Great Expectations: Meeting the Supreme Court's Expectations on Judicial Review

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Throughout Canada, federal and provincial governments have created a complex web of administrative tribunals, officers, and other officials who are given the delegated authority to make significant decisions that impact the everyday lives of Canadians. These include immigration officers who review and approve visa applications, assessment review boards who review municipal property tax assessments, labour relations boards, the Canadian Radio-television and Telecommunications Commission, the Canadian Energy Regulator, and a myriad of others.

Under the *Municipal Government Act*, these administrative decision makers include the Local Assessment Review Board, the Composite Assessment Review Board, Subdivision Development Appeal Boards, and the Municipal Government Board.

Courts exercise a "supervisory" function over administrative tribunals, which is known as "judicial review." This is to ensure that tribunals operate within their legislated jurisdiction, follow fair procedures, and make reasonable decisions consistent with Canadian law. However, the extent to which courts should show deference to decisions made by administrative tribunals on judicial review (known as the "standard of review") and when it is appropriate to intervene to quash decisions has been a subject of considerable debate, confusion and controversy in recent years.

The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65* (and its companion decision *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66) attempts to resolve that debate. *Vavilov* provides the most comprehensive review and reformulation of the law on the standard of review in over a decade, and in many ways departs from previous jurisprudence.

This article provides a high-level overview of the debate and controversy which led to the Supreme Court's decision in *Vavilov*, and describes some of the more significant clarifications and changes made by the Supreme Court in *Vavilov* to the law on selecting and applying the appropriate standard of review.

i) *Dunsmuir* and the Controversy on Standard of Review Pre *Vavilov*

In 2008, the Supreme Court of Canada released its decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, which was intended to simplify the law on selecting the appropriate standard of review. The Court indicated that a contextual analysis of the tribunal's expertise, its enabling legislation and other factors was required to determine the level of deference to be shown by courts to decisions made by a particular tribunal. Several known categories which call for a less deferential "correctness" standard of review were prescribed, including constitutional questions, issues of general importance to the legal system as a whole and beyond the tribunal's area of expertise, and true questions of jurisdiction. For other decisions where a tribunal possesses specialized expertise in a particular area, and the enabling legislation suggests the legislature intended for the tribunal to be shown greater deference, courts were directed to apply the more deferential "reasonableness" standard of review. In applying the

"reasonableness" standard, the Supreme Court mandated that lower courts determine whether the decision "falls within a range of possible, acceptable outcomes" based on the facts and law, and not substitute its own preferred reasoning for that of the tribunal's, although little specific direction was given on how a reasonableness review should be conducted in practice.

In the eleven years since the release of *Dunsmuir*, lower courts, legal practitioners, academics and members of the public have expressed confusion on how to select the appropriate standard of review, and how to apply the more deferential "reasonableness" standard. For example:

- If a tribunal is interpreting legislation, can it really be said that the tribunal possesses greater expertise than the Court to interpret statutes?
- What if the tribunal's interpretation of a statute does not correspond with how the Court might interpret it?
- If the appointees to a tribunal do not have any particular training or expertise in the matters which come before them, should any deference be shown by the Court to their decisions?

Different courts came to different conclusions on these and other questions, leading to uncertainty and confusion in the law of choosing and applying the standard of review.

The following discussion of the judicial review analysis of two recent Composite Assessment Review Board decisions illustrated the dichotomy in the application of the reasonableness standard.

Two recent decisions from the Court of Queen's Bench illustrate how critical it is for ARBs to craft well-reasoned and thorough decisions to ensure that their interpretations of their home statutes meet the Court's approval.

In *Associated Developers Ltd v Edmonton (City)*, 2019 ABQB 262, the Court was tasked with reviewing an ARB decision which interpreted section 4(3) of the *Matters Relating to Assessment and Taxation Regulation* ["*MRAT*"] and section 297 of the *MGA*. Section 4(3) of *MRAT* states that, if a parcel is being used for farming operations, but can be serviced using water and sewer distribution lines located adjacent to that parcel, a notional area of three acres must be assessed at market value, instead of using the "agricultural use" valuation standard that typically applies to farm land. The ARB determined that, when determining the assessment class of the three-acre parcel, it was reasonable for the assessor to classify that land as "non-residential" instead of "farm land" since section 4(3) directed that the agricultural use valuation standard could not apply. On judicial review, the taxpayer argued that it was not reasonable for the ARB to conclude that section 4(3) influences which assessment class applies to the parcel, particularly since the parcel was being used as farm land.

In this case, the Court agreed that the taxpayer's preferred interpretation of the relevant legislation was more consistent with what the Court believed was the proper

interpretation, but the Court ultimately found that the ARB's interpretation was justifiable nonetheless. In other words, the judge upheld the ARB's interpretation, even though she found that she would have preferred a different interpretation (and even though she had far more expertise in interpreting statutes than the ARB did). In coming to this conclusion, the Court noted that the ARB's reasons were transparent and intelligible, and applied the tools of statutory interpretation properly. Had the ARB's reasons not been clear, intelligible and complete, it is possible the Court might have found its interpretation to be unreasonable.

In *Quattro Farms Ltd. v. County of Forty Mile No. 8*, 2019 ABQB 135, the Court was asked to review an ARB decision which evaluated whether certain improvements located on a mint farm used to extract mint oil from mint plants met the statutory definition of "farm buildings" under the *MGA*. In its decision, the ARB determined that the improvements were not "farm buildings" because the improvements included machinery and equipment involved in processing, which was beyond what the statute intended for farm buildings to be engaged in.

While the Court recognized that the ARB was entitled to deference in determining whether the improvements on the subject property constitute "farm buildings", the Court found that the ARB's interpretation "does not accord with the legislation or its purpose." In coming to this conclusion, the Court noted that the ARB's reasons improperly focused on whether the improvements could be classified as "machinery and equipment", which was not the question before it. On that basis, the Court concluded that the ARB's analysis was premised on an improper framework, and it proceeded to conduct its own statutory interpretation. In doing so, the Court found that it would have reached a different conclusion. Given the errors identified by the Court in the ARB's reasons, the Court concluded that the Board's interpretation was "not defensible on a proper reading of the legislation" (*Quattro* at para 48).

The *Quattro* and *Associated Developers* decisions demonstrate the high standards courts hold ARBs to in crafting written decisions. If the Court finds that it would have interpreted a statute differently, the Court will scrutinize the ARB's reasons to determine if its contrary interpretation is defensible. If the reasons are confusing or incomplete, there is a greater risk that the Court will find the decision is unreasonable if it determines that it prefers an interpretation that differs from the ARB's.

Practically, these decisions demonstrate how important it is for ARBs to receive proper training in statutory interpretation. ARBs are rarely supported by independent counsel, which would assist in crafting written decisions that will withstand scrutiny by the Court. The Supreme Court's direction to show deference to ARBs means that it is more important than ever for ARBs to get their decisions right at first instance. Training and supporting ARBs can go a long way to instilling certainty in the assessment review process, and will reduce the likelihood that decisions are overturned by the Court.

The Supreme Court's decision in *Vavilov* addresses these two issues head-on: how should a Court select the appropriate standard of review, and how should a Court apply the more deferential "reasonableness" standard of review? The following is a high-level summary of the framework prescribed by *Vavilov* for these two issues.

ii) Selecting the Appropriate Standard of Review

Vavilov simplifies the process for determining the applicable standard of review. *Vavilov* abolishes the "contextual" approach prescribed by *Dunsmuir*, noting this analysis is overly complex, and has often overshadowed a review of the merits of the actual decision. Instead, the presumption in all cases is that the more deferential "reasonableness" standard should apply, unless the legislature has expressly prescribed a different standard of review by statute, or the issue on judicial review falls into one of three categories which call for less deference to be shown: constitutional questions, general questions of law that are important to the legal system as a whole, and the jurisdictional boundaries between administrative bodies.

By shifting the test towards a presumption that the reasonableness standard should apply, the "relative expertise of the tribunal" is no longer a relevant consideration in determining the standard of review (see *Vavilov* at paras 27-28). Instead, Courts are to show respect for the legislature's "institutional design choice", and in the absence of a contrary direction, the Court should assume that the legislature's choice to create a tribunal to adjudicate certain matters means by implication that it intended for the Court to play a minimal role in those matters.

One of the most significant changes made by the Supreme Court is how courts should interpret statutory appeal mechanisms (see *Vavilov* at paras 36-52). Previously, the Supreme Court has applied a similar analytical framework to determining the standard of review applicable to administrative tribunals for both judicial reviews and statutory appeals. The majority of the Supreme Court has now expressly disclaimed this line of authority, and instead has indicated that the legislature's choice of creating a right of "appeal" should be assumed to mean that the less deferential framework of appellate review should apply, following the Supreme Court's decision in *Housen v. Nikolaisen*, 2002 SCC 33. In essence, a statutory right of appeal reflects the legislature's intent to give the Court a more robust role in supervising and reviewing the tribunal's decisions and functions, and makes the Court an active participant in the overall decision-making process. This represents a significant change in the law, and may cause legislatures to review statutory appeal clauses to determine if amendments are required to properly reflect the legislature's intentions with respect to the applicable standard of review.

The Supreme Court has affirmed that the legislature retains the jurisdiction to depart from the common law and specify a different standard of review by statute (within the limits prescribed by the rule of law), citing British Columbia's *Administrative Tribunals Act* as an example.

Under the *Municipal Government Act*, decisions of the Local Assessment Review Boards, Composite Assessment Review Boards, and the Municipal Government Board are subject to judicial review. Following the direction of the Supreme Court in *Vavilov*, the standard of review is presumed to be reasonableness.

However, decisions of the Subdivision Development Appeal Board are subject to a statutory right of appeal, meaning that the less deferential standard of appellate review will apply, on the assumption that the legislature intended the Court to be an active participant in the decision making process.

iii) Applying the "Reasonableness" Standard of Review

In several important respects, *Vavilov* clarifies what it means for a court to show deference to a decision made by an administrative decision-maker under the "reasonableness" standard of review. *Vavilov* represents the Supreme Court's most comprehensive effort to date to provide direction on this issue, as previous decisions have tended to focus more on selecting the appropriate standard, as opposed to applying it. Overall, *Vavilov* sets high standards for tribunals to meet, perhaps higher than the standards applied in the past.

One of the criticisms of the "reasonableness" standard is that courts have become too deferential to administrative tribunals, creating a "two-tiered justice system", where those subject to decisions made by administrative tribunals "are entitled only to an outcome somewhere between 'good enough' and 'not quite wrong'" (para 11). The Supreme Court is sympathetic to this criticism, and addresses it by setting high standards for tribunals to provide detailed, cogent and rational reasons to justify their decisions.

First, the Supreme Court has indicated that the lower court's focus must remain squarely on the "decision actually made", which includes both the reasoning process, and the outcome. Courts are not to consider what decision they might have made in place of the tribunal, whether a range of possible conclusions are possible on the issue, or otherwise conduct a *de novo* analysis of the issue decided by the tribunal (para 83). The Court's sole focus is on whether the decision reached by the tribunal is *unreasonable*.

The majority repeatedly emphasizes that the institutional legitimacy of tribunals and other administrative decision-makers is directly correlated to reasoned decision-making (para 74). While the Court affirms that written reasons are not required in all circumstances, courts should remain focused on the reasons given by the decision-maker in whatever form those reasons take. Reasons give tribunals an opportunity to carefully examine and articulate the basis upon which they have reached their decision (para 80), and they help facilitate meaningful judicial review.

Second, the Court directs that "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85), and emphasizes that the decision must not only be *justifiable*, but properly and logically *justified* (para 86). In other words, the decision cannot be upheld on the "reasonableness" standard of review if a tribunal reaches an otherwise reasonable outcome based on flawed logic. Both outcome and process are considered together (para 87).

Third, the Court affirms that "reasonableness" remains a single standard, but how it is applied will vary depending on the context, given the wide variety of decisions and decision-makers who are subject to judicial review (paras 88-90).

Fourth, the Court affirms that judicial review includes a robust review of the record of proceedings and the administrative setting in which the decision was made (paras 91-98). If such a review demonstrates that the tribunal failed to consider relevant evidence or discloses a fundamental gap in the tribunal's chain of analysis, the decision should be held as unreasonable even if the result, on its face, was not unreasonable (see paras 125-126). A critical consideration is whether the decision is justified and intelligible to the parties subject to the decision, in light of the evidence adduced before the decision-maker, and the parties' submissions.

Fifth, the Supreme Court affirms that lower courts should not engage in a "treasure hunt for errors" and quash tribunal decisions on the basis of "minor missteps" (paras 99-101). This repeats the same caution expressed in previous Supreme Court decisions addressing standard of review, and confirms that errors in reasoning must be sufficiently serious to warrant court intervention. Within that analysis, the Supreme Court confirms that reasonable decisions must be internally logical, and cannot simply re-state the parties' positions before setting out a peremptory conclusion without explaining how it reached that conclusion (para 102). The Court also emphasizes that the reasonableness of a decision will be guided by the relevant statutory scheme, and other applicable law (such as decisions which comment on the same or related legal issues), although the Court cautions that administrative decision-makers are not necessarily required to apply equitable and common law principles in the same manner as courts (para 113). Similarly, while tribunals are not bound by previous decisions made by the same tribunal, a panel that departs from an established precedent must explain why it is doing so (para 131).

The Supreme Court expressly states that courts should not apply a less deferential standard of review to issues where there is "persistent discord" within the tribunal on how such issues are to be resolved. The court's role is not to manage the risk of persistently discordant or contradictory interpretations issued by the same administrative body, which differentiates judicial review from appellate review (para 132).

The Supreme Court provides detailed direction on how courts should review matters of statutory interpretation, and confirms that the standard of review remains "reasonableness" despite the fact courts regularly engage in their own interpretations of statutes. The Court confirms that the "modern approach" to statutory interpretation applies to interpretations conducted by administrative tribunals, and that such interpretations must be "consistent with the text, context and purpose of the provision" (paras 118-120). The Court notes that, in some cases, there may be only one "reasonable" interpretation if the statutory language is sufficiently clear and unambiguous (para 124), but cautions courts against pronouncing upon a definitive interpretation of a provision that is within the administrative tribunal's home jurisdiction (para 124).

The Supreme Court also provides some direction on how courts should address decisions where no written reasons are issued (paras 136-138), and how to determine the proper remedy for when a decision is found to be unreasonable (paras 139-142).

Overall, the Supreme Court's decision in *Vavilov* provides lower courts with a robust framework for both determining and applying the proper standard of review. The revised approach simplifies the analysis for determining the applicable standard of review, and for the first time, comprehensive direction is given for the application of the "reasonableness" standard of review. In general, *Vavilov* sets high standards for administrative decision-makers to aspire to; higher, perhaps, than the standards previously imposed. The Court was clearly troubled by the suggestion that administrative tribunals represent a type of "two-tiered" justice system. *Vavilov* attempts to correct that by emphasizing the importance of rendering decisions that are logical, coherent, and based on a sound and defensible application of legal principles. We see the *Vavilov* decision as reinforcing the importance of providing assessment review boards and subdivision and development appeal boards with training and support to tackle the complex legal issues before them.

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