

Goodmans^{LLP} Update

Supreme Court of Canada Establishes New Approach to Standard of Review

This week, the Supreme Court of Canada (SCC) released a trilogy of cases that establish a new framework for how Canadian courts are to review decisions of administrative actors (e.g., tribunals, boards or government ministers and their delegates).

The SCC found that courts should presumptively review administrative decisions on a deferential standard of reasonableness, unless the legislature has indicated, or the rule of law requires, that a correctness standard should apply (see decision tree at the end of this Update). The SCC also provided much needed guidance on how to apply the reasonableness standard, which had been mired in uncertainty for decades.

Background

A little over a decade ago, the SCC tried to clarify the approach to judicial reviews of administrative decisions in *Dunsmuir v New Brunswick*. In that case, the SCC established two standards of review: reasonableness and correctness.

While *Dunsmuir* sought to provide clarity to this area of the law, courts sometimes had difficulty applying the framework and legal principles that *Dunsmuir* established. This resulted in considerable uncertainty and inconsistency over the standard of review that should be applied in any particular case. As the SCC noted, “It has become clear that *Dunsmuir*’s promise of simplicity and predictability in this respect has not been fully realized.”

The Supreme Court Revisits the Standard of Review

In 2018, in the wake of the legal uncertainties that followed *Dunsmuir*, the SCC granted leave to appeal in three cases from the Federal Court of Appeal, each involving judicial reviews of administrative decision-makers. In a rare move, the SCC, in its reasons granting leave, specifically requested submissions from the parties on the nature and scope of the standard of review. The SCC also appointed two *amici curiae* (“friends of the court”) and 27 interveners were granted leave to provide submissions.

The cases dealt with two substantive issues, as two of the cases in the trilogy arose from the same facts. The history of these cases is briefly summarized below.

Canada (Minister of Citizenship and Immigration) v. Vavilov

The first case was a judicial review of a decision by Canada’s Registrar of Citizenship that cancelled an individual’s Canadian citizenship. Mr. Vavilov was born in Toronto but, unbeknownst to him until he was a teenager, his parents were foreign nationals working on a long-term assignment for the Russian intelligence service. After his parents were arrested in the United States and charged with conspiracy and acting as unregistered agents of a foreign government, Mr. Vavilov’s citizenship was brought into question.

Specifically, section 3(2)(a) of the *Citizenship Act* states that a person born on Canadian soil is not a Canadian citizen if neither of the person’s parents were lawfully admitted into Canada and the person’s parents were representatives/employees of a foreign government. The Registrar determined that Mr. Vavilov, despite being born in Canada, was not a citizen because his parents were “employees of a foreign government” and were not lawfully admitted into Canada.

Authors



Tamryn Jacobson
tjacobson@goodmans.ca
416.597.4293



Ryan Cookson
rcookson@goodmans.ca
416.849.6012



Matthew Lakatos-Hayward
mlakatoshayward@goodmans.ca
416.849.6906

The Federal Court of Canada dismissed Mr. Vavilov's application for judicial review. The Federal Court of Appeal overturned the lower court decision.

Bell Canada v. Canada (Attorney General) and National Football League et al. v. Canada (Attorney General)

The other two cases arose from the same facts and dealt with an administrative tribunal's jurisdiction to regulate Super Bowl broadcasts. For over 40 years, Super Bowl broadcasts in Canada were subject to the "simultaneous substitution" regime, which allows broadcasters that hold the Canadian rights to specific programs to request that broadcasting distribution undertakings, such as cable or satellite companies, delete international signals carrying such programs and substitute their local signals. The effect of the simultaneous substitution regime was that Canadians would see Canadian advertisements during the Super Bowl and the Canadian broadcaster would be able to monetize its Canadian program rights across all signals shown in Canada. In 2016, the Canadian Radio-television and Telecommunications Commission (CRTC) issued an order prohibiting simultaneous substitution only with respect to the Super Bowl and retained the regime for other programs. The CRTC justified its policy under section 9(1)(h) of the *Broadcasting Act*, which allows the CRTC to require broadcasting distribution undertakings to carry "on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission".

Bell Canada and the National Football League appealed the CRTC's decision to the Federal Court of Appeal, who upheld the decision as reasonable.

The Supreme Court's Decision

Determining the standard of review

In *Vavilov*, a seven judge majority of the SCC established a new framework for determining the standard of review. The majority surveyed the judicial history on the standard of review and found that it would not be bound by its previous cases. It found that departing from the framework that informed its previous decisions would support the goal of simplifying the law to "get the parties away from arguing about the tests and back to arguing about the substantive merits of their case." The SCC applied the new framework to the facts in the *Vavilov* and *Bell/NFL* cases.

Specifically, the SCC found there should be a presumption that the deferential standard of reasonableness applies when a court reviews administrative decisions. This was needed to give effect to the legislature's intent that administrative decision makers should function with minimum judicial interference. The SCC noted that "it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review." By adopting this new approach, the Court abandoned the "contextual analysis" previously used to determine the standard of review, which had become mired in uncertainty.

The presumption of reasonableness is rebuttable in two situations. The first is where the legislature has indicated that it intends a different standard of review to apply. The legislature may do so expressly by prescribing the standard of review that should be applied. In addition, where a statute provides for an appeal from an administrative decision to a court, the court hearing such an appeal is to apply an appellate standard of review (i.e., correctness on questions of pure law and palpable and overriding error for questions of fact or mixed fact and law).

The second situation in which the presumption is rebuttable is when the "rule of law requires that the standard of correctness be applied." The majority identifies three categories of legal questions courts must consider under a correctness review:

- constitutional questions regarding the relationship of different levels of government and the scope of Indigenous rights protected under section 35 of the *Constitution Act, 1982* and other constitutional matters;
- general legal questions "of central importance to the legal system as a whole"; and
- questions that require the court to delineate the boundaries of two administrative actors whose authority to determine a matter arises.

At the end of this Update is a decision tree that summarizes the SCC's new framework for determining the standard of review.

Applying the reasonableness standard of review

The SCC also established a new analytical framework for applying the reasonableness standard of review. The SCC held that a reasonableness review is focused on both the decision-making process and substantive outcomes. The majority found that the reasonableness of a decision can generally be assessed based on two factors:

- whether the decision is based on internally coherent reasoning; and
- whether the decision is justified in light of the legal and factual constraints bearing on the decision.

For the first factor, a decision is unreasonable if the reviewing court fails to find a rational “chain of analysis” that led to the decision. Conversely, a reasonable decision is one that allows the reviewing court to trace the decision-maker’s reasoning and understand the administrative actor’s rationale in arriving at their conclusion.

For the second factor, the court is to consider whether the decision was justified based on considerations such as the limits imposed by the governing statutory scheme, the evidence before the administrative actor, the parties’ submissions, previous decisions from the administrative actor, and the decision’s impacts on a person.

Application of the new framework

The SCC went on to apply its new framework for judicial review to the cases before it.

In *Vavilov*, the SCC applied the reasonableness standard and restored Mr. Vavilov’s citizenship. The SCC found that the Registrar’s interpretation of section 3(2)(a) of the *Citizenship Act* unreasonably expanded the exception to cover foreign government employees without diplomatic privileges or immunities.

In *Bell/NFL*, the Court reviewed the CRTC’s decision on a correctness standard because Bell and the NFL appealed under a statutory right of appeal in the *Broadcasting Act* on a question of law. The SCC found that the CRTC lacked the authority under section 9(1)(h) of the *Broadcasting Act* to prohibit broadcasting distribution undertakings from substituting Canadian signals including Canadian advertisements over non-Canadian signals and advertisements during the Super Bowl.

The Court also provided important clarity on the application of section 9(1)(h) of the *Broadcasting Act*. The Court noted that the CRTC’s order was based on an incorrect interpretation of that section because the order did not mandate the carriage of any particular programming services but instead sought to add a condition that must be fulfilled should a broadcasting distribution undertaking carry a Canadian station that broadcasts the Super Bowl. Properly interpreted, section 9(1)(h) only authorizes the issuance of mandatory carriage orders that require broadcasting distribution undertakings to carry specific channels as part of their cable or satellite offerings that include specified terms and conditions. It does not empower the CRTC to impose terms and conditions on the distribution of programming services generally.

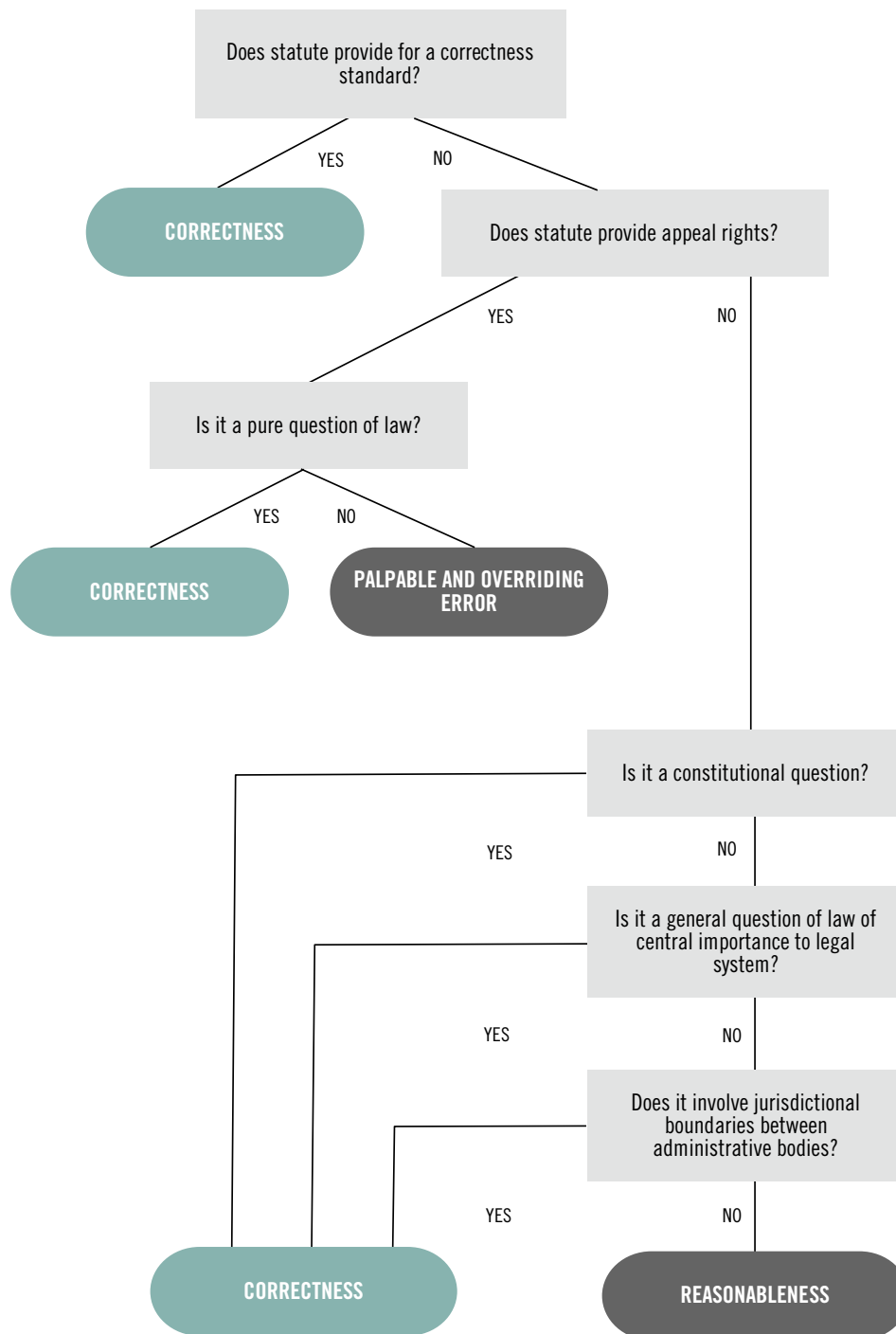
Implications

The SCC’s decisions mark a major change to the framework that applies to judicial review of administrative actions. By establishing a presumption that a court will review administrative decisions on a standard of reasonableness, and setting out very specific exceptions to that presumption, the decisions provide much needed clarity to the standard of review analysis. However, the SCC’s guidance on how to apply the reasonableness standard to individual cases likely means that many of the difficult issues that arise when reviewing administrative decisions will now be addressed at that stage of the analysis.

It remains to be seen whether the SCC’s decisions will achieve the promise of simplicity and predictability that has eluded the courts since *Dunsmuir*.

For further information on this trilogy of cases, please contact the authors or any member of our [Litigation Group](#).

WHAT STANDARD OF REVIEW APPLIES? (VAVILOV DECISION TREE)



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