SUPREME COURT OF YUKON

Citation: *VinAudit Canada Inc v Yukon (Government of)*, 2023 YKSC 39

Date: 20230711
S.C. No. 22-A0065
Registry: Whitehorse

BETWEEN:

VINAUDIT CANADA INC.

PETITIONER

AND

YUKON GOVERNMENT
(DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS)

RESPONDENT

AND

THE INFORMATION AND PRIVACY COMMISSIONER

INTERVENER

Before Chief Justice S.M. Duncan

Counsel for the Petitioner	Mark Wallace
Counsel for the Respondent	Lesley Banton and Simone Dumbleton
Counsel for the Intervener	Kelly Hjorth

REASONS FOR DECISION

Overview

[1] This is an application brought by the parties for a determination of two preliminary questions arising in two applications for judicial review under s. 105 of the *Access to Information and Protection of Privacy Act*, SY 2018, c. 9 (the "*Act*") and Rule 54 of the *Rules of Court of the Supreme Court of Yukon ("Rules of Court")*. For

reasons of efficiency, one application was brought to determine these questions in two different and unrelated files. This decision applies to both files. [1]

[2] In both cases, the petitioners seek a review by the Court of decisions by the Yukon government to reject recommendations provided by the Information and Privacy Commissioner ("IPC") in their reports after investigations. The IPC recommended in both cases that the Yukon government disclose to the petitioners the complete and unredacted records requested.

[3] The two questions for this preliminary application articulated by the parties in case management were: 1) what is the decision to be reviewed; and 2) what is the standard of review.

[4] Many other arguments were raised by all parties to this application. I will only address those relevant to the two issues to be decided. Rule 36 sets out case management powers of the Court and allows for applications to be decided in the case management context. This does not however remove the need for written notices of applications to be brought and their scope and basis to be clearly articulated. This unfortunately did not occur here. Earlier and clearer discussion among the parties and the Court in case management may have avoided the unnecessary duplication of materials and expansion of the scope of this hearing.

[5] The parties have requested a decision about the appropriate standard of review under s. 106 of the *Act*. There is no factual foundation for any determination by the Court at this time about the interpretation of s. 106. Both petitions are brought under s. 105 of the *Act*; both are a request for review of a decision made after the IPC issued

[1] See *Maraj v Commissioner of Yukon*, 2023 YKSC 40.

an investigation report. Section 106, as pointed out by several counsel at the hearing of this application, is for a review by the Court in a situation where there is no IPC investigation and report. A s. 106 review may be a review of decisions set out in various sections in the *Act*, none of which is before the Court in these petitions. To decide the issue of standard of review without any context is not possible and I decline to do so.

[6] In the following, I will briefly set out the background of these petitions; the procedure of an access to information request where there is an IPC investigation and report under the *Act*; and address each issue after summarizing the positions of the parties and intervener and reviewing the applicable law.

[7] My conclusions are: 1) the decision to be reviewed in each case is the decision of the public body (that is, the Yukon government) to reject the recommendations of the IPC; and 2) the standard of review for these petitions brought under s. 105 is reasonableness.

Background

[8] The first petition is brought by VinAudit Canada Inc. (“VinAudit”) against the Yukon government, Department of Highways and Public Works (“HPW”). VinAudit, a company that offers vehicle history reports, requested records of vehicle collisions in the Yukon from October 16, 2016, to September 24, 2021. HPW redacted information from 11 of the 15 data fields requested. VinAudit filed a complaint with the IPC, who investigated and recommended that HPW disclose the redacted records in their entirety to VinAudit in their original form or a form that could be reused by VinAudit. HPW rejected the recommendations on the basis they did not agree that third party personal information would not be disclosed and would not be an unreasonable invasion of

privacy. VinAudit brought the application for review under s. 105 of the *Act* for an order of disclosure of the complete unredacted requested records.

[9] The second petition is by Ramona Maraj ("Ramona Maraj") for an order for disclosure by the Yukon Department of the Environment of all GPS collar data from Yukon north slope grizzly bears from January 1, 2004, to December 31, 2010, including all data fields such as coordinates, time, temperature, motions accelerometer. The Department of Environment refused to disclose the data on the basis that disclosure would be harmful to the economic or financial interests of a public body (ss. 75(1)(a)(ii) and (iv); intergovernmental relations (s. 76(1); and conservation or heritage sites (s. 78(b)). The IPC investigated and recommended that the Department of Environment disclose the requested information because it lacked the requisite authority under the exemptions relied upon to withhold it. The Department of Environment rejected the recommendation of the IPC because the implications and consequences of disclosure are significant. Ramona Maraj seeks a review of the decision not to disclose under s. 105 of the *Act*.

Procedure in *Act*

[10] One of the purposes of the *Act* is to permit members of the public to access information held by public bodies, subject to exceptions, some mandatory, some discretionary. More specifically, s. 6 states as follows:

> (e) to provide the public with a right to access information held by public bodies (subject to specific exceptions) in order to ensure government transparency and to facilitate the public's ability to meaningfully participate in the democratic process; and
>
> (f) to provide the commissioner with powers and duties that enable the commissioner to monitor public bodies'

> compliance with this Act and ensure that public bodies' decision-making is conducted in accordance with the purposes of this Act and that their administration is in accordance with the purposes of this Act.

[11] Public body is defined as "(a) a ministerial body, (b) a statutory body prescribed as a public body, or (c) an entity prescribed as a public body".

[12] Those who seek such information submit an access to information request (s. 44). The public body identifies records responding to the request and assesses whether those records are subject to any provisions of the *Act* that relate to exclusions or prohibitions from release or denial of access.

[13] If any of the requested information is withheld as a result of these exclusions, prohibitions, or denials of access, the public body must provide the requester with written reasons including the section of the *Act* on which they rely.

[14] The requester may accept this outcome, apply to the court for a review of the decision (s. 106), or complain to the IPC (s. 90).

[15] When the IPC receives a complaint, it first decides whether to dismiss or investigate it (s. 91). If the IPC decides to investigate, it may first conduct a consultation with the complainant and the public body (s. 93) in an attempt to mediate or narrow the scope of the disagreement.

[16] If the complaint cannot be resolved by consultation, then the investigation begins. It must be conducted in private. The *Act* gives the IPC powers of a court to summon witnesses, compel them to give testimony, compel production of information and records, and examine information and records produced. The public body is required to produce any information or records the IPC compels them to produce. The IPC may also enter premises, conduct interviews, receive and consider any evidence relevant to

the investigation, and administer oaths. It may also determine each question of fact arising in relation to the decision or matter under investigation, and each question of law arising in relation to the decision or matter (s. 95). The IPC must permit the complainant and the public body to make submissions to the IPC and may permit another person to make submissions either orally or in writing or in reply.

[17] Once the investigation is complete, the IPC prepares a report that sets out each determination of fact or question of law with reasons, and provides recommendations based on these determinations to the public body that the IPC believes will address the complaint, with reasons (s. 101).

[18] The public body then has 15 business days to decide whether to accept or reject the recommendations of the IPC. If they reject the recommendations, the public body must provide reasons. If the public body does not respond within the 15 days, they are deemed to have rejected the recommendations (s. 104).

[19] Rejection or deemed rejection of the recommendations triggers the right to a review by the complainant under s. 105. This is what occurred in the cases currently before the Court.

[20] Section 105(1) states:

> Subject to subsection (7), if a respondent rejects a recommendation under subparagraph 104(1)(a)(ii), or is considered to have rejected a recommendation under subsection 104(5), the complainant may apply to the Court for a review of the decision or matter to which the recommendation relates not later than 30 business days after [various dates depending on when notice of the rejection or acceptance was provided]

Issue #1 – What is being reviewed?

Positions of the Parties

[21] The Yukon government stated in its written submissions that counsel disagreed on whether the decision to be reviewed under s. 105(1) was the IPC report and recommendations, or the decision of the head of the public body to reject the recommendations.

[22] I will summarize the position only of counsel for Ramona Maraj, as she was the only party who disagreed, in a nuanced way, that the decision to be reviewed under s. 105(1) was the decision of the head of the public body to reject the IPC recommendations. Counsel for Ramona Maraj did not take the position that the Court was to review the IPC recommendations. Instead, he argued that some of what is being reviewed is the public body's assessment of the "matter to which the recommendation relates" which is different from the decision of the public body to reject the IPC recommendations. This argument turns on the use of the word "determined" in ss. 64(1)(b)(i) and (ii) rather than "decide". The *Act* states the public body is to determine whether information and records requested are generally excluded information, and whether access is prohibited under Part 3, Division 8 (which references Cabinet records, confidential information from another government, third party confidential business information, third party personal information). Counsel for Ramona Maraj says by contrast, the public body is to decide to deny a requester access to information and records under Part 3, Division 9 of the *Act* (which references information related to law enforcement, legal privilege of a public body or other person, policy advice and recommendations prepared for a public body or minister; or

information that could be expected to harm the financial or economic interests of a public body, intergovernmental relations, third party business interests, conservation or heritage sites, individual or public health and safety; or information provided by an individual to a public body for potential employment or an honour or award.) These decisions, counsel says, are discretionary and attract a reasonableness standard of review, not a *de novo* or correctness standard of review. The standard of review is the second issue and is addressed below.

[23] To summarize, where a "permissive exclusion" applies, such as under Part 3, Division 9, a public body decides whether to release information. Where a public body determines whether information is generally excluded or prohibited from release under Part 3, Division 8, this determination is a "matter to which the recommendation relates" and the public body has no discretion in making this determination.

[24] Here, counsel for Ramona Maraj says part of what is being reviewed is a "matter to which the recommendation relates" under s. 105, meaning that the public body is making a determination, not a decision, about whether the records are subject to an exclusion or prohibition. He relies on the dissenting decision in *Dagg v Canada (Minister of Finance),* [1997] 2 SCR 403 ("*Dagg*"), which he says was confirmed in *Canada (Information Commissioner) v Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 ("*Information Commissioner*"), both decisions under federal legislation. Counsel argues they lend support to the argument that the Court must substitute its opinion for that of the public body where the question for the Court is whether the public body determined properly if the requested information falls within one of the mandatory exclusions or prohibitions from release. This different standard of

review is the purpose of distinguishing between a matter to be reviewed and a decision under the *Act.*

Legal Principles

[25] The answer to this question of what is being reviewed depends on proper statutory interpretation. It is accepted that modern statutory interpretation is described as follows: “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 SCR 27 at para. 21).

Analysis

[26] I agree with the argument advanced by the IPC. The meaning of “the decision or matter to which the recommendation relates” in s. 105(1) is clear from reading the subsection immediately before it, s. 104(5). That subsection provides that the public body is deemed to have rejected a recommendation if it does not respond within the required 15-day period or if it does not comply with the recommendation. In those circumstances there is no decision to be reviewed, but there are inactions of the public body that may warrant review. In the first circumstance the public body has neither accepted nor rejected the recommendations, so there is no decision, only a deemed rejection. In the second circumstance although the public body has accepted the recommendations, that acceptance is incomplete because it has not implemented them. It is not the decision to accept the recommendation that needs to be challenged, but the failure to implement it. For these reasons, s. 105(1) refers to the right to review these

inactions of the public body as a "matter to which the recommendation relates", instead of a decision.

[27] In both petitions there are decisions made by the public bodies to reject the recommendations of the IPC. Even if the legal argument of Ramona Maraj were accepted – that is, this is a matter to which the recommendation relates and not a decision, it is not factually supported. The basis for the public body's rejection of the recommendations in the Maraj petition all derive from sections of the *Act* found in Part 3, Division 9 of the *Act* – "Information to which access may be denied". These sections are permissive and require the exercise of discretion by the public body. On counsel for Ramona Maraj's theory, these would be decisions and not matters to which the recommendation relates.

Issue #2 – Standard of Review

Positions of the Parties

Yukon government

[28] The Yukon government proposes a "hybrid *de novo*" standard of review in a review under s. 105. They describe this as a review that is in some cases done on a standard of correctness and in other cases done on a standard of reasonableness. The Yukon government also state that a review can include consideration of new evidence and new submissions "where fair and just in the circumstances" or "to the extent determined appropriate in the circumstances by the reviewing court".

[29] The Yukon government says at paras. 84 and 85 of its written submissions that because:

> [t]he Legislature has given only the Court binding authority to make orders under the ATIPPA …necessarily and implicitly

> the Legislature must intend that the Court have the power, as needed, to properly consider matters on "review" under sections 105 and 106, including: hear new evidence; consider new submissions; and, allow affected third parties to join the proceeding.
>
> This will ensure that, in regards to "must not disclose" information or records, the Court "gets it right"; and, so as to ensure that in relation to "may choose not to disclose" information or records, the Court has the relevant information needed to assess whether or not the head considered the appropriate factors.

[30] The Yukon government says that the review under s. 105 may include a challenge to the procedural fairness of the IPC's investigation and report, and this could require additional evidence and submissions, supporting a *de novo* hearing.

[31] The Yukon government addresses *Canada (Minister of Citizenship and Immigration v Vavilov,* 2019 SCC 65 ("*Vavilov*"). They say because *Vavilov* had not yet been decided when the *Act* was drafted, it is possible that the legislature treated the words "review" and "appeal" synonymously. The Yukon government also appears to suggest it is possible to create a new exception to the presumptive reasonableness standard in this case because the Court in *Vavilov* left open that possibility "in rare and exceptional cases". They do not articulate what the new exception is. They describe its basis as stemming from the Court's review in some circumstances of whether the mandatory exclusions and prohibitions of release of information and records were properly assessed by the public body. In these circumstances, they say the Court must take a less deferential approach, through a correctness standard of review, to ensure the law is applied correctly.

[32] The Yukon government also relies on s. 107 of the *Act*, the remedies section, to argue for a correctness standard. It notes that the Court is the "first and only

independent adjudicative body" to objectively assess a decision and make binding orders. Section 107 provides:

> After hearing an application made under subsection 105(1) or 106(1), the Court may
>
> (a) make an order, in addition to or instead of any other order, directing the respondent to take any action that the Court considers necessary in the circumstances; or
>
> (b) dismiss the application.

[33] The Yukon government argues that this includes the ability of the Court to substitute its decision for that of the public body, which is consistent with the correctness standard. It further asserts that the broad range of remedy, in contrast to the previous *Act,* supports a less deferential approach. It says the IPC's argument that s. 107 allows the Court to remit the decision to the public body for permissive provisions and to quash the decision for mandatory provisions is "far too narrow" given the powers of authority provided to the Court under s. 107. The Yukon government does not explain this further.

Ramona Maraj

[34] Counsel for Ramona Maraj, as noted above, argues for a correctness standard of review when the mandatory provisions related to withholding of information under the *Act* are being assessed, and a reasonableness standard of review when the permissive provisions are assessed. This position is similar to that of the Yukon government. The reasons flow from the argument by counsel for Ramona Maraj about the distinction between determination and decision, explained above. When a determination is being made about whether the information or records requested are subject to a mandatory exclusion or a prohibition from release, there is no discretion bestowed on the public

body. In the absence of discretion, the standard of review for the court on review is correctness or a "*de no*vo" standard. Where the information or records requested may or may not be excluded from disclosure depending on the application of discretion by the public body, that decision is subject to a reasonableness standard of review. The standard of review therefore changes with the statutory basis on which the withholding or release of information is assessed.

VinAudit

[35] VinAudit's position is that a review under s. 105 is a standard judicial review that attracts the standard of reasonableness. The word review was a deliberate choice by the legislature and is to be contrasted with the previous version of the *Act* which allowed for an appeal to the Supreme Court of Yukon and a new hearing, in the circumstance where the public body rejected the IPC recommendation.

[36] In addressing the Yukon government's argument about allowing new evidence in a judicial review under s. 105 where appropriate and just, in effect holding a hearing *de novo,* VinAudit notes first the general rule that the record of a judicial review consists of evidence that was before the decision-maker. New evidence may be admitted, but at the discretion of the Court and in limited circumstances.

[37] VinAudit further notes the *Rules of Court* allow for the following additions to the record:

a. Rule 54(5) - the petitioner is required to name any party directly affected by the order sought.

b. Rule 54(14) - the court may allow a party to file additional affidavits, conduct cross examinations on the additional affidavits or file a supplementary record.

c. Rule 54(16) - the court may order other materials be filed where the court considers the record incomplete.

d. Rule 54(18) – the court may on application in special circumstances authorize a witness to testify in court in relation to an issue of fact raised in an application.

e. A party not named in a petition for judicial review may apply for intervenor status.

[38] VinAudit does not address the mandatory/permissive exception argument.

IPC

[39] I agree with the IPC position as will be clear from my analysis below, so I will not repeat it here.

Legal Principles

[40] In the dissenting decision (on other aspects) at para. 115 of *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 ("*Society of Composers*"), the Supreme Court of Canada wrote that in *Vavilov* "… this Court sought to bring coherence and predictability to the law governing judicial review. The majority "set out a holistic revision of the framework" anchored in a strong presumption of reasonableness, which could only be rebutted in five situations (Vavilov para. 143)". Those five situations are:

- legislated standard of review;
- statutory appeal mechanisms;
- constitutional questions;
- general questions of law of central importance to the legal system as a whole; and
- questions related to the jurisdictional boundaries between two or more administrative bodies.

[41] A sixth category was added by the Supreme Court of Canada in *Society of Composers* – concurrent administrative and court first instance jurisdiction.

[42] The Court stated in *Vavilov* (para. 143) and confirmed in *Society of Composers* (para. 25) that its reasoning and the outcome "overtook the prior jurisprudence" in determining the appropriate standard of review in a case. The Court wrote: "certain cases – including those on the effect of statutory appeal mechanisms, "true" questions of jurisdiction or the former contextual analysis – will necessarily have less precedential force" (*Vavilov* at para. 143). In other words, prior jurisprudence on standard of review needs to be re-interpreted in light of the reasons in *Vavilov*.

[43] The Supreme Court of Canada explained the rationale for their approach at the outset of the *Vavilov* decision. Emphasizing the need for clarification and simplification of the law of judicial review, they noted that it has been the subject of "continuously evolving jurisprudence and vigorous academic debate" (*Vavilov* at para. 4). Instead of the simplification anticipated by the 2008 decision of *Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*"), where "the standards of "patent unreasonableness" and "reasonableness *simpliciter*"" were merged into one standard of reasonableness, uncertainty continued about the scope of the category of questions that attracted a correctness review. In addition, debate persisted about whether a contextual analysis to determine the legislature's intent about the standard of correctness was appropriate (*Vavilov* at para. 7). The judicial and academic criticisms of these uncertainties "go to the core of the coherence of our administrative law jurisprudence and to the practical implications of this lack of coherence" (*Vavilov* at para. 9). Abella, J. in *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, had earlier recognized the need "to simplify the

standard of review labyrinth we currently find ourselves in" (*Vavilov* at para. 9). The Court also noted the increased role of administrative decision-making in Canada:

> … the administration of countless public bodies and regulatory regimes has been entrusted to statutory delegates with decision-making power. …[making] administrative decision making one of the principal manifestations of state power in the lives of Canadians (*Vavilov* at para. 4).

As a result, the Supreme Court of Canada adopted the revised framework for determining the standard of review set out in *Vavilov*. At para. 69, it specifically directed courts to "no longer engage in a contextual inquiry to determine the standard of review or to rebut the presumption of reasonableness review".

[44] In explaining there was still a possibility of new categories of correctness review, the Supreme Court of Canada placed a high bar on the establishment of a new category. It would have to be exceptional and would need to be consistent with the principles and framework in *Vavilov*. It "would require a signal of legislative intent as strong and compelling as those identified in these reasons (i.e., a legislated standard of review or a statutory appeal mechanism)" (*Vavilov* at para. 70). Any new correctness category based on the rule of law requires that a failure to apply correctness would undermine it and would jeopardize the proper functioning of the justice system in a way that is analogous to the situations described in the *Vavilov* reasons" (*Vavilov* at para. 70).

Analysis

[45] There is no reason to disturb the presumptive standard of reasonableness review in these cases. The circumstances do not fit into any of the exceptions set out by the Supreme Court of Canada, nor are they exceptional enough to create a new category of

correctness review. The reasonableness standard of review does not contemplate a *de novo* hearing or analysis. The record before the Court consists of what was before the decision-maker and may be subject to expansion based on arguments made at the judicial review and in the discretion of the judge applying the jurisprudence and the *Rules of Court*. The remedy section of the *Act* (s. 107) is consistent with a review on the standard of reasonableness and provides a wide range of options to address various circumstances, including mandatory and permissive exceptions to the release of requested information. If procedural fairness issues arise, they may be addressed at the judicial review, applying the fairness standard, sometimes referred to as the correctness standard. *Vavilov* did not change the Court's approach to procedural fairness arguments.

[46] I will address each of these points below.

i) Exceptions in Vavilov do not apply

[47] *Vavilov* provides clear direction that the presumptive standard of review in the judicial review of a decision of an administrative decision-maker is reasonableness, subject only to derogation from that standard in six delineated circumstances.

[48] In these cases, none of the exceptions applies. First, the *Act* does not set out a standard of review.

[49] Second, there is no statutory appeal mechanism. The Yukon government's argument that the legislative intent could have been to use "review" and "appeal" interchangeably is groundless. The former *Act* (*Access to Information and Protection of Privacy Act,* RSY 2002, c.1) at ss. 59 and 60 provided that an applicant may appeal a decision of the public body to the Supreme Court of Yukon and on an appeal, the

Supreme Court may conduct a new hearing and consider any matter the Commissioner could have considered. There are no such sections in the current revised *Act*. The legislature deliberately used the word “review” in s. 105, not appeal, and makes no reference to a new hearing to be conducted. The intent of the legislature in the current revised *Act* is to show deference to the decision-maker.

[50] Third, fourth, and fifth, these cases do not involve constitutional questions, general questions of law of central importance to the legal system as a whole, or questions related to the jurisdictional boundaries among administrative bodies.

[51] Finally, these are not cases of concurrent administrative and court first instance jurisdiction. Section 105 does not contain anything that shows the legislature has expressly involved the Court in the interpretation of the *Act*.

ii) No basis for a new category for application of correctness standard

[52] The argument made by the Yukon government and Ramona Maraj in support of a correctness standard was the need for the administrative decision-maker to apply the mandatory provisions in Part 3, Division 8, (even though these do not arise on the facts of the Maraj case). The suggestion is that without the Court’s application of a correctness standard on review, legal inconsistency in the interpretation of the mandatory provisions may result and this would negatively affect the rule of law.

[53] These cases present the type of situation *Vavilov* was designed to address. The Court declined to recognize a correctness standard for legal questions to be answered by administrative bodies for three reasons: 1) ensuring administrative bodies remain independent, as the legislature intended, requires tolerating some inconsistencies; 2) a robust reasonableness review can adequately manage the serious rule of law concerns

that emerge when the law is indeterminate; and 3) the point at which internal discord becomes serious enough to warrant a correctness standard is impossible to define in the abstract (*Vavilov* at para. 72).

[54] The cases relied on by both counsel for the Yukon government and counsel for Ramona Maraj for their argument of different standards of review based on mandatory or permissive/discretionary exceptions are based on federal legislation. That legislation contains specific provisions setting out the standard of review for specific questions. Section 49[2] of the federal *Access to Information Act*, RSC, 1985, c A-1, specifically directs the Federal Court to order the head of the institution to disclose a withheld record if the head of the institution is not authorized to refuse to disclose the record. Thus it falls within the first exception stated in *Vavilov* – legislated standard of review. There is no such provision in the Yukon statute. The analysis in the cases decided under the federal legislation is inapplicable.

[55] There is no rare and exceptional circumstance here to provide a basis for the creation of a new category for the application of a correctness standard. The high bar set out in *Vavilov* is not met.

iii) Reasonableness review does not require de novo hearing; record may be expanded

[56] *Vavilov* also answers the question of what kind of hearing a reasonableness review entails. At para. 83, the Court wrote:

[2] 49 Where the head of a government institution refuses to disclose a record requested under this Part or a part thereof on the basis of a provision of this Part not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

> 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. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a de novo analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[57] The role of the court in a reasonableness review is to determine if the decision was reasonable – that is, justified, transparent, and intelligible – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para. 99).

[58] The evidentiary record on a reasonableness review consists of the record that was before the decision-maker and the reasons of the decision-maker, but can also include the history and context of the proceedings. This can include the submissions of the parties, publicly available policies or guidelines that inform the decision-maker's work, and past decisions of the relevant administrative body (*Vavilov* at para. 94).

[59] Any party to the judicial review seeking to expand the evidentiary record beyond what was before the decision-maker can make submissions to the deciding judge on the

basis of the *Rules of Court* as outlined above, and through the established law for admission of new evidence.

[60] The court on a reasonableness review can consider a range of material in its deferential review of the decision-maker's decision.

iv) Remedy in statute consistent with reasonableness review

[61] Section 107 of the *Act* (see para. 32 above) provides for a wide range of decision-making power for the Court.

[62] Contrary to the Yukon government's assertion (without jurisprudential support) that this wide-ranging remedial power indicates a legislative direction that a correctness standard of review applies, s. 107 is consistent with a reasonableness standard of review. A remedy for a correctness standard of review would not need to be so broad – see for example, the former *Act* in which s. 61 provided on an appeal that the Court may order the public body give the applicant access to all or part of the record requested, or confirm the public body's refusal to give access.

[63] The Supreme Court of Canada in *Vavilov* described the large available scope of remedy available on a reasonableness review.

> [139] … [T]he question of the appropriate remedy is multi-faceted. It engages considerations that include the reviewing court's common law or statutory jurisdiction and the great diversity of elements that may influence a court's decision to exercise its discretion in respect of available remedies. [The court wishes to address] whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons.
>
> [140] Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the

> legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide …. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized tribunals in the first place": ….
>
> [141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: …
>
> [142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended. … 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 re-considerations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. … Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed. [citations omitted]

[64] Further, at para. 124 of *Vavilov*, the Court again noted the appropriateness of the substitution by the Court of its decision on a reasonableness review, if it is clear there is only one interpretation possible of the matter at issue.

[65] Thus the broad language used in s. 107 is consistent with the options for remedies on reasonableness reviews set out in *Vavilov,* ranging from returning the matter to the decision-maker to the court substituting its own view.

v) Procedural fairness arguments remain available

[66] Finally, *Vavilov* did not alter the legal principles applicable to procedural fairness. "Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual" (*Dunsmuir* at para. 79). The duty of procedural fairness is best described by its objective – to ensure a party is given a meaningful opportunity in a given context to present its case fully and fairly. The means by which this may be achieved will vary depending on the context which includes the particular statute and the rights affected (*Uniboard Surfaces Inc v Kronotex Fussboden GmbH and Co*, 2006 FCA 398). There are three questions to be asked in a procedural fairness analysis in a particular case. First, does the duty of procedural fairness arise? Second, what degree of procedural fairness is required? Third, was procedural fairness breached? The second question requires a determination of the scope of the duty of procedural fairness. The leading case to guide this determination is *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. The Court stated there that "the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected" (at 837). The Court then listed the following non-exhaustive factors (at 838-840):

a. the nature of the decision being made and the process followed in making it;

b. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

c. the importance of the decision to the individual or individuals affected;

d. the legitimate expectations of the person challenging the decision; and

e. the choice of procedure made by the administrative decision-maker itself.

[67] This process can be used in a judicial review to challenge any absence of procedural fairness occurring in these cases. It is a separate inquiry and not dependent on a finding that the standard of review for any other questions for the Court is correctness or reasonableness.

Conclusion

[68] The decisions to be reviewed in these two cases are those of the public bodies in refusing to accept the recommendations of the IPC.

[69] The intention of the Supreme Court of Canada in *Vavilov* was to avoid the kind of debate about the appropriate standard of review raised by this application. The Minister's statement while introducing the revised *Act* in the Yukon legislature that it "provides a robust and flexible legal framework that includes dynamic oversight" is consistent with the application of a standard of reasonableness review under s. 105 ("Bill No. 24: *Access to Information and Protection of Privacy Act*", General Debate, *Yukon Legislative Assembly Hansards*, 34th Legislature, No 109 (1 November 2018) at 3314 (Hon Richard Mostyn)). A robust reasonableness review under s. 105, especially with the broad remedial powers in s. 107, is capable of achieving a just result, while respecting the scope of decision-making authority of the public body. Even if a more

deferential approach may result in legal inconsistencies, these are to be tolerated and accepted in the name of a coherent and practical approach to judicial review.

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DUNCAN C.J.