

# Reviewing Environmental Decisions

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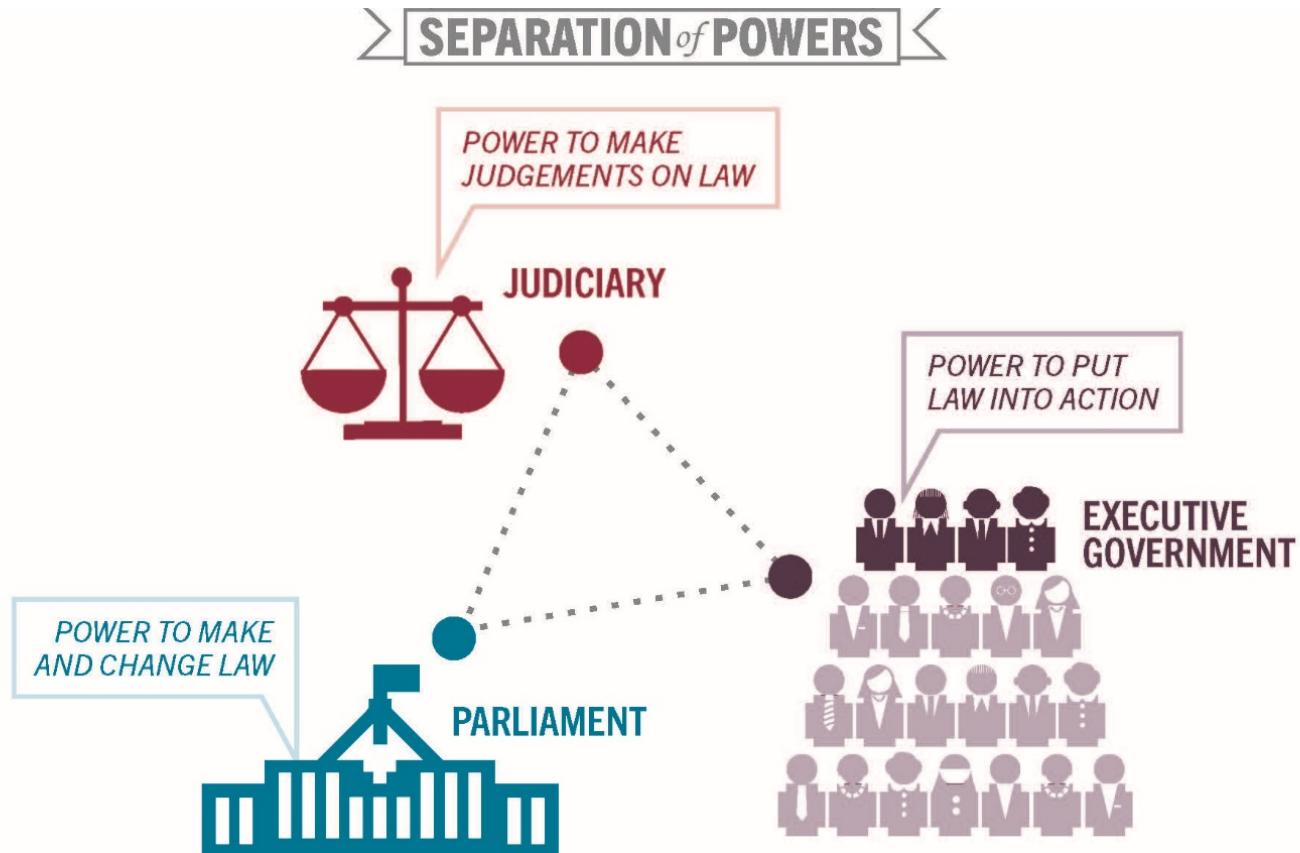
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# 1. Sharpening the tools

- case selection
  - options
  - strategy
  - risks

## 2. Framework of decision makers



# 3. Administrative decisions

- **Administrative actions**

- federal Minister of Environment and Climate Change
- provincial Ministry of the Environment, Conservation and Parks;  
Ministry of Natural Resources
  - e.g., “environmentally significant proposals for policies, Acts, regulations and instruments” (Part II EBR)
  - definition of “instrument”: permit, licence, approval, authorization, direction or order

- **Administrative adjudication**

- federal, e.g., Pest Management Regulatory Agency (PMRA)
- provincial, e.g., Ontario Land Tribunals: Local Planning Appeal Tribunal (LPAT) and Environmental Review Tribunal (ERT)
- Information and Privacy Commissioner

## 4. Reviewing environmental decisions

- some types of review
  - request review by tribunal or minister; statutory appeal, e.g., *Environmental Protection Act* (Ontario) s. 145.6 appeal on a question of law to Divisional Court and to Minister on any matter not a question of law; judicial review
- applicable law
  - provincial and federal environmental legislation
  - Charter (can affect standard of review)
- procedure and other considerations

## 5. Standard of Review

- reasonableness or correctness
- *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 – “a rollicking good read”
  - “a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions”
  - presumption can be rebutted 1. where the legislature has indicated that it intends a different standard to apply, e.g., statutory appeal mechanism 2. where the rule of law requires that the standard of correctness be applied.

# 6. Some cases and commentary

## Case law

- *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
- *Bancroft v. Nova Scotia (Lands and Forests)*, 2020 NSSC 175 (CanLII)
- *Nation Rise Wind Farm Limited Partnership v. Minister of the Environment, Conservation and Parks*, 2020 ONSC 2984 (CanLII)
- in the works: judicial review of Omnibus Bill 197 (see CELA and Ecojustice websites)

## Commentary on *Vavilov*

- [“Judicial Review post Vavilov: Are courts ‘correcting’ administrative decisions?”](#) Dina Awad and Elliot Windfield (Dentons), August 27, 2020
- [“Vavilov hits the Road”](#) Paul Daly (Feb. 4, 2020)
- [“Vavilov on Standard of Review in Canadian Administrative Law”](#) Shaun Fluker (February 6, 2020)

# 7. Final (?) thoughts

- statutory interpretation > ahead or behind?
- no specific mention of the environment in *Vavilov* except in passing in para. 202 (the minority); understandable as is a citizenship case involving the person > like to see it added to the shopping list in para. 106 (contextual analysis)
- tribunal expertise – diminished in Ontario?...
- commentaries cited reflect that there is uncertainty in application of *Vavilov*
- more decisions with reasons > tribunals will receive training on *Vavilov* proofing their decisions
- better reasons in decisions
- clarity in the law?
- in Ontario, legislating around judicial review? > shifting decision making to ministers > overlap with policy and JR more difficult on reasonableness standard e.g., statutory interpretation
- more work for lawyers and legal pundits (good or bad?)
- impact on case selection criteria

## **Stay tuned!**

- what will happen in the JR of omnibus Bill 197 bring? > will test many of the ingredients in *Vavilov*