DD WEST LLP

“Vavilov: Standard of Review in Canadian Administrative Law”

Author: Collin May
Last Updated:06/05/2020

Late in December, the Supreme Court of Canada was busy preparing a trio of decisions dealing with judicial review of rulings made by administrative tribunals in Canada. Known in legal circles as “the Trilogy”, the judgments speak to the range of topics covered by administrative law: immigration, television broadcasting and workplace safety. The first case among the Trilogy – *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("Vavilov") – is as exciting as administrative law cases come. In substance, the case deals with the Canadian-born son of parents who were eventually determined to be Russian spies. The son was unaware of his parents’ secret lives and believed himself to be a Canadian citizen. The Registrar of Citizenship disagreed and cancelled young Vavilov’s certificate of citizenship when he applied for a passport. Vavilov appealed the Registrar’s decision and eventually made his way to the Supreme Court of Canada ("SCC") by way of the Federal Court and Federal Court of Appeal. In their decision the SCC overruled the Registrar, finding her ruling to be unreasonable. The Court then reinstituted Vavilov’s citizenship.

Normally, an immigration case of this kind would not garner much attention outside its own field of specialization, but in this instance, the SCC took the opportunity presented by Vavilov, along with the other cases in the Trilogy, to fundamentally reconsider the Court’s approach to judicial review. Generally, each administrative body has its own appeals or review process for parties who are not satisfied with a decision. And when these are not satisfactory, the disgruntled party can seek judicial review from the courts. Vavilov and the Trilogy are about when and to what extent the courts can review and overturn the decision of administrative tribunals.
Historically, administrative agencies came into their own over the course of the twentieth century. Progressives and reformers found them especially useful as tools to advance social causes because they allowed legislators to enact and implement measures that more conservative courts might otherwise strike down as unconstitutional or outside the legislature’s jurisdiction. Regardless, the courts determined that they had the authority to judicially review the decisions of these bodies, often limiting their jurisdictional reach. However, in the 1970s, courts increasingly recognized the specialized expertise of these bodies and began to defer to their decisions, exercising significant restraint when reviewing their rulings.

For the past fifty years, Canadian courts, following the lead of the SCC, have shown increasing deference to administrative actors, as tribunals and agencies have expanded their reach to cover virtually all aspects of life. Increasingly there are those in and outside the legal community who believe this deference has become excessive. Where administrative bodies once acted to promote needed social reform, they are now questioned as potential sources of unjust decision-making prone to procedural abuse and institutional capture by activist stakeholders. This has

led some on the bench to more aggressive efforts to review and overturn what they see as unfair decisions based on poorly reasoned arguments. And this has resulted in something of a free-for-all in administrative law as principles fray and the predictability necessary for the rule of law collapses.

Vavilov is the SCC's attempt to mediate this dispute and bring some clarity to the situation. But it is also an instance where contending political and legal philosophies come to fight it out. While a majority of seven members of the SCC agreed on the new framework, two Justices – Abella and Karakatsanis – vigorously opposed the changes, going so far as accusing the majority of ignoring and wantonly tampering with legal precedent.

The Court's new framework in Vavilov addresses two key features. The first is how judicial review should proceed – should courts apply the more rigorous standard, known as "correctness", or should they defer more readily to administrative tribunals and apply the "reasonableness" standard? Correctness means that the reviewing court will determine whether the administrative body's decision was right. This involves looking at the factual findings to determine if the decision reached was correct and is similar to what appellate courts do when a lower court's decision is appealed, rather than simply reviewed.

Reasonableness, on the other hand, involves reviewing the decision-making process to determine if, overall, the administrative agency followed a fair and rational process in arriving at its decision. The courts will not overturn a decision simply because it is not the decision the court would have reached. If the court can follow the administrative body's line of thought, then the decision will be reasonable. This standard has traditionally been used in most cases and often is based on the notion that administrative tribunals are experts in interpreting and applying their home statute.

And this leads to the second key feature the SCC tackled in Vavilov: How to apply the reasonableness standard. Generally, the courts have viewed reasonableness as a highly deferential standard. Increasingly, over the past fifty years, judicial review doves have been unwilling to interfere with the presumed expertise and specialization of administrative decision-makers. By contrast, judicial review hawks have been much more active in their approach to judicial review, questioning the fairness and procedural integrity of administrative rulings.

In Vavilov, we can't say that the judicial review hawks necessarily won the day, but they did strike a balance in the majority that moves the needle away from the more deferential standard. First, on the issue of choosing between correctness and reasonableness, the SCC majority determined that any statute referring to a right of appeal of a decision should invoke correctness, meaning that the approach the reviewing courts will take will be more along the lines of a full appeal, rather than deferential review. This is a change from past procedure and one that the minority strongly opposed. Additionally, there are specific categories where correctness will apply, such as on constitutional matters, matters affecting the rule of law generally, and where different administrative bodies disagree over jurisdiction and outcomes. Outside these categories, the assumed standard is the more deferential reasonableness.

Turning to the second issue – how to apply reasonableness – the SCC has fundamentally departed from the presumption of expertise that was once used as the basis for significant deference. Expertise is simply folded into the assumption for reasonableness and no longer serves as a contextual factor in determining whether the standard should be reasonableness or correctness. This is a significant change, and again, one the minority vehemently opposes. In fact, this is probably the key difference going forward. By downplaying the notion of expertise, the SCC has effectively expanded the role of the courts as a reviewing body. It has also rendered the reasonableness standard more robust. While the majority restate the need for deference, they also confirm that administrative bodies must adopt a culture of justification, indicating a greater willingness to hold tribunals and agencies accountable for faulty or poorly considered decisions.

For lawyers who argue in front of tribunals, and for citizens who are subject to their decisions, the changes related to decision-makers' expertise will have significant repercussions. The assumption that administrative decision-makers are experts or that administrative bodies are specialized and therefore better able to apply their legislation is now openly questioned. While specialized bodies certainly are closer to facts on the ground, as the minority argues, there is an increasing sense that administrative tribunals are also open to institutional paralysis whereby unique circumstances and original situations are subjected to rote procedures that fail to take account of changing conditions and facts. There is also the concern that these bodies are subject to institutional capture by stakeholders, creating a climate of conformity to traditional approaches that can lead to unjust results.

As with any SCC decision, the extent of the changes will be in the application by lower courts and by how the SCC itself resolves these disputes. Going forward, it will be interesting to see just how well the majority holds together when it comes to applying the Vavilov framework. This appears to have been a decision full of compromise for the majority. For now, Vavilov suggests a movement toward more accountability on the part of administrative tribunals, and potentially, more fairness for parties.