  - misapplication of the Act
  - special or unreasonable hardship
  - unreasonable refusal of variance
- Third party
  - misapplication of the Act
  - special or unreasonable hardship on land, building or structure
- Standards applied to non-conforming uses or proposed cessation
- Refusal to allow subdivision of land resulted in misapplication of the Act

Statutory Appeals in Planning

- Authority
  - Dismiss, vary or revoke Refer a matter back and provide directions
  - May allow an appeal if by-law provision is not allowed by the Act

First Matter

SNBSC v Brown, Groulx, unreported SJM-30-2020

Judicial Review of Guy Groulx v. Southwest NB Service Commission & Browne (TP), 2020 NBAPAB 3 (CanLII)

SNBSC v Brown, Groulx, unreported SJM-30-2020

Judicial Review

- Brownes had applied for 3 variances
  1. To allow their single-family dwelling be used to provide sleeping accommodation for the traveling public with a second separate entrance;
  2. To allow for the installation of a walkway and driveway; and,
  3. To allow their shed be placed within five (5) feet of their rear yard lot line.
- These variances were approved by the Commission's Planning Review and Adjustment Committee (PRAC) subject to certain conditions.
- Groulx appealed


38 Ernest St
St. Andrews, New Brunswick
Google
Street View
Expand
Augustus St
Patrick St
Google


38 Ernest St
St. Andrews, New Brunswick
Google
Street View
Expand
Google


50
Ernest St
318
45
38
Ernest St
323

Assessment and Planning Appeal Board decision

Guy Groulx v. Southwest NB Service Commission & Browne (TP), 2020 NBAPAB 3 (CanLII),

- first variance – misapplication
  - PRAC erred in classifying the structure as a single-family dwelling, as opposed to a converted dwelling and that an Air B&B is not a permitted use in the zone
- second variance - it had been resolved
- third variance - addressed by compromise

SNBSC v Brown, Groulx, unreported SJM-30-2020

Judicial Review

ARGUMENTS

1) Lacking internal coherence
2) Governing Statutory Scheme
3) APAB Lacked Impartiality
4) Lack of Evidence before APAB
5) Absence of Reasons (from dissent)

SNBSC v Brown, Groulx, unreported SJM-30-2020

Judicial Review

[14] The Applicant states that the APAB overstepped its bounds in finding, as it did, that Airbnbs were not a permitted use within the zone. I agree. The determination as to what will be permitted is not within the purview of the APAB. As stated by the Applicant in its brief at para. 28:

> **Simply put, council decides by way of adopting its zoning by-laws what uses are allowed, and what uses are not allowed. The PRAC can then vary uses and dimensional standards and the Board can play its oversight role.**

[15] In my view, the APAB's finding that an Airbnb is not a permitted use is not a finding that it legitimately can make, not to mention it does not seem to have been a question before it. Such a finding is not grounded in legislative authority.

SNBSC v Brown, Groulx, unreported SJM-30-2020

Judicial Review

[16] As to the issue of the APAB's finding that 'a compromise' can be enforced, I also find that the language used by the APAB in making that assertion is inconsistent with its remedial authority. The remedial authority is set out as follows in the *Act*:

> **121**(2)With respect to an appeal under paragraph 120(1)(b), the Board may
>
> (a) dismiss it,
>
> (b) allow it by revoking the approval or the permit, or
>
> (c) attach any terms and conditions to the approval or the permit as the Board considers necessary to ensure consistency with this Act or a by-law or regulation under this Act.

SNBSC v Brown, Groulx, unreported SJM-30-2020

Judicial Review

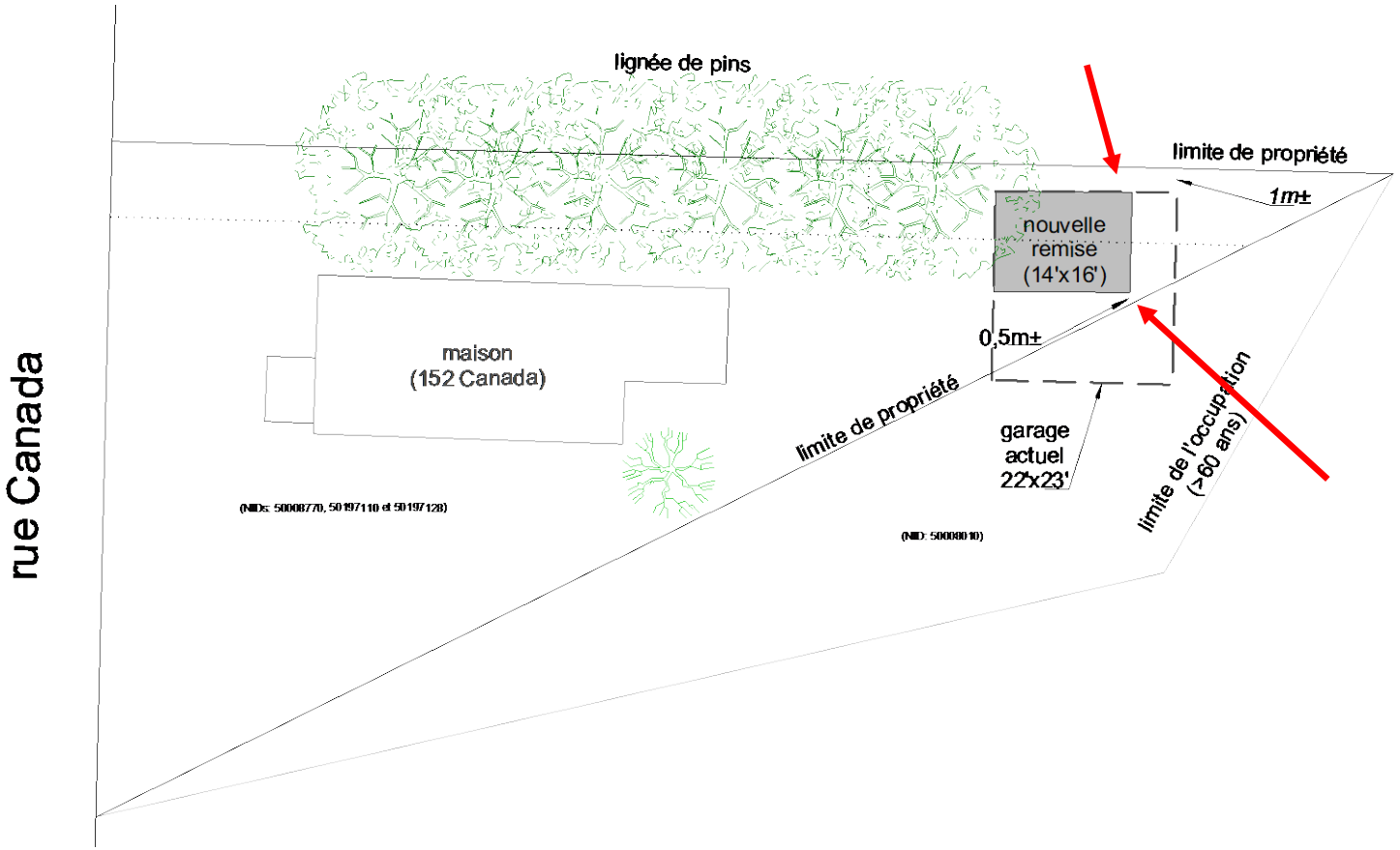
[18] The impugned determination of the APAB do not conform to the remedial powers it has. As such, it cannot stand as being reasonable.

Second Matter

La Commission des services régionaux du nord est et Louise Somers, Martin Vigneault, EM-14-2020, October 7, 2020 (unreported)

La Commission des services régionaux du nord est et Louise Somers, Martin Vigneault, EM-14-2020, October 7, 2020 (unreported)

- Variance application to allow changes to its garage in the back yard and required variances to setback provisions because of the irregularly shaped lot
- PRAC refused variance
  - Could be placed elsewhere
  - Variances deemed excessive
  - Simply changed one variance situation to another


rue Canada
lignée de pins
limite de propriété
1m±
nouvelle
remise
(14'x16')
0,5m±
maison
(152 Canada)
limite de propriété
garage
actuel
22'x23'
limite de l'occupation
(>60 ans)
(NIDs: 5000877O, 5019711O et 5019712S)
(NID: 5000881O)

La Commission des services régionaux du nord est et Louise Somers, Martin Vigneault, EM-14-2020, October 7, 2020 (unreported)

- APAB decision
  - Hardship raised on appeal
  - Decision centered on the PRAC's reasons
  - PRAC should have considered
    - long-standing presence of a garage on the appellant's land that created clear grounds for adverse possession
    - the lack of objections from neighbours

La Commission des services régionaux du nord est et Louise Somers, Martin Vigneault, EM-14-2020, October 7, 2020 (unreported)

JR Arguments

1) Lacking internal coherence
2) Governing Statutory Scheme
3) Past Practices and Past Decisions
4) Lack of Evidence before APAB
5) Absence of Reasons (from dissent)

La Commission des services régionaux du nord est et Louise Somers, Martin Vigneault, EM-14-2020, October 7, 2020 (unreported)

Court of Queen's Bench

- Board's decision lacked internally coherent reasoning in that the Board found hardship by looking at how the PRAC rendered its decision, which was clearly a misapplication analysis.
- The Board should not have put itself into the shoes of the PRAC by deciding that its decision was not reasonable. Rather, it should have stayed within its mandate of determine how the owners would suffer hardship. The Board ignored or attempted to re-write the laws of its statutory regime.

Pre-Vavilov and Somers decisions: Westfield

- Mr. Wambolt applied for 3 variances to construct a two-car garage (height, 2nd storey, front yard)
- Planning Advisory Committee refused
- The Board concluded that the 3 requests were reasonable and ordered the issuance of the permit

Westfield (Village) v. Wambolt (1986), 68 N.B.R. (2d) 436 (CA)

Pre-Vavilov and Somers decisions: Westfield

- Court of Appeal
  - Board had not suggested a finding of misapplication, hardship or unreasonable refusal.
  - The Board carried out the adjustment role entrusted to the advisory committee.
- The variance provisions of the legislation was a function to be carried out by an advisory committee.
- By deciding that the variance was reasonable, the Board put itself in the position of the planning advisory committee.
- The Board has no such jurisdiction; it could only determine if the adjustment committee's refusal caused the appellant special or unreasonable hardship not subject to alleviation or that alleviation was unreasonably refused.

Westfield (Village) v. Wambolt (1986), 68 N.B.R. (2d) 43 (CA), par. 10)

Third Matter (CQB)

Southeast Regional Service Commission v. Eastland Realty Limited, FM-31-2019, August 19, 2020 (unreported)

Southeast

Assessment and Planning Appeal Board

- referred a tentative subdivision plan back to the development officer for reconsideration
- development officer unable to approve a tentative plan (Department of Transportation and Infrastructure (DTI) would not assent (accept) to the proposed street
- DTI policy as to road length had changed

Southeast

APAB Decision

- the development officer had not misapplied the legislation
- would try to assist the parties
- directed that the tentative plan be sent back to DTI with a recommendation that DTI reconsider its previous practice of approving previously approved plans unless there has been a change in its road construction standards and that the parties make every effort to resolve the issues

Southeast

Court of Queen's Bench Judicial Review

- "unnecessary and unreasonable to send the matter back to" the development officer
- Eastland had known for some time that one particular street did not meet the minimum standards established by DTI
- development officer had jurisdiction to approve the tentative plan but was obliged to consult DTI regarding compliance with construction standards
- development officer properly refused the tentative plan because DTI indicated it would not accept the road design as submitted

Southeast

Court of Queen's Bench

- the directions provided fell just short of telling the development officer what to do (i.e. approve the tentative plan
- the Court could not direct an official who has statutory discretion to exercise that discretion in a particular way, nor could the Board
- since the development officer had not misapplied the act, it was unnecessary and unreasonable to send the matter back to him.

Southeast

Judicial Review arguments

1) Lacking internal coherence
2) Governing Statutory Scheme
3) Principles of Statutory Interpretation
4) Submission of the Parties
5) Remedies: stop the merry-go-round

Fourth Matter (CA)

Eastland Realty Limited v. Southeast Regional Service Commission, 2021 NBCA 10 (CanLii)

Eastland (appeal from *Southeast*)

Court of Appeal

- Reaffirmed that it could direct an official as to how it should proceed
- Rather found the Board's aim was to influence DTI

Eastland (appeal from *Southeast*)

Court of Appeal

- Board used one of its statutory powers to send a matter back to the development officer
- No apparent advantage to development officer approving the tentative plan if DTI would not sign off on final subdivision plan

Eastland (appeal from *Southeast*)

Court of Appeal

- Agreed with the lower court on reasonableness standard
- Was the standard had applied correctly
- Court of Appeal had to step into the shoes of the application judge

Eastland (appeal from *Southeast*)

Court of Appeal

- The Board's decision did not lack transparency or rationale that could not be ascertained
- Difficulty lied with the analysis that grounded the Board's decision and whether it could be justified in relation to the facts and law that constrained it
- Did the decision "add up"?

Eastland (appeal from *Southeast*)

Court of Appeal

- Did the decision "add up"? (Internally coherent reasoning)… no, because
  - Sending the tentative back to the development officer served no useful purpose, it would only delay the impasse
- Governing Statutory Scheme
  - Board had authority to send a matter back
  - Substantive question of connection to a finding of misapplication left for another day
  - Seemed clear that sending matter back should have been anchored in a finding of misapplication
- Merry-go-round remedy applied

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André is the co-founder of Droit JURIS Law (2014), which is a firm located in Dieppe and Shediac. He practices in the areas of local government, land-use planning and procurement. André also coaches and educates municipal staff and elected officials.

André began as a solo practitioner in 2002 and then joined the City of Dieppe during a period of substantial growth as the city solicitor, planning & development director and city clerk. He returned to private practice in 2011.

Before his legal career, he worked as a land use planner with the NB government on policy and regulation development, planning commission restructurings, municipal amalgamations, as well as municipal plan reviews.

Andre received a Master of Urban and Rural Planning degree from the Technical University of Nova Scotia (1992) and a Master of Laws (Municipal) degree from Osgoode Hall (2009).

André is the Past Chair of the national and provincial Municipal Law sections of the Canadian Bar Association. He is also the past President of the Atlantic Planners Institute, past President of the NB Association of Planners and past member of the Professional Standards Board (CIP).





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