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New Beacons of Administrative Law: Top Court Reviews the Approach to Judicial Review of Administrative Decisions

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The Supreme Court of Canada (SCC) recently rendered its much-awaited decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov* and companion appeals. Upon granting leave to appeal, the SCC had announced that these appeals would "provide an opportunity to consider the nature and scope of judicial review of administrative action."

Released on December 19, 2019, *Vavilov* delivers on the expectations set by the SCC. The majority of the SCC has reformulated the approach to judicial review of administrative decisions and made significant changes to the law, providing clarity regarding when the "correctness" standard of review applies and the approach to be taken when applying the "reasonableness" standard of review.

The applicable standard of review is important because it determines the degree of deference the reviewing court must show to the administrative decision-maker. This, in turn, has an enormous impact on the advice we provide to clients about the possibility of successfully challenging an administrative decision.

Vavilov will have important implications for a vast number of persons and entities already engaged in litigation with the state and for the processes of administrative decision-makers themselves.

Background

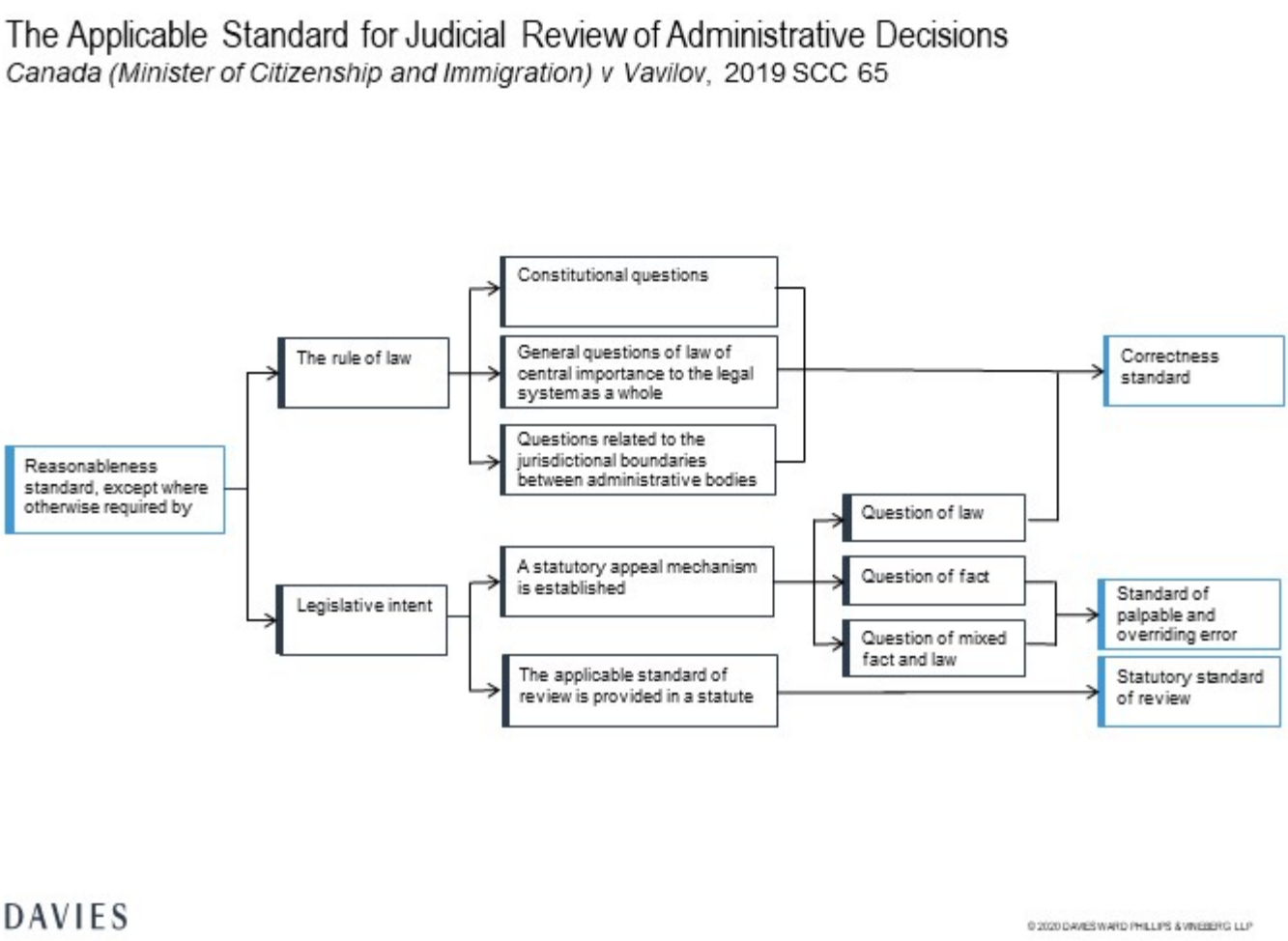
The underlying facts of *Vavilov* are worthy of a thriller. The applicant, Alexander Foley, was born in Canada, but his parents were later arrested and charged by the United States of America, having been found to be Russian nationals who had been deployed to Canada prior to Mr. Foley's birth as part of a "deep cover" espionage network for the Foreign Intelligence Service of the Russian Federation. In the wake of these events, the Registrar of Citizenship concluded that Mr. Foley – now Mr. Vavilov – fell within a statutory exception of the *Citizenship Act* applicable to persons born from "a diplomatic or consular officer or other representative or employee in Canada of a foreign government." The Registrar therefore cancelled the Canadian citizenship of Mr. Vavilov, who petitioned the federal courts for judicial review of such decision.

Applying the "correctness" standard of review, the Federal Court dismissed Mr. Vavilov's challenge. The Federal Court of Appeal, however, applied the "reasonableness" standard and found that the Registrar's decision was an unreasonable interpretation of the *Citizenship Act*.

For context, the previous framework for judicial review of administrative decisions had been established in the *Dunsmuir* decision of 2008, which ruled that reviewing courts ought to subject administrative decisions to one of two standards – correctness or reasonableness – depending on various factors such as the nature of the question at issue, features of the statute establishing the decision-maker and the decision-maker's expertise. While the *Dunsmuir* framework was propounded with a view to simplifying judicial review and making it more predictable, courts and commentators alike criticized it for being unclear and resulting in lengthy – and costly – judicial debates about the applicable standard. Hence the need for some degree of restatement. Enter *Vavilov*.

The SCC Decision

In its ruling, the majority of the SCC establishes a revised framework for determining the appropriate standard of review in any administrative law case. A schematized view of this framework is included below.



The standard of reasonableness is now presumed to be the applicable standard in all administrative law cases. However, this presumption can be rebutted in two types of situations. The first is where Parliament or a provincial legislature has indicated that it intends a different standard to apply – for example, where the legislature establishes a statutory right of appeal, as discussed further below. The second type of situation is where respect for the rule of law requires a singular, determinate and final answer to the question at issue. The majority defined three rule-of-law-related grounds warranting a review on the basis of correctness:

- constitutional questions;
- general questions of law of central importance to the legal system as a whole; and
- questions regarding jurisdictional boundaries between administrative bodies.

The recognition of additional grounds remains possible, but the majority of the SCC has forewarned that it is to remain exceptional. In the vast majority of cases, this revised framework is expected to cut short judicial inquiries about the applicable standard.

The majority of the SCC also provides guidance on the proper application of the "reasonableness" standard. In particular, this guidance stresses the importance of the reasons given by the administrative decision-maker. The majority openly affirms "the need to develop and strengthen a culture of justification in decision-making" and indicates that "an otherwise reasonable outcome" will not be allowed to stand "if it was reached on an improper basis" or, put differently, if it was based on a faulty reasoning process.

The decision of the Registrar of Citizenship regarding Mr. Vavilov was deemed unreasonable, and a unanimous SCC declared him to be a Canadian citizen.

Implications

The *Vavilov* ruling is immediately applicable, including to administrative decisions already rendered and to ongoing administrative litigation. Although it does not amount to a complete upheaval of the previous approach to judicial review, it does alter it in significant respects. Any person or entity engaged in litigation with the state should carefully review their legal strategy developed under the *Dunsmuir* framework to ensure that it remains consistent with the *Vavilov* framework or that it makes full use of the new guidance provided by the SCC.

This is especially true for litigants engaged in statutory appeals of administrative decisions. Even if such appeals are not formally judicial review proceedings, the courts had previously applied the *Dunsmuir* framework to them. This meant that the courts were sometimes bound to dismiss statutory appeals while being of the opinion that the administrative decision-maker had rendered an incorrect decision, inasmuch as its decision was not unreasonable, a much higher threshold. In *Vavilov*, however, the majority of the SCC decided that the standards of review used in judicial appeals – rather than judicial review proceedings – ought to be applied in such statutory appeals. Generally speaking, the appellate standards of review are the standard of correctness for questions of law and the standard of "palpable and overriding error" for questions of fact or mixed fact and law. *Vavilov* is therefore expected to open the door to a greater number of appeals in a very diverse landscape of regulatory fields, including the regulation of securities and public issuers, the oversight of professions, the governance of residential tenants and landlords, the regulation of telecommunications and the provision of social security entitlements.

Finally, due to its call for the development and strengthening of a culture of justification in decision-making, *Vavilov* is expected to affect the internal decision-making processes of various administrative entities, whose reasoning process should now be subjected to a higher degree of scrutiny. The administrative decision-makers who do not adjust their practices accordingly and swiftly will see their unreasoned decisions open to challenge.

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