**AN UPDATE – STANDARD OF REVIEW**

*To accompany Ch 15 of Administrative Law: Principles and Advocacy, 4th edition, ISBN 9781772555028*

**August 4, 2021**

* On December 19, 2019, the Supreme Court of Canada (SCC) in *Vavilov*[[1]](#footnote-1) established a new standard of review framework.
* This change came just over 10 years after the release of *Dunsmuir*. Recall that in *Dunsmuir* the SCC provided much needed clarity to the approach to judicial reviews of administrative decisions and the court established two standards of review: reasonableness and correctness. In the years that followed, however, there has been a lack of clarity at times around applying the standard.
* In *Vavilov*, the SCC found that courts should presumptively review administrative decisions on a deferential standard and set out some exceptions. The SCC also provided guidance on how to apply a reasonableness standard.

***Dunsmuir*’s Methodology**

* The first step for the reviewing court was to determine if there were any **past cases** that had already decided the standard of review to be applied.
* If the case being reviewed did not fit into one of the previous precedential categories, then the reviewing court moved to a more in-depth analysis: **the standard of review analysis.** This waspreviously called “the pragmatic and functional analysis.”
* The *Dunsmuir* methodology involved weighing four factors:
	+ 1. the presence or absence of a privative clause;
		2. the purpose of the tribunal as determined by interpretation of enabling legislation;
		3. the nature of the questions at issue (fact, law, and mixed fact and law); and
		4. the expertise of the tribunal.
* In *Dunsmuir* and subsequent cases before *Vavilov*, **reasonableness** was the presumptive standard in administrative law when:
	+ a specialized or expert tribunal;
	+ interpreting its enabling or home statute;
	+ on a question of fact or mixed fact and law;
	+ or exercising broad statutory discretion;
	+ correctly applies all legal principles or tests;
	+ to construct an interpretation of its statutory powers that falls within range of possible acceptable interpretations;
	+ resulting in a decision that demonstrates justification, transparency, and intelligibility; and
	+ produces a reasonable outcome that is defensible in respect of the facts and law.

A standard of correctness was adopted in the following cases:

* + where the question of law is “a question of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise,”
	+ in constitutional questions,
	+ in “true” questions of jurisdiction: “where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter,” and
	+ in questions regarding the jurisdictional lines between two or more competing specialized tribunals.

***Vavilov* Framework: Reasonableness or Correctness*?***

Under the *Vavilov* framework, the default is a presumption of reasonableness review. This presumption is based on the idea that the legislature intended the standard of review to be reasonableness and a respect for the legislature’s institutional design choice.

There are exceptions.

* **Specified standard of review** and the legislature has specifically indicated another standard, in which that specified standard will apply.
* Where there is a **statutory appeal** as the mechanism for review. In this case, appellate standards of review apply; or
	+ *Questions of law.* Review for correctness.
	+ *Questions of fact.* Review for palpable and overriding error.
	+ *Questions of mixed fact and law.* Review for palpable and overriding error, unless the question law can be isolated, in which case the question should be reviewed for correctness.
* Where the **rule of law demands correctness** review, such when dealing with constitutional questions; general questions of law of central importance to the legal system as a whole; and questions related to the boundaries between two or more administrative bodies.

**Chapter 15 Review Questions**

p. 347, Question 7 should now read:

1. Since *Vavilov*, in what circumstances will the court apply a reasonableness and correctness standard?
1. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [↑](#footnote-ref-1)