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LANDMARK DECISION FROM THE SUPREME COURT: NEW FRAMEWORK FOR JUDICIAL REVIEW

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On December 19, 2019, the Supreme Court of Canada (the Court) released a landmark ruling in a trilogy of cases intended to bring clarity to the judicial review of administrative decisions. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, the Court adopted a revised framework for determining when the applicable standard of review is "reasonableness" or "correctness". The Court also provided additional guidance on the proper application of the reasonableness standard, emphasizing the importance for administrative adjudicators to provide rational and coherent justifications for their decisions. This new approach was then applied in two appeals heard together as *Bell Canada v. Canada (Attorney General)*.

Why Judicial Review Matters

Judicial review is the process through which courts supervise administrative decision-making. The legislatures have endowed administrative bodies, such as human rights tribunals, labour boards, and labour arbitrators, with the ability to make decisions touching on complex social and economic issues of fundamental importance to Canadians. The function of judicial review is to ensure the legality, the reasonableness, and the fairness of the administrative process and its outcomes. The "standard of review" refers to the extent to which the courts should defer to an administrative decision-maker in reviewing its decision.

The Old Approach—*Dunsmuir*

The decision of *Dunsmuir v. New Brunswick* was the last time the Supreme Court attempted to articulate a simplified approach to the standard of review. In *Dunsmuir*, the Court merged three standards of review into two: reasonableness and correctness. Under the correctness standard, a reviewing court does not show deference to the decision-maker's reasoning process. Under the reasonableness standard, deference is shown to the decision-maker; the decision must fall within a range of acceptable outcomes, but it need not be "correct".

Under the *Dunsmuir* framework, there was a presumption of reasonableness applied to certain categories of questions. That presumption could be rebutted in favour of the correctness standard in certain specified instances. Where the standard of review had to be determined, *Dunsmuir* directed courts to apply a number of contextual factors developed in earlier jurisprudence.

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The New Approach—*Vavilov*

In the *Vavilov* trilogy, the Court seized the opportunity to re-examine its approach to judicial review of administrative decisions. The Court appointed two *amici curiae*, invited submissions on the standard of review issue, and granted leave to 27 interveners.

1. *New Framework for Standard of Review*

The Supreme Court has fundamentally revised the framework for determining the applicable standard of review. The new framework starts with a presumption that reasonableness is the applicable standard whenever a court reviews an administrative decision. This presumption of reasonableness can be rebutted in favour of a standard of correctness in two types of situations:

1. Where the legislature has indicated that it intends a different standard to apply; including:
    a. Where the legislature explicitly prescribes the applicable standard of review; or
    b. Where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the application of appellate standards when a court reviews the decision.
2. Where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies.

Under this new framework, the contextual factor analysis is no longer required.

2. *New Guidance on Applying the Reasonableness Standard*

Vavilov is also significant because the Court provides additional guidance on the proper application of the reasonableness standard. In particular, the majority describes two types of fundamental flaws that may make a decision unreasonable:

1. Where the decision is not based on internally coherent reasoning; and
2. Where the decision is not justified in light of the legal and factual constraints bearing on the decision.

With respect to the second "fundamental flaw", the Court discusses a number of relevant considerations, including the governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision-maker, 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.

Justices Abella and Karakatsanis concurred in the result but broke with the majority regarding the standard of review. They describe the majority's reasons as a "eulogy" for deference. They criticize the majority for veering away from the established deferential standard and for departing from precedent. In their view, the presumption of deference will "yield all too easily to justifications for a correctness-oriented framework."

Significance of *Vavilov*

Vavilov purports to make the standard of review jurisprudence more certain, coherent and workable going forward. This simplified approach aims to limit the time and resources spent by the parties addressing the applicable standard of review, before getting to the merits of the review.

The Court has expanded the types of administrative decisions where the reasonableness standard applies, while limiting the types of decisions in which the correctness standard applies. This appears to suggest there will be more presumptive deference to administrative decision-makers, such as labour relations boards, human rights adjudicators, and labour arbitrators.

However, as a result of the majority's decision, and as identified by Justices Abella and Karakatsanis in their concurring reasons, hundreds of administrative decision-makers subject to different kinds of statutory rights of appeal will now be

subject to an irrebuttable presumption of correctness review. The focus on statutory rights of appeal is a departure from the Court's previous jurisprudence, and it means that a significant number of administrative decisions previously reviewed on a reasonableness standard will now be subject to review for correctness.

Finally, where the standard of reasonableness applies, reviewing courts may actually become less deferential. The reasonableness review described by the majority calls for a "robust" evaluation of administration decisions, and includes comprehensive guidance with respect to the type of scrutiny that should be applied in evaluating a decision. This could, in effect, result in less deference being afforded to administrative decision-makers under the reasonableness standard.

It remains to be seen whether *Vavilov* will bring the clarity and coherence it purports to achieve.

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ONTARIO COURT OF APPEAL REFUSES TO RECOGNIZE FREESTANDING TORT OF HARASSMENT

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In Merrifield v. Canada (Attorney General), 2019 ONCA 205, the plaintiff was a longstanding member of the RCMP who alleged that his supervisors had discriminated against him for years. The strained relationship began when the plaintiff had run for public office. He was considered to be in a potential conflict of interest following his investigation of threats against a political rival. The plaintiff had also been reprimanded for his appearance on a radio show, and subject to an investigation relating to credit card use. He claimed that he had been subjected to bullying and harassment which damaged his professional reputation and prospects, and caused severe emotional and psychological distress.

The trial judge found that the plaintiff's superiors had intentionally sabotaged his career with reckless disregard for the mental distress he suffered. The trial judge found that the tort of harassment exists under the common law in Ontario, and accepted that the elements of that tort had been made out. The judge also concluded that actions of the plaintiff's superiors constituted intentional infliction of mental distress, and awarded him damages in the amount of $100,000.

The Crown appealed the trial judgment and the appeal was allowed. The Ontario Court of Appeal's decision was the first decision in which a Canadian appellate court had the opportunity to consider whether the tort of harassment exists at common law. The Court noted that none of the cases which the plaintiff had cited or on which the trial judge had relied confirms the existence of a freestanding tort of harassment in this country. Ultimately, the Court of Appeal concluded that no freestanding tort of harassment has yet been recognized in Canada, and nothing about the circumstances of the plaintiff's case "cried out" for the establishment of such a tort. This was particularly true because the tort of intentional infliction of mental distress was already available to the plaintiff as a remedy for any "flagrant and outrageous" conduct which was "calculated to produce harm".

The Court of Appeal went on to conclude that the trial judge had made serious errors in applying the test for intentional infliction of mental distress. The trial judge had ignored relevant evidence, made incorrect factual findings, and relied on irrelevant evidence to conclude that the plaintiff's supervisors had engaged in outrageous conduct intended to harm him and the conduct had resulted in a visible and provable illness.

Significantly for present purposes, the plaintiff was denied leave to appeal to the Supreme Court of Canada.

Key Employer Takeaways

- The Court of Appeal did not completely foreclose the possibility that a new tort of harassment might be established some day. However, the Court's decision makes clear that courts should be slow and cautious to recognize such a