of review for a tribunal interpreting its home statute would be one of "reasonableness". *Vavilov* cemented two exceptions to the presumptive reasonableness standard: 1) where the legislature has indicated that a different standard should apply (such as by creating legislated standards like those under the *ATA*, or by establishing statutory appeal mechanisms); and 2) where the rule of law requires the correctness standard be applied (such as for constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries of two or more administrative bodies) (see paras. 32–72). For a further discussion of these developments, see chapter 1 (An Overview of Administrative Law).

B. KNOW YOUR DECISION-MAKER OR TRIBUNAL [§2.18]

Despite the removal of "expertise" as a relevant factor in the standard of review analysis, the concept of "expertise" remains relevant on a practical level, and those practising before administrative decision-makers, whether tribunals or otherwise, would be well advised to do some advance research on the composition and membership of the specific decision-making body at issue. In much the same way that counsel may research the background and decisions of a particular judge before a hearing—to determine, for example, level of familiarity with the subject matter—administrative law practitioners increasingly have the same opportunities.

Many tribunal websites list the names of their current members, and may contain a short biography that sets out the member's background, training/education/professional status, the position held on the tribunal, and the length of time the member has served on the tribunal, which may indicate familiarity with the tribunal's processes or subject matter (see, for example, the B.C. Securities Commission website, which provides biographies for the chair and commissioners: www.bcsc.bc.ca/about/who-we-are/chair-and-commissioners). The website may also have details about whether certain members are full-time or part-time, the process and qualifications for appointment, and even rates of remuneration (see, for example, the Environmental Appeal Board website at www.eab.gov.bc.ca/board_members/index.htm).

The information available may indicate whether the tribunal members are appointed to more than one tribunal. For example, in 2020, the three current members of the Surface Rights Board are each also

members of the Property Assessment Appeal Board. If the website does not list that information, there are ways of searching for it—for example, by searching online or contacting the tribunal directly.

Determining the background of your tribunal members may allow you to tailor your submissions and evidence presentation more effectively. For example, if the members of your panel have technical expertise in forestry conservation matters, it may not be necessary to go back to first principles in order to present your opposition to the issuance of a licence or permit.

Your decision-maker may sit as a single member or as a panel (with varying numbers), or as a tribunal it may be able to sit in several different configurations. You should familiarize yourself with whether the composition of the tribunal for any particular hearing is determined by statute, rule, or convention, and if there are reasons (discretionary or otherwise) for selecting a certain composition (for example, is it at the discretion of the chair? Does the tribunal attempt to have a particular set of skills or experience represented on each matter?). In many cases, the enabling statute or a regulation under it will establish the possible configurations and the quorum for each, and will authorize someone, usually the chair, to determine composition. Section 93.1 of the *Environmental Management Act*, S.B.C. 2003, c. 53, applies certain provisions of the *ATA* to the Environmental Appeal Board, including s. 26 of the *ATA*. Among other things, that provision allows the chair to organize the board into panels of one or more members, requires the chair to designate who will chair a panel composed of more than one member, and specifies that a decision of a majority of a panel constitutes a decision of the board (with the chair of the panel having the tie-breaking vote if required). As a result of certain provisions of the *ATA* having been made applicable to the board, the Environmental Appeal Board Procedure Regulation, B.C. Reg. 240/2015 was revised and its content reduced, such that it now only addresses the notice of appeal, the requirement to provide reasons for orders or decisions, and transcripts.

You may also wish to consider whether the decision-maker has staff to assist and, if so, in what capacities. As noted above, some tribunals have in-house counsel, or access to legal advice (the British Columbia Residential Tenancy Branch receives advice from solicitors at the Ministry of Attorney General); some tribunals have employed researchers. While they cannot participate in the decision-making, it is good to have a sense of the resources to which your decision-maker has access and the other players who may be involved peripherally.

With respect to the decision itself, some tribunals will engage in full board deliberations after a draft decision. The Supreme Court of Canada has held that there is nothing inherently improper with such a practice, provided that the consultation is not imposed, that it is confined to questions of law and policy, and that the decision-makers remain free to make their own decisions (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4; see also *Tremblay v. Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC); staff and other members cannot be so involved as to control the process and wrest it away from the members who heard the case, and those who heard the case cannot delegate the decision-making to staff, regardless of their expertise).

VI. CHECKLIST: CHALLENGING AN ADMINISTRATIVE LAW DECISION [§2.19]

If someone is aggrieved by a decision of a person or entity that may be an administrative law decision-maker, the following are questions that they and their counsel might ask themselves when considering whether they have grounds for appeal or judicial review of the decision, or to pursue further with the decision-maker in appropriate cases.

- □ Does there appear to be an administrative law decision-making authority being exercised? If so, under which specific sections of which Act/regulations are the decisions being made?
- □ Does the administrative law decision-maker himself or herself understand and acknowledge that they are engaged in an administrative law decision-making exercise?
- □ Is the administrative law decision-maker able to cite the relevant sections of the Act and regulations? Do they understand that the principles of administrative fairness apply to administrative law decision-making?
- □ Does the person have the applicable designation or delegation to grant them the administrative law decision-making powers at issue? Can they provide a copy of the designation or delegation instrument upon request?
- □ If the statute gives the administrative law decision-making responsibility to a minister, has the minister made the decision personally? If not, is there an express or implied right of delegation, or is this a decision that a court may find a minister lacked the authority to delegate?

- In the case of an administrative law decision made by a person with delegated authority, has that person complied with any terms and conditions of the delegation instrument (if applicable)? Have they impermissibly sub-delegated that to another official?
- Is there any case law dealing specifically with the exercise of the statutory power in question? If so, does that case law provide guidance as to what specific procedures are required to discharge the principles of administrative fairness in this context?
- Have procedural fairness requirements been discharged? For example, has the applicant been given an opportunity to make their position known before a decision is made? Has the applicant been advised of any competing submissions or objections and been given a chance to respond? Have interested parties other than the applicant been given an opportunity to state their views?
- Can the administrative law decision-maker identify any written or unwritten policy that is used to guide her or his decision-making? If so, has a copy of the policy been provided or made accessible? Is the policy or guidance worded in a manner that respects the role (and limits) of policy in administrative law decision-making, or is there any suggestion that discretion has been fettered?
- Is there any indication that the administrative law decision-maker was not the person who really made the decision, but instead simply rubber-stamped a decision or implemented a direction by someone else (for example, their bosses)?