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20th
Anniversary

 **October 28–29, 2020**  **Virtual Conference** (EASTERN TIME)

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CREDITS**

Hear from an Elite Panel of Former and Current Judges:



**The Right Honourable
Beverley McLachlin P.C., C.C.**
Judge
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and Hong Kong Court of Final Appeal**
*Former Chief Justice of the Supreme Court of
Canada (2000-2017)*



**The Honourable
Marshall Rothstein C.C., Q.C.**
Partner
Osler, Hoskin & Harcourt LLP
*Former Justice of the Supreme Court of
Canada (2006-2015)*



**The Honourable
Lorne Sossin**
Judge
Ontario Superior Court of Justice

Distinguished Speakers from Administrative Bodies:



Julie Baril
Director of Legal Affairs
**Tribunal administratif
du Québec**



Ian Demers
Senior Counsel
Justice Canada



David Field
President and CEO
Legal Aid Ontario



Darren McLeod
Legal Counsel
**Immigration and Refugee
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Michael Gottheil
*Chief of the Commission
and Tribunals*
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Senior General Counsel
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Tim Moseley
Vice Chair
**Ontario Securities
Commission**



Shannon Salter
Chair
**BC Civil
Resolution Tribunal**

Gail Sinclair
General Counsel
Justice Canada

20th Anniversary Highlights:

- » Thorough analysis of *Vavilov* and its implications for administrative bodies
- » Timely COVID-related content on operating in the context of the pandemic and beyond
- » Diverse perspectives: federal and provincial decision-makers, judges, professors, and external counsel

...and much more!

Canadian administrative law has entered a new era.

With the Supreme Court's decision in *Vavilov*, administrative bodies must grapple with increased scrutiny of their reasoning in rendering decisions. The extensive criteria for "reasonableness" appear to demand much more of decision-makers, who do not always have legal training, and bodies that are subject to statutory appeals must face an even more burdensome correctness standard.

The Canadian Institute's **20th Annual Conference on Advanced Administrative Law and Practice** returns this year to help you make sense of these developments, understand how you are affected, and make your decision-making as resistant as possible to fierce judicial review.

You will hear from and connect with an outstanding line-up of speakers including federal and provincial decision-makers, former Supreme Court Justices, academic experts, and law firms.

Key program highlights include:

- » Why the court invokes "impact on the individual" to assess reasonableness
- » How judicial review of arbitration decisions, ministerial discretion, and subordinate legislation will change
- » What decisions rendered by lower courts since December 2019 reveal about the application of *Vavilov*

Plus, do not miss timely discussion of other topics including:

- » The status of the law on independence in adjudication
- » Operational challenges in the context of the pandemic and beyond
- » Tribunals' obligations to self-represented parties

We hope you will join us to celebrate the 20th anniversary of the premier national administrative law conference for an unparalleled learning and networking experience.

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This 2-day conference program can be applied towards 9 of the 9 substantive hours and 2 of the 3 professionalism hours of annual Continuing Professional Development (CPD) as required by the **Law Society of Ontario**. Members will also receive an additional 3 substantive hours for the post-conference workshop.

The same number of hours may be applied to your continuing legal educational requirements in **British Columbia**.

The **Barreau du Québec** recognizes this training activity, the latter having been accredited by another Law Society subject to the MCLE.

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Senior Counsel
Justice Canada



Nadia Effendi
Partner
Borden Ladner Gervais LLP

ADMINISTRATIVE BODIES:

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Director of Legal Affairs
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FORMER AND CURRENT JUDGES:



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Ontario Superior Court of Justice

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John Buhlman
Partner
WeirFoulds LLP



Geneviève Cartier
Professor
University of Sherbrooke



Paul Daly
Research Chair in Administrative
Law and Governance
University of Ottawa



Shaun Charles Fluker
Associate Professor
University of Calgary



Ruth Goba
Former Executive Director
Black Legal Action Centre
Former Tribunal Member
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Brandon Kain
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Matthew Lewans
Associate Professor
University of Alberta



Audrey Macklin
Director, Centre for Criminology
and Sociolegal Studies; Professor
of Law and Chair in Human Rights
University of Toronto



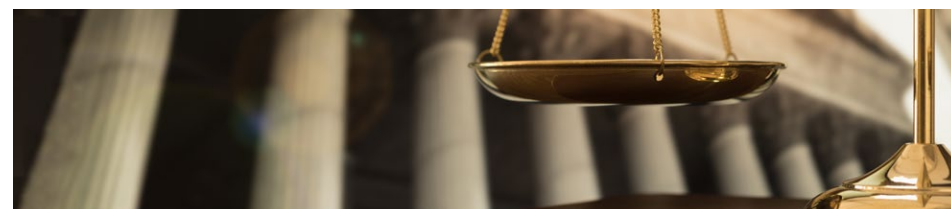
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Senior Litigation Counsel
Hunter Litigation Chambers



Alyssa Tomkins
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Cara Faith Zwibel
Director, Fundamental
Freedoms Program
Canadian Civil
Liberties Association



9:15


Opening Remarks from the Conference Co-Chairs

 Ian Demers, Senior Counsel, **Justice Canada**

Nadia Effendi, Partner, **Borden Ladner Gervais LLP**

9:30

20TH ANNIVERSARY JUDICIAL KEYNOTE PANEL**Reflections on How Canadian Administrative Law and Practice Has Evolved in the Past Two Decades and New Questions to be Resolved Moving Forward**

 The Right Honourable Beverley McLachlin P.C., C.C., Judge, **Singapore International Commercial Court and Hong Kong Court of Final Appeal**, Former Chief Justice of the Supreme Court of Canada (2000-2017)


The Honourable Marshall Rothstein C.C., Q.C., Partner, **Osler, Hoskin & Harcourt LLP**, Former Justice of the Supreme Court of Canada (2006-2015)

The Honourable Lorne Sossin, Judge, **Ontario Superior Court of Justice**

In this exclusive panel to celebrate the 20th anniversary of the conference, a distinguished panel of former and current judges, the most authoritative voices in the field, will analyze how the common law of administrative review has developed since the turn of the century and assess the implications of the ground-breaking decision in *Vavilov* for standards of review, judicial deference, and the rule of law.

10:30

Defining and Applying the Reasonableness Standard Post-Vavilov: Enduring Principles or Radical Break from Precedent in Judicial Review?

 Audrey Macklin, Director, Centre for Criminology and Sociolegal Studies; Professor of Law and Chair in Human Rights, **University of Toronto**


In *Vavilov*, the Supreme Court revises the pre-requisites for departing from a presumption of deference and offers criteria for assessing the reasonableness of legal interpretations offered by administrative decision-makers. This session will cover:

- The significance of the majority's demotion of expertise as a rationale for deference
- Indicia of [un]reasonableness, and the ways in which the court's conception of reasonableness in *Vavilov* departs from *Dunsmuir* and post-*Dunsmuir* jurisprudence
- Implications for review of the exercise of discretion
- Linkages between *Vavilov* and procedural fairness doctrine: toward a unified public law?

11:00 Break

11:30

Practical Implications of Vavilov for Adjudicative Bodies: How to Interpret the Duty to Provide Reasons

 Michael H. Morris, Senior General Counsel, **Justice Canada**

Tim Moseley, Vice Chair, **Ontario Securities Commission**

In *Vavilov*, the court asserts that reasonableness review must be founded in "the principle of judicial restraint" while still constituting "a robust form of review." Although it generally insists on the importance of deference, it sets exhaustive criteria for determining the reasonableness of a decision. Notably, the court stresses the importance of reasons provided by the adjudicator. This session will cover:

- How does the new reasonableness standard under *Vavilov* differ from how that standard applied before in respect of "sufficiency of reasons"—and how is it distinct from "correctness"?
- What special obligations arise, in particular, in respect of the sufficiency of reasons when tribunals are confronted with interpretation of statutes?
- What is the significance of the impact of the decision on affected individuals under the new expectations for reasons?
- On what basis did the minority dissent in respect of sufficiency of reasons—and what is the significance of this going forward?
- How courts will review decisions where reasons are not required, and what the Supreme Court means when it states that such review would "focus on the outcome rather than on the decision maker's reasoning process"
- Implications of the duty to provide reasons for the speedy delivery of administrative justice

12:30

Why the Court Invokes "Impact on the Individual" to Assess Reasonableness in Vavilov: Reasons and Consequences of the Court's Novel Criterion in Judicial Review

 Geneviève Cartier, Professor, **University of Sherbrooke**


The Supreme Court determines that decision-makers must grapple with the consequences of a "severe or harsh" decision for the affected individual, and that failure to do so may render that decision unreasonable. What are the reasons for this move and what challenges does it pose? This session will address:

- The sources of tensions in administrative decision-making that led to the decision in *Vavilov* and how considering the individual aims to resolve some of these tensions
- Ambiguities surrounding the court's definition of "severe or harsh" consequences and how decision-makers are meant to demonstrate their consideration of these consequences
- Why it may be difficult to justify this novel invocation of individual
- New tensions that arise from this jurisprudential approach to assessing reasonableness

1:00 Break

1:45

Statutory Appeal Rights Post-Vavilov: Discerning the Burden of the Correctness Standard on Decision-Makers


 Brandon Kain, Partner, **McCarthy Tétrault LLP**

Vavilov reversed decades of precedent by holding that questions of law in statutory appeals must be reviewed for correctness and questions of fact or mixed fact and law must be reviewed for palpable and overriding error. With this increased level of scrutiny, decision-makers must prepare for greater interference by courts. This session will discuss the reasons for and consequences of this move by the Supreme Court:

- How the court justifies departure from presumption of reasonableness in statutory appeals
- The implications of no longer considering relative expertise as a criterion in determining the level of deference in statutory appeals
- Potential issues in applying appellate standards in adjudicative contexts where administrative standards applied pre-*Vavilov*
- The relationship between the standard of palpable and overriding error that applies on statutory appeals to questions of fact and the standard of reasonableness that applies on judicial review

2:30 CASE LAW SYNTHESIS

Analyzing Divergent Readings of *Vavilov* by Lower Courts and Navigating Ambiguities in the Law

 Barbara Jackman, Senior Lawyer, **Jackman & Associates**

Alyssa Tomkins, Partner, **Caza Saikaley LLP**


With *Vavilov* impacting the entire realm of administrative law, the decision has been cited in over a thousand judgements since it was rendered. Lower courts' interpretations of this decision are varied, with some focusing on those parts that cite deference as the overriding concern and others taking the decision to have heightened the standard of review. This panel will examine:

- Inconsistencies in how *Vavilov* is being applied
- Trends specific to key sectors that intersect with administrative law—such as labour and immigration
- Why the courts may be coming to such conflicting readings of the decision and what ambiguities its varied applications reveal that remain to be solved

3:30 Break

4:00

Assessing the Convergence of Administrative and Constitutional Law: How Might the Status of *Doré* in Charter-Related Proceedings Change with *Vavilov*? S

 Paul Daly, Research Chair in Administrative Law and Governance, **University of Ottawa**

Gail Sinclair, General Counsel, **Justice Canada**

While *Vavilov* does not prescribe a new standard for review of administrative decisions that touch on Charter rights, there is uncertainty about the manner in which such decisions are meant to be assessed in light of new criteria set out for review of administrative decision-making as a whole. In addition, *Vavilov* raises questions over whether the reasonableness standard should apply to begin with, given that matters relating to the rule of law require correctness review. This session will address:

- How the courts will balance the deference required by *Doré* with the increased scrutiny laid out in *Vavilov* in assessing reasonableness
- Conflicting considerations of expertise in determining the appropriate level of deference
- The tension in *Vavilov* in declining to reconsider the *Doré* approach while asserting that it is the role of courts to interpret the Constitution

5:00 Closing Remarks, Conference Adjourns

9:10

Opening Remarks from the Conference Co-Chairs

 Ian Demers, Senior Counsel, **Justice Canada**

Nadia Effendi, Partner, **Borden Ladner Gervais LLP**

9:15

Judicial Review of Arbitration Decisions: What Standard Should Arbitrators Expect After *Vavilov*? S

 John Buhlman, Partner, **WeirFoulds LLP**

While *Vavilov* changed the standard of review for statutory appeals from reasonableness to correctness, it did not specify a standard for review of appeals of arbitral awards. This session will explore:

- Standard of review of arbitral awards prior to *Vavilov* on appeal and motions to set aside an award
- How lower courts have been interpreting the Supreme Court's position on this issue, and how they have justified their presumption of reasonableness or correctness
- Limitations on court intervention in arbitral decisions under domestic and international arbitration acts in the provinces, and whether these limitations survive *Vavilov*
- Practical implications of decreased judicial deference towards arbitration boards for the administration of justice

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BEYOND THE ADJUDICATIVE CONTEXT

9:45


How *Vavilov* Changes Judicial Review of Ministerial Discretion

 Matthew Lewans, Associate Professor,
University of Alberta

In *Vavilov*, the Supreme Court is silent on the exercise of ministerial discretion. In light of the decision's insistence on obeying legislative intent and the rule of law, will the reasonableness standard continue to apply?

10:15

Judicial Review of Subordinate Legislation Under *Vavilov*

 Shaun Charles Fluker, Associate Professor,
University of Calgary

Vavilov does not specifically address the difficulties in applying reasonableness to review the legality of subordinate legislation enacted by an administrative agency. The majority cites the Supreme Court's 2013 decision in *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64, re-iterating that "an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers," but this does not speak to the important distinctions between the exercise of legislative and adjudicative powers.

- Is deference appropriate in the judicial review of delegated legislative powers?
- If so, does *Vavilov* provide sufficient guidance on how to apply the standard of reasonableness to the exercise of legislative powers?

10:45 Break

11:15

What Recent Cases Reveal About the Status of the Law on Independence in Adjudication

 Andrea Gonsalves, Partner, **Stockwoods LLP**

Darren McLeod, Legal Counsel, **Immigration and Refugee Board of Canada**

J. Scott Mackenzie, Q.C., Chair and CEO,
PEI Regulatory & Appeals Commission

This session will examine the implications for administrative decision-makers of three key cases decided by the courts in 2019 which touch on the question of independence within tribunals:

- *Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals)*, 2019 ONCA 518, in which the Court of Appeal for Ontario considered the lawfulness of decision-makers consulting with other tribunal members in coming to their decisions.
- *Canadian Association of Refugee Lawyers v. Canada (Citizenship and Immigration)*, 2019 FC 1126, where the Federal Court grappled with whether the Chairperson's issuance of a case law guideline ("jurisprudential guide") to members of the Immigration and Refugee Board detrimentally affected the members' independence.
- *Walter v BC*, 2019 BCCA 221, in which the British Columbia Court of Appeal considered the remuneration policy of tribunal members, and contrasted said policy with the constitutionalized remuneration principles adopted for judges in cases such as the *PEI Reference*.

12:15

Navigating the Interface Between Administrative and Class Proceedings: Public Authority Liability Post-*Paradis Honey*

 Jordan Goldblatt, Managing Partner,
Adair Goldblatt Bieber LLP

In its landmark 2015 decision, *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, the Federal Court of Appeal reversed long-standing precedent by ruling that private law principles should not be used to resolve actions against public bodies. Instead, public law principles should apply, with monetary relief determined by assessing "unacceptability" or "indefensibility" of government actions in the administrative law sense. More recent cases—including *Wenham v. Canada (Attorney General)*, 2018 FCA 199 and *Brake v. Canada (Attorney General)*, 2019 FCA 274—further clarify how to consolidate judicial reviews and civil actions in federal court. This session will address:

- Avenues for "class application" as laid out in *Wenham*
- How *Brake* is meant to simplify procedure for seeking damages in individual and class actions
- Why the court reaffirms the *Paradis Honey* and *Hinton* approaches to class certification and dismisses the *Tihomirovs* approach
- The implications of this case law for government bodies as they seek to limit liability

1:00 Break

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SPOTLIGHT ON COVID-19

1:45

Anticipating Disputes Over the Exercise of Emergency Powers During the Pandemic: Privacy Considerations and Potential for Abuse in Governmental Conduct


 Cara Faith Zwibel, Director, Fundamental Freedoms Program, **Canadian Civil Liberties Association**

Since March, federal and provincial government bodies have taken emergency measures to mitigate the impact of the pandemic. As in any state of emergency, there are concerns about whether powers are exercised appropriately and in a manner that does not excessively infringe on individuals' rights. This session will address:

- Legislative and constitutional constraints on the government's ability to limit freedoms in order to pursue a collective interest
- Questions about how the Canadian *Charter* can be interpreted to apply to public health interventions
- Possible disputes relating to disclosure of personal information, freedom of movement, workers' rights, and the right to protest
- The implications of imposing mandatory vaccination, which is under consideration by provincial legislatures

2:15

Administering Justice Remotely: Procedural Fairness, Security, and Evidentiary Challenges in Virtual Hearings

 Michael Gottheil, Chief of the Commission and Tribunals, **Alberta Human Rights Commission**

Shannon Salter, Chair, **BC Civil Resolution Tribunal**


In light of safety concerns surrounding in-person gatherings, provincial and federal courts and tribunals have turned to remote adjudication to ensure continued access to justice amid the COVID-19 pandemic. While some tribunals built on a pre-COVID practice of holding certain hearings via teleconference, others were unprepared for this procedural transition. This session will explore best practices for managing virtual hearings and overcoming logistical barriers to delivering justice in a digital environment:

- Procedural fairness considerations and how virtual proceedings may facilitate or hinder access
- Building the appropriate infrastructure and legal issues with respect to security
- Challenges in effectively presenting technical evidence or large amounts of evidence
- Ways of maintaining a high degree of formality and upholding the integrity of the adjudicative body

3:00 Break

3:30

Overcoming COVID-19-Related Setbacks and Resuming Regular Operations Following the Pandemic


 David Field, President and CEO, **Legal Aid Ontario**

This session will address challenges in mitigation measures taken in the context of the pandemic and how administrative bodies will grapple with its aftermath. Topics include:

- Temporary rules of procedure that may be worth maintaining to make the administrative process more efficient
- How organizations are mitigating the impact of backlogs and managing the transition back to primarily in-person operations
- Navigating obstacles to service delivery where budgets are reduced
- Where the system was unprepared, and lessons learned for future crises

4:00

How Decision-Makers Can Foster Anti-Racism in Administrative Proceedings

 Ruth Goba, Former Executive Director, **Black Legal Action Centre**, Former Tribunal Member and Commissioner

4:30

Understanding Tribunals' Duties to Self-Represented Parties

 Julie Baril, Director of Legal Affairs, **Tribunal administratif du Québec**

With self-represented individuals appearing before tribunals and courts in important numbers, it is important that they be able to fairly navigate these institutions. This session will address practical ways of assisting such parties throughout the administrative process, and particularly in hearings (including in virtual hearings).

5:00 Closing Remarks, Conference Concludes

POST-CONFERENCE WORKSHOP Friday, October 30, 2020

🕒 11:00 am–2:30 pm (Break from 12:30 pm–1:00 pm)

Decision Writing Post-Vavilov: A Practical Guide for Drafting Robust Reasons

 Ian Demers, Senior Counsel, **Justice Canada**

K. Michael Stephens, Senior Litigation Counsel, **Hunter Litigation Chambers**

While there is uncertainty over what makes for "transparent and intelligible" justification under *Vavilov*, it is clear that the decision imposes an important burden on decision-makers to provide thorough reasons. In light of increased scrutiny in judicial review, it is more important than ever for administrative bodies to ensure that their decisions are well-reasoned. This session will offer practical strategies for lawyers and non-lawyers alike, addressing:

- An overview of principles of statutory interpretation for decision-makers who are not trained in the law
- What generally makes for a legally defensible decision
- How to demonstrate consideration of evidence presented by the parties in rendering a decision
- Organizing reasons logically and making them understandable to the reader





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