HLA-564 Judicial review of substance.

Halsbury's Laws of Canada - Labour (2024 Reissue)

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Halsbury's Laws of Canada - Labour (2024 Reissue) (Knight, MacDonald) > IX. Judicial Review > 5. Standard of Judicial Review > (2) Substantive Review

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5. Standard of Judicial Review

(2) Substantive Review

Judicial review of substance.

The other element of judicial review is substantive review. While substantive review once again questions whether a decision-maker has the jurisdiction to make the decision that was made, this question is separate and distinct from procedural review. Procedural review is concerned with the process employed in reaching a decision and not with the decision itself, whereas substantive review considers the decision reached by the adjudicator.

Standard of review. Substantive review requires that a court first determine the correct standard of review to be applied. Finding the correct standard has long presented a challenge for courts considering issues of judicial review.[1]

Two-stage test for determining the level of deference owed. Prior to *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[2] the courts applied a two-stage test to determine the level of deference due for substantive decision-making. The first stage asked whether a standard of review had already been determined for a particular category of issue or decision. The Supreme Court expressed a strong preference for "summarily" resolving standard of review questions based on this categorical approach without resorting to a full standard of review analysis.[3] However, if the answer to this first question was in the negative, then at the second step the courts were to apply a variety of "contextual factors" in order to determine the correct level of deference due.[4] The three primary contextual factors were: the presence and wording of any privative clause contained in the administrative decision-maker's enabling statute;[5] whether there was a discrete and special administrative regime in which the adjudicator had special expertise;[6] and whether the question being asked was a question of law, fact, or mixed fact and law.[7]

Determining the Standard of Review post-*Vavilov*. In *Vavilov*,[8] the Supreme Court revisited the test for determining whether to apply a reasonableness or correctness standard of review. The Court held that in all cases there is a presumption that the standard of review is reasonableness. This presumption may be rebutted in two circumstances: (i) where there is legislative intent that the standard should be correctness; and (ii) where the rule of law requires that the standard of review be correctness. The legislature will have "intended" that a different

standard of review be applied where the legislation expressly prescribes the applicable standard of review or creates a statutory appeal mechanism from an administrative decision maker to a court.[9] Where a statutory appeal mechanism exists, the ordinary standards of appellate review will apply.[10] The "rule of law" exception to the reasonableness standard applies to the following categories of question: constitutional questions regarding the division of powers;[11] questions of law that are of central importance to the legal system as a whole;[12] and questions related to the jurisdictional boundaries between two or more administrative bodies.[13]

Correctness. Correctness provides the court with the widest scope for review. The correctness standard is applied to decisions for which there is only one right answer or for which the court has the authority to substitute its own answer. Under this concept of permissible review, the decision-maker must have decided correctly or else it loses jurisdiction. Under the correctness standard, the court may undertake its own reasoning process in order to arrive at the result that the judges find is correct, which is then compared or contrasted with the result arrived at by the administrative decision-maker.[14] Post *Vavilov*, the correctness standard is only applied where: (i) there is legislative intent that the standard of review should be correctness; and (ii) where the rule of law requires that the standard of review be correctness.[15] While the Supreme Court left the door open for the correctness standard to be applied in other types of circumstances, the court emphasized that any new basis for applying the correctness standard would be "exceptional".[16]

Reasonableness. Reasonableness is deferential and applies when there is a range of reasonable outcomes that are defensible in light of the following factors: the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies.[17] The court is concerned with the existence of justification, transparency and intelligibility in terms of the decision that is actually made and whether the result falls within a range of defensible outcomes.[18] Reasonableness is the presumptive standard in all cases of judicial review.[19] This presumption is rebutted in favour of the correctness standard where legislative intent or the rule of law requires that the correctness standard be applied.[20]

Adequacy of reasons. As stated by the Supreme Court in *Vavilov*, "where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable."[21] While the reasons provided by a decision-maker remain an important factor in the reasonableness analysis, in other cases the courts have considered both the actual reasons provided by a decision-maker and what other reasons were available that the decision-maker could have given, but did not. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador*, the Supreme Court held that the adequacy of a tribunal's reasons for a decision is not in and of itself a standalone basis for quashing a decision as being unreasonable.[22] The reasons provided by a decision-maker may be considered adequate even where they are "sparse" and/or do not make an explicit finding on each constituent element of a legal test.[23] In some cases, a failure to provide any reasons at all will not render a decision unreasonable.[24] Prior to declaring a decision unreasonable based on the adequacy of the reasons or the lack of reasons, the court must consider what reasons are available to support the decision and determine whether the outcome is reasonable in light of those available reasons.[25] However, where a decision-maker provides detailed reasons incorrectly setting out the law, courts are not entitled to ignore the actual reasons provided by the decision-maker and substitute their own.[26]

Judicial review and the Charter. The presumption in favour of the reasonableness standard continues to apply even where an administrative decision-maker's decision involves the consideration of Charter rights or values.[27] However, where an administrative decision engages a Charter right, the reasonableness analysis primarily focuses on the issue of proportionality. The "reasonableness" of a decision is viewed from the perspective of whether it reflects a proportionate balancing of the Charter right or value and the decision-maker's statutory mandate. A decision must give as full effect as possible to the Charter right at stake. If there was another option or avenue reasonably available to the decision-maker that would have sufficiently furthered the relevant statutory objective while having a lesser impact on the protected Charter right, then the decision does not fall within a range of

reasonable outcomes. Any such decision that disproportionately impacts a Charter right is regarded by the reviewing court as an unreasonable decision.[28]

Reasonable is not a sliding scale. The Supreme Court has repeatedly held that reasonableness is a single deferential standard and not a sliding scale.[29] However, this clarification remains blurred by the Supreme Court's finding that the single standard of reasonableness "takes its colour from the context" and that reasonableness must "be assessed in the context of the particular type of decision-making involved and all relevant factors".[30] The Supreme Court further elaborated on this issue in *Vavilov*, commenting that, rather than modulating the standard or degree of scrutiny that the reviewing court will apply to a decision, the particular context of a decision merely constrains what would be reasonable for a decision maker to decide in a given case.[31]

Future of substantive review. While *Dunsmuir* seemed to resolve many outstanding issues in the law of substantive review, the post-*Dunsmuir* jurisprudence raised many new questions and debates. The pre-*Dunsmuir* confusion regarding the difference between the standards of "patent unreasonableness" and "reasonableness *simpliciter*" was shifted to the difference between the standards of reasonableness and correctness. Questions also remain regarding what it means for "reasonableness" to be a single standard that varies based on the context. Significant disputes continue to arise at the Supreme Court, with much of the post-*Dunsmuir* jurisprudence on substantive review being characterized by multiple dissenting and/or concurring opinions. In one such decision, Justice Abella went as far as questioning whether the correctness standard of review might be eliminated altogether in the future.[32] The Supreme Court's recent decision, *Vavilov* attempted to resolve some of these questions regarding how to determine the appropriate standard of review and apply the reasonableness standard. Given how recently *Vavilov* was released, the precise impact of the decision and its new approach to the standard of review analysis is not yet known.

Footnote(s)

1 For further discussion of the struggle to establish a standard of review see: David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17 Can. J. Admin. L. & Prac. 59 and Lorne Sossin, "Empty Ritual, Mechanical Exercise of the Discipline of Deference? Revisiting the Standard of Review in Administrative Law" (2003) 27 Adv. Q. 478.

2 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.).

3 *Alberta Teachers' Assn. v. Alberta (Information and Privacy Commissioner)*, [2011] S.C.J. No. 61, [2011] 3 S.C.R. 654 at para. 44 (S.C.C.).

4 *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 at paras. 62–64 (S.C.C.); *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, [2018] S.C.J. No. 22, [2018] 1 S.C.R. 635 at para. 8 (S.C.C.).

5 The first factor was the presence and wording of a privative clause contained in the administrative decision-maker's enabling statute, if any. While not read literally, the privative clause provided some evidence of legislative intent regarding what standard of review should be applied. See: *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 at para. 55 (S.C.C.).

6 The second factor was whether or not there is a discrete and special administrative regime in which the decision-maker had special expertise. This second factor took into account both the expertise of the adjudicator, including whether there were any statutory requirements for panel members' qualifications, and whether the decision-making regime was of a quasi-judicial nature (see: *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 at para. 55 (S.C.C.)). Ordinarily, administrative decision-makers attracted a higher degree of deference when they were interpreting statutes that fell within their area of particular expertise (see: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] S.C.J. No. 47, [2016] 2 S.C.R. 293 at para. 33 (S.C.C.)).

7 The third factor considered the nature of the question to be determined by the decision-maker, namely whether the specific question the court was reviewing was a question of law, a question of fact, or a question of mixed law and fact (see: *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 at para. 55 (S.C.C.)).

8 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.).

9 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 at paras. 17, 37 (S.C.C.).

10 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 at para. 17 (S.C.C.).

11 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 at paras. 55-57 (S.C.C.).

12 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 at paras. 58-62 (S.C.C.).

13 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 at paras. 63-72 (S.C.C.).

14 *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 at para. 50 (S.C.C.). See also *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*, [2013] B.C.J. No. 767, 2013 BCCA 179 (B.C.C.A.), where the Court of Appeal held that the interpretation of s. 56(3) of the (B.C.) *Employment Standards Act*, R.S.B.C. 1996, c. 113 was a question of general law and that the standard of review was correctness.

15 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 at para. 17 (S.C.C.).

16 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 at para. 70 (S.C.C.).

17 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 at para. 106 (S.C.C.).

18 *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, [2011] 3 S.C.R. 708 at paras. 12–14 (S.C.C.).

19 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 at para. 10 (S.C.C.).

20 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 at para. 17 (S.C.C.).

21 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 81, 2019 SCC 65 (S.C.C.). Accordingly, the Ontario Divisional Court has held that while the reasons in an interest arbitration need not be elaborate or lengthy, they must fulfil their essential purpose, which is to "explain how and why a decision was made", and "to show the parties that their arguments have been considered and that the decision was made in a fair and lawful manner": *Scarborough Health Network v. Canadian Union of Public Employees, Local 5852*, [2020] O.J. No. 3193, 2020 ONSC 4577 (Ont. Div. Ct.), citing *Vavilov*, para. 71.

22 *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, [2011] 3 S.C.R. 708 at para. 14 (S.C.C.).

23 *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] S.C.J. No. 4, [2018] 1 S.C.R. 83 at paras. 107–108 (S.C.C.).

24 *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] S.C.J. No. 47, [2016] 2 S.C.R. 293 (S.C.C.).

25 *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] S.C.J. No. 47, [2016] 2 S.C.R. 293 at para. 23 (S.C.C.); *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, [2011] 3 S.C.R. 708 at paras. 12–14 (S.C.C.).

26 *Delta Airlines Inc. v. Lucáks*, [2018] S.C.J. No. 2, [2018] 1 S.C.R. 6 at paras. 23–25 (S.C.C.).

27 *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395 at paras. 43–46, 57 (S.C.C.).

28 *Trinity Western University v. Law Society of Upper Canada*, [2018] S.C.J. No. 33, [2018] 2 S.C.R. 453 at paras. 35–36 (S.C.C.). As held by the Supreme Court in *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, [2018] 2 S.C.R. 293 (S.C.C.), this proportionality approach "recognizes that an administrative decision-maker, exercising a discretionary power under his or her home statute, typically brings expertise to the balancing of a *Charter* protection with the statutory objectives at stake. Consequently, the decision-maker is generally in the best position to

weigh the *Charter* protections with his or her statutory mandate in light of the specific facts of the case. It follows that deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance" (para. 79). See also *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, [2015] 1 S.C.R. 613 (S.C.C.).

29 *Canada (Citizenship and Immigration) v. Khosa*, [2009] S.C.J. No. 12, [2009] 1 S.C.R. 339 (S.C.C.). At para. 59, Binnie J. for the majority found: "Reasonableness is a single standard that takes its colour from the context. ... Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' [citing *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 at para. 47 (S.C.C.)]. There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome." See also *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29, [2016] 1 S.C.R. 770 at paras. 18, 73 (S.C.C.). For further discussion of the application of *Dunsmuir* in *Khosa*, see Andrew Wray & Christian Vernon, "Khosa: Extending and Clarifying Dunsmuir" (2009) 17:1 Ontario Bar Association: Administrative Law. See also *Nor-Man Regional Health Authority Inc. v. Manitoba Assn. of Health Care Professionals*, [2011] S.C.J. No. 59, [2011] 3 S.C.R. 616 (S.C.C.), which held that the imposition by the arbitrator of an estoppel remedy did not transform the grievance into a question of general law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise.

30 *Canada (Citizenship and Immigration) v. Khosa*, [2009] S.C.J. No. 12, [2009] 1 S.C.R. 339 at paras. 4, 26 and 19 (S.C.C.); *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] S.C.J. No. 2, [2012] 1 S.C.R. 5 at para. 18 (S.C.C.); *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29, [2016] 1 S.C.R. 770 at para. 73 (S.C.C.).

31 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 89, 2019 SCC 65 (S.C.C.).

32 *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29, [2016] 1 S.C.R. 770 at paras. 25, 37–38 (S.C.C.).

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