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ARTICLE

Canada (Minister of Citizenship and Immigration) v. Vavilov: A Practical Guide to the Revised Standard of Review Analysis

Canada (Minister of Citizenship and Immigration) v. Vavilov is a landmark ruling on administrative law as a majority of the Supreme Court revises the approach articulated in *Dunsmuir*. The ruling represents a departure from the deferential approach to administrative decision-making that the Court has espoused since at least *Dunsmuir*. While the Court affirms a presumption that judicial review will be done on a standard of reasonableness, the Court invokes the notions of the rule of law to signal that decision-makers will be held to a higher standard of justification when their decisions are reviewed. Absent proper reasons, administrative delegates are at an increased risk of having their decisions quashed.

While the decision is ripe for academic analysis, this post provides a practical guide to how the standard of review analysis operates for litigants and decision makers alike going forward. In doing so, we focus on the Court's analysis of what the revised standard of review framework entails and leave the discussion about the facts of *Vavilov* and its companion decision — *Bell Canada v. Canada (Attorney General)* (2019 SCC 66) — for another time. We also do not explore the concurring reasons of Justices Abella and Karakatsanis, where they raised concerns about the majority's decision. These, and other academic issues, will be taken up in a supplemental post on *Vavilov*.

In brief, the majority of the Supreme Court confirms that the standard of reasonableness presumptively applies to administrative decisions. However, the Court articulated two paths through which the presumption of reasonableness can be rebutted.

- First, where the enabling legislation provides statutory appeal rights to a court, *Vavilov* establishes that the appellate standards of review will apply.
- Second, the presumption of reasonableness can be ousted where the rule of law dictates that the standard of correctness be applied. This will be engaged in cases that raise (a) constitutional questions, (b) general questions of law of central importance to the legal system as a whole and (c) questions related to the jurisdictional boundaries between two or more administrative bodies.

Overall, the Court's decision is a signal to decision makers that their decisions will be subjected to greater scrutiny and that the standard for justification and reasons will be higher.

Below we provide a roadmap of how the *Vavilov* standard of review framework operates.

Step 1: Reasonableness is the Presumptive Applicable Standard to Administrative Decisions

Post- *Vavilov*, reasonableness review is the default approach. The majority — consisting of Chief Justice Wagner and Justices Moldaver, Gascon, Côté, Brown, Rowe and Martin — held that the "starting point" of any standard of review analysis is "a presumption that the legislature intended the standard of review to be reasonableness."

Step 2: Correctness Review is Possible in Two Circumstances

The majority observed that the presumption of reasonableness can be rebutted in two circumstances:

- Where the legislated standard of review is correctness or the impugned legislation contains statutory appeal rights to a court; or
- The rule of law requires the standard of correctness to be applied.

The majority noted, however, that future courts may find other ways the presumption of reasonableness is rebutted, whereby correctness review is required.

Legislated Standard of Review and Statutory Appeal Rights

Like in British Columbia, if legislature expressly implements a particular standard of review to be applied concerning administrative decisions, courts should give effect to that standard.

On a more ground breaking level, the majority in *Vavilov* finds that where there is a statutory appeal mechanism in legislation, the appellate standards of review will apply. For example if a court is hearing an appeal from an administrative decision, it would determine a question of law — including questions of statutory interpretation and those concerning the scope of a decision maker's authority — in accordance with the standard of correctness established in *Housen v. Nikolaisen*. Similarly, on questions of fact the appellate standard of palpable and overriding error would apply.

The emphasis on statutory appeal rights is rooted in the majority's recognition that for too long the case law has not placed any weight on such rights, despite the fact that statutory appeal mechanisms are clear signals of legislative intent with respect to the applicable standard of review. For the Court, it was time to end the anomalous treatment of statutory appeal rights vis-à-vis other traditional "signals" of legislative intent (such as privative clauses).

Practically speaking, the Court's statutory appeal mechanisms has a number of restrictions and consequences:

- Should statutory appeal have a leave requirement, the majority held that "[w]hile the existence of a leave requirement will affect whether a court will hear an appeal from a particular decision, it does not affect the standard to be applied if leave is given and the appeal is heard"; in other words, the standard of correctness would be applied;
- Where the legislative provision does not contemplate a court reviewing administrative decision and there is no statutory appeal mechanism, the

majority held that these provisions "do not authorize the application of appellate standards"; put another way, the standard of correctness would not apply.

Correctness Review Required by the Rule of Law

The majority held that there are circumstances where rule of law requires courts to apply the standard of correctness for particular questions. In providing a non-exhaustive list, the Court noted these questions to be:

(a) constitutional questions: the majority finds that questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, and the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982* necessitate a final and determinative answer from the courts. Therefore the standard of correctness is engaged.

(b) general questions of law of central importance to the legal system as a whole: the majority observed that these questions require uniform and consistent answers as they impact the administration of justice as a whole. Correctness review, and not reasonableness review, provides such certainty. The majority provides some examples of "questions of central importance": namely, when an administrative proceeding will be barred by the doctrines of res judicata and abuse of process; the scope of the state's duty of religious neutrality; the appropriateness of limits on solicitor-client privilege; and the scope of parliamentary privilege. On this point, the Court cautioned that merely because a question is of wider public concern it may not amount to a "question of central importance."

(c) questions regarding the jurisdictional boundaries between two or more administrative bodies: the majority noted that these questions are rare; but the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another.

Step 3: Guidance on How to Perform Reasonableness Review

The majority reiterated the longstanding view that reasonableness is a single standard "that takes its colour from the context" The Court also further affirmed that the reasons given for a decision are not assessed on a standard of perfection but need to contain the hallmarks of intelligibility, transparency, and justification. In reviewing these settled points of reasonableness review, the majority outlined two ways decisions can be unreasonable. These provide considerable insight into the internal workings of reasonableness review.

Internally Incoherent Reasoning

The majority ruled that an administrative body's reasons must be read in light of the record. A decision is unreasonable if the reasons, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. Here, the test for litigants and decision maker is to be satisfied "that the decision maker's reasoning 'adds up'". Reliance on logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise may also render an impugned decision unreasonable.

Unreasonable decision in light of the legal and factual constraints – Badges of Reasonableness?

In a highly helpful and innovative approach, the majority enumerated a number of constraints on decision makers conducting reasonableness review. The failure to abide by or provide due weight to such constraints can render their decisions unreasonable. In other words, these may be thought of as badges of reasonableness:

a. Governing scheme

The majority held that when a decision maker acts beyond the statutory constraints imposed on them that such decision is unreasonable.

b. Case law constraints

Precedents on the matter before the decision maker will act as a constraint on what the decision maker can reasonably decide. In particular, if there is a relevant jurisprudence where a court considered the impugned statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without carefully considering the precedent. At minimum, the decision maker will have to provide an explanation as to why a different interpretation of the provision is preferable in such instances.

c. Principles of statutory interpretation

Administrative delegates must interpret the contested provision in a manner consistent with its text, context and purpose, applying their particular insight into the statutory scheme at issue. In doing so, they cannot adopt an inferior — albeit plausible — [interpretation] merely because the interpretation in question appears to be available and is expedient."

d. Considering the evidentiary record

While a reviewing court does not engage in reweighing and reassessing the evidence considered by the decision maker, the court must be alert as to whether the administrative actor took the evidentiary record and the general factual matrix into account.

e. Submissions of the parties

While an administrative delegate does not need to address every single argument raised before them, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it.

f. Administrative body's past practices and decisions

Administrative bodies must be concerned with the general consistency of administrative decisions. That is, justice cannot be conditional on merely the identity of the individual decision maker. As such, the majority ruled that where a decision maker departs from longstanding practices, "it bears the justificatory burden of explaining that departure in its reasons." Otherwise the impugned decisions may be unreasonable.

g. Decision's impact on the parties

In merging procedural fairness considerations with reasonableness review, the majority held that where decisions threaten an individual's life, liberty, dignity or livelihood, it is incumbent on an administrative delegate to provide complete and thorough reasons. The failure to do so may render the decision unreasonable.

Should a decision fail to adhere to the foregoing badges of reasonableness, a court may find the decision unreasonable and quash it. Interestingly, the majority, in passing, opined that while typically a matter should be remitted to an administrative body to re-determine, a court can provide a directed verdict if it is a timely and effective resolution.

Conclusion

Like *Dunsmuir*, whether the promise of *Vavilov* — with the presumption of reasonableness and narrow carve outs for correctness review — leads to simplification and substantive changes in Canadian administrative law remains to be seen. At minimum, however, the majority in *Vavilov* shone a light on the importance of proper reasons from administrative decision makers. Absent proper reasons, administrative delegates are at an increased risk of having their decisions quashed. The Court has also opened the door for the rule of law to play a more prominent and direct role in standard of review discussions. The outcome, hopefully, is increased stability — and not another complete revision in the next decade.

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