

Supreme Court Majority alters framework for judicial reviews and statutory appeals

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On December 19, 2019, the Supreme Court of Canada issued its much-anticipated decisions in *Canada (Minister of Citizenship and Immigration) v. Vavilov* [PDF] and *Bell Canada v. Canada (Attorney General)* [PDF] and *National Football League v. Canada* [PDF] (together, the Administrative Law Trilogy). The Administrative Law Trilogy is of tremendous significance to all participants in the administrative state, including regulated companies operating within Canada, as it redefines the nature and scope of judicial review of administrative action.

The Majority's reasons fundamentally alter the standard of review analysis that is applied to judicial reviews and statutory appeals from administrative bodies. First, the reasonableness standard now applies to all reviews of the merits of administrative decisions, except where a clear indication of legislative intent or the rule of law demands a correctness review. Second, the Majority clarified the application of the reasonableness standard to decisions with and without reasons. Perhaps most profoundly, the Court departed from its own recent decisions by finding that a *correctness* standard of review applies to legal questions on statutory appeals from administrative bodies.

Background

Since the Supreme Court's 2008 decision in *Dunsmuir v. New Brunswick*, Canadian courts increasingly applied a deferential standard of "reasonableness" to review the merits of regulatory, administrative or executive decisions that interpreted and applied their enabling or "home" statutes. The reasonableness standard recognizes that legislators created administrative bodies such as energy boards, labour relations bodies, and telecommunications and securities regulators to serve as experts on complex issues of fact, law and policy. So long as their decisions and reasoning processes fall within the range of reasonableness, they will not be overturned by courts, even if the court would have reached a different decision.

In contrast, since *Dunsmuir*, courts largely limited the "correctness" standard of review (under which no deference applies) to more-or-less defined categories where context, the rule of law, or consistency between administrative decision-makers required it. Although certain aspects of this framework were clear, others were the subject of extensive debate or could give way to an occasionally searching "contextual analysis" to determine the standard of review.

These administrative law standards of review contrast with general appellate standards of review from trial courts in which all legal questions are assessed for correctness, while issues of fact and mixed fact and law are only overturned where there has been a palpable and overriding error. These appellate standards are rarely the subject of extensive debate, as the

framework has been largely settled for nearly two decades.

The administrative law standards of review have been much more turbulent. Notwithstanding that *Dunsmuir* was intended to simplify the framework, parties continued to spend disproportionate time arguing over the proper standard of review, rather than the actual merits of the case. The Supreme Court granted the Administrative Law Trilogy leave to appeal to clarify the law on standard of review.

The Majority reasons: Distinguishing judicial review from statutory appeals

The Majority identified several areas of administrative law that required clarification.

Expanded presumption of reasonableness: To clarify the analysis for determining the standard of review, the Majority expanded the presumption of reasonableness beyond the interpretation and application of an administrative body's "home statute" to *all cases* in which a court reviews the merits of an administrative decision.

Five categories for correctness to apply: The Majority reformulated the situations where the presumption of reasonableness review is rebutted in favour of a "correctness" review. The *Dunsmuir* framework has been replaced with two situations where correctness applies, under which there are five nearly exhaustive categories. Under the new *Vavilov* framework, a correctness review will apply only where:

1. The legislature has indicated that correctness is the standard of review, which includes:
 1. Where the legislature explicitly prescribed the standard of review as correctness;
 2. Where the legislature has provided a statutory appeal mechanism to a court, thereby signalling that the "appellate" as opposed to "administrative" standards will apply;
2. The rule of law requires that the standard of correctness applies, which includes:
 1. Constitutional questions;
 2. General questions of law of central importance to the legal system; and
 3. Questions of the jurisdictional boundaries between administrative bodies.

Although the Court did not foreclose the possibility of identifying new categories of correctness review, the Court did not invite the routine expansion of this framework. It is no longer possible to argue generally that the "context" requires the correctness review to apply, and the recognition of new categories of correctness review will be exceptional.

Statutory appeals attract a correctness standard: In a significant change in law, the Majority departed from its recent decisions by finding that a statutory appeal mechanism will result in the Court applying the correctness standard to questions of law arising on appeal. More particularly, courts will now substitute the "appellate" standards of review for "administrative" standards of review where the matter comes before the court on statutory appeal from an administrative body. As a result, the "correctness" standard will now apply to all questions of law, regardless of the relative expertise of that administrative body, and the "palpable and overriding error" standard will apply to questions of fact and mixed fact and law.

Broader application of the correctness standard: The Court also expanded the category regarding questions of "central importance." Formerly under the *Dunsmuir* framework, this category of correctness review required *both* that the question be: (1) of central importance to the legal system, and (2) outside of the adjudicator's specialized area of expertise. Under

the new *Vavilov* framework, the second element of the test has been abandoned.

Elimination of “true” jurisdictional questions: Also notable is that the Majority jettisoned the much-criticized concept of “true” jurisdictional questions, which had formerly been a category of correctness review under *Dunsmuir* (although its content had been the subject of extensive debate). In eliminating this category, the Majority acknowledged that valid concerns underlay the prior attempts to define this category, namely the concern about administrative actors determining the scope of their own authority. The Majority took these concerns into account in re-articulating the application of the reasonableness standard.

Clarity in respect of the reasonableness review: To clarify the application of the reasonableness standard, the Majority confirmed several first principles of administrative law that had been subject to diverging interpretations in recent years, including: (1) the role of the court is to review the actual decision and reasoning process, not decide the issue or attempt to ascertain the range of reasonable outcomes itself; (2) reasonableness is a single standard that accounts for context; and, (3) courts cannot disregard flawed reasoning for a decision and substitute their own reasoning just because the same outcome would be reasonable under different circumstances.

Fundamental flaws leading to an unreasonable decision: The Majority identified two types of fundamental flaws that render a decision unreasonable: (1) one that is internally incoherent; and (2) one that is untenable in light of factual and legal constraints such as the governing statutory scheme, applicable common law adapted to the administrative context, principles of statutory interpretation, the evidence, the submissions of the parties, and past practices and decisions (which should only be departed from where justified in its reasons).

The Minority: The Majority fundamentally re-alters administrative law

Justices Abella and Karakatsanis delivered minority opinions. Although they agreed with aspects of the Majority’s new framework (such as eliminating the general “contextual” inquiry and doing away with “true” questions of jurisdiction), they expressed concern that the new framework would expand the role of correctness review, particularly in the context of the statutory appeals from administrative actors. Justices Abella and Karakatsanis reasoned that the Majority “fundamentally reorients the decades-old relationship between administrative actors and the judiciary, by dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis.”

Impact on regulated companies

The Majority’s detailed reasons have the potential to clarify and simplify some aspects of Canadian administrative law that had been the subject of debate and diverging judicial application. This is good news for all regulated companies. These developments may also encourage decision makers to better substantiate their decisions, particularly discretionary ones that are subject to a reasonableness review. However, by expanding the appellate standard of “correctness” to legal questions on statutory appeals from administrative bodies, the Majority has fundamentally altered the scope of deference provided by appellate courts to these important administrative bodies (that currently include energy and telecommunications regulators). In doing so, the Court has increased appeal risk which, absent legislative amendment to prescribe a reasonableness standard, will likely result in an increase in the volume of appeals from these bodies. These developments may also spur legislative changes to address standard of review and provide guidance to reviewing courts.