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Judicial Review: impact of the Vavilov Judgment

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In Vavilov, the Supreme Court of Canada revised the applicable legal framework for the determination and application of the standard of judicial review of administrative decisions.

Changes were made to the analytical framework for determining the applicable standard of review and clarification was provided as to how the standard of reasonableness should be applied. The objective was a more easily identifiable standard and diminished debate on the standard of review applicable to a given administrative matter.

On December 19 and 20, 2019, the Supreme Court of Canada published three administrative judicial review decisions in the cases of *Vavilov*[1], *Bell Canada*[2] and *Canada Post Corporation*[3].

In the first case, which dealt with espionage, the majority set out a new approach to the judicial review of administrative decisions, with particular regard to the application of the reasonableness standard. The other two decisions similarly illustrate the application of these new principles.

Determining the appropriate standard of review

Presumption of reasonableness

The new analytical framework includes a presumption that reasonableness is the applicable standard in all cases. Going forward, whenever a court reviews the merits of an administrative decision, it should begin with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. As a result, it is not necessary for courts to engage in a contextual analysis as there are no longer categories of questions for which the standard of review is not identified at the outset.

Categories of questions subject to the correctness standard

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The categories of questions to which the standard of correctness applies remain essentially the same:

> Constitutional questions;
> Questions regarding the respective jurisdictional boundaries of the specialized tribunals;
> Questions of law of central importance to the legal system as a whole; more specifically, it is no longer necessary for the question submitted to be outside the area of expertise of the decision-maker; rather, it is sufficient that it is of central importance to the legal system as a whole.

Category of jurisdictional questions

"Jurisdictional questions"or "true questions of jurisdiction" are no longer questions for which the correctness standard must be applied.

Although this is not a major change in itself, the Supreme Court has often stated that this type of question is exceptional. Now that the fate of these questions has been clarified, the standard of reasonableness applies.

Cases where the law provides for a statutory appeal mechanism

In cases where the law provides for an appeal of an administrative decision to a court of law[4], counsel must now defer to the appellate standards of review, keeping in mind the nature of the question at hand (question of law, question of fact or question of mixed fact and law) as opposed to the standards of judicial review.

Cases where the law specifies the applicable standard of review

The presumption of reasonableness review can be rebutted where a legislature expressly outlines the standard of review applicable to a given administrative decision. In such cases, the standard determined by the legislature applies.

Important Take Aways

The *Vavilov* judgment marks a major shift in the state of the law of judicial review. For this reason, prior case law should be treated with caution.

The situations in which the presumption of reasonableness review can be rebutted are limited to the five listed above: the three categories of questions where the application of the correctness standard is required, cases of appeal provided for by law, and cases in which the legislature has expressly specified the applicable standard.

Nevertheless, the Supreme Court appears to have opened the door to subsequent recognition of new exceptions, albeit on an exceptional basis and in accordance with the analytical framework and principles set out in the decision.

Applying the reasonableness standard – Moving forward

In addition to revising the analytical framework for determining the applicable standard of review, the majority provides a series of clarifications and indications on how the standard of reasonableness

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should be applied, and refers to a “more robust form of reasonableness review.”

It is important to follow future judgments of the Supreme Court (in addition to other lower courts) in order to accurately measure the impact of this new framework for applying the reasonableness standard.

Our colleagues specialized in administrative law, labour law and litigation remain at your disposal for any questions that may arise.

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1. *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65.
2. *Bell Canada* v. *Canada (Attorney General)*, 2019 SCC 66.
3. *Canada Post Corporation v. Canadian Union of Postal Workers*
4. For example, the appeal of certain decisions of the Administrative Tribunal of Québec to the Court of Québec.

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