Standard of Review of Administrative Decisions: How the Supreme Court's New Decision Applies in Ontario

Brian Sunohara
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Administrative bodies and tribunals play an important role in our legal system. They utilize specialized expertise to render decisions on important issues that have a great impact on individuals.

The courts have struggled for decades on the level of deference to give to administrative decision makers. The standard of review has been revised by the Supreme Court of Canada on several occasions.

This issue was revisited by the Supreme Court of Canada in a landmark decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*"), and the companion decision in *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66. The Court was divided on the appropriate standard of review.

A majority of the Court outlined a new framework for judicial review of administrative decisions and also provided guidance on how to apply the reasonableness standard of review. The new approach provides much needed clarity.

The previous leading case was *Dunsmuir v. New Brunswick,* [2008] 1 SCR 190 ("*Dunsmuir*"). In *Dunsmuir*, the Supreme Court outlined a two-step process for determining the standard of review of administrative decisions.

First, courts were required to ascertain whether the jurisprudence had already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question.

Second, where the first inquiry proved unfruitful, courts had to apply a "contextual approach", analyzing factors such as the presence or absence of a privative clause; the purpose of the tribunal as determined by interpretation of the enabling legislation; the nature of the question at issue; and the expertise of the tribunal.

In *Vavilov*, the majority found this process to be unclear and unduly complex. The majority wanted a simpler approach.

Under the new protocol, the presumption is that the applicable standard is reasonableness. However, the reasonableness standard will not apply where the statute in issue calls for a different standard. Further, the reasonableness standard will not apply where there is a statutory appeal mechanism. This is a major change from previous decisions of the Supreme Court. The reasonableness standard will also not apply for certain important legal questions.

This new approach is not without controversy. Justices Abella and Karakatsanis were highly critical of the majority decision, particularly on the exclusion of an administrative body's expertise, specialization, and other institutional advantages from the standard of review analysis, as well as with the presumption of a standard of reasonableness being displaced when there is a statutory right of appeal.

Justices Abella and Karakatsanis expressed very strong concerns that the majority's presumption of deference will yield all too easily to justifications for a correctness-oriented framework and, thus, less deference.

Justices Abella and Karakatsanis stated: "[p]resented with an opportunity to steady the ship, the majority instead dramatically reverses course — away from this generation's deferential approach and back towards a prior generation's more intrusive one". The majority called these comments "grossly exaggerated".

The following are highlights of the decision and how it applies in Ontario.

Presumptive Standard of Review

Whenever a court reviews an administrative decision, it must start with the presumption that the applicable standard of review for all aspects of that decision is reasonableness.

Administrative bodies are creatures of statute. Where the legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of the decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference.

Rebutting the Presumption of Reasonableness

The reasonableness standard will not apply if the statute in issue explicitly provides for a different standard of review.

Further, if there is a statutory appeal mechanism from an administrative decision to a court, then the court is to perform an appellate function with respect to that decision. This means that the applicable standard is to be determined with reference to the nature of the question and to the Supreme Court's jurisprudence on appellate standards of review.

On questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, the standard of review is correctness.

On questions of fact and mixed fact and law, the standard of review is palpable and overriding error.

If there is no statutory right of appeal, a party may still bring an application for judicial review. However, an application for judicial review is distinct from an appeal, and the presumption of a reasonableness review is not rebutted.

Lastly, the majority stated that the rule of law requires courts to apply the standard of correctness for certain types of legal questions, in particular, constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies.

What is Reasonable?

A reasonable decision is one that is: (1) based on an internally coherent and rational chain of analysis, and (2) justified in relation to the facts and law that constrain the decision maker.

In terms of the first point, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis.

A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical issue.

In terms of the second point, some of the factors to consider are: 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.

Guidance on Reasonableness Review

The focus of a reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review and to generally refrain from deciding the issue themselves.

Courts can only intervene in administrative matters where it is truly necessary to do so in order to safeguard the legality, rationality, and fairness of the administrative process.

A court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker; attempt to ascertain the

"range" of possible conclusions that would have been open to the decision maker; conduct a new analysis; or seek to determine the "correct" solution to the problem.

As a starting point, courts must follow the principle of judicial restraint and demonstrate respect for the distinct role of administrative decision makers. However, this is not a "rubber-stamping" process. A robust form of review is required.

The administrative decision as a whole must be transparent, intelligible, and justified. Unlike a correctness review, a reasonableness review must focus on the decision made, including the justification for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

In circumstances where an administrative decision maker is not required to give reasons, a reviewing court must look to the record as a whole, as well as the context in which the decision was made, to understand the decision.

If the record and context do not shed light on the basis for the decision, the court must still examine the decision with regard to the relevant factual and legal constraints on the decision maker in order to determine whether the decision was reasonable.

Remedy

If a decision reviewed by applying the reasonableness standard cannot be upheld, courts should usually remit the matter to the decision maker to reconsider the decision, with the benefit of the court's reasons. In reconsidering its decision, the same outcome or a different outcome may be reached.

However, there are limited scenarios in which remitting a matter would stymie the timely and effective resolution of the matter in a manner that no legislature could have intended.

Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose.

Other factors to consider are concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources.

Application in Ontario

The enabling legislation must be reviewed to determine whether there is a specified standard of review and whether there is a right of appeal.

In general, the decision in *Vavilov* will have the following impact with respect to decisions made under the following commonly referred to statutes in Ontario:

Licence Appeal Tribunal Act

Section 11(1) of the *Licence Appeal Tribunal Act* indicates that a party may appeal a decision or order to the Divisional Court. However, certain appeals are only permitted on questions of law. This includes appeals relating to matters under the *Insurance Act*.

Therefore, for statutory accident benefits claims, appeals are only permitted on questions of law, and the standard of review is correctness. For questions of fact and mixed fact and law, a party can bring an application for judicial review, and the standard of review is reasonableness.

Workplace Safety and Insurance Act, 1997

Section 31(3) of the *Workplace Safety and Insurance Act, 1997* states that a decision of the Workplace Safety and Insurance Appeals Tribunal is final and is not open to question or review in a court.

Although there is no statutory right of appeal, a party can bring an application for judicial review. The standard of reasonableness applies.

Environmental Review Tribunal Act, 2000

The *Environmental Review Tribunal Act, 2000* does not contain an appeal provision. Therefore, the standard of reasonableness applies.

Regulated Health Professions Act, 1991

Section 70 of the *Regulated Health Professions Act, 1991* permits appeals to the Divisional Court, except for matters involving applications for reinstatement. Appeals can be brought on questions of law and fact.

On appeals involving questions of law, the standard of review is correctness. On appeals involving questions of fact and mixed fact and law, the standard of review is palpable and overriding error.

Human Rights Code

Section 45.8 of the *Human Rights Code* indicates that, with certain exceptions, a decision of the Human Rights Tribunal is final and not subject to an appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.

Therefore, a party may bring an application for judicial review, and the standard of review is patent unreasonableness.

Landlord and Tenant Board

Section 210 of the *Residential Tenancies Act, 2006*, states that any person affected by an order of the Landlord and Tenant Board may appeal to the Divisional Court within 30 days after being given the order, but only on a question of law.

Therefore, for appeals involving questions of law, the standard of review is correctness. For questions of fact and mixed fact and law, a party can bring an application for judicial review, and the standard of review is reasonableness.

Ontario College of Teachers Act, 1996

Section 35(1) of the *Ontario College of Teachers Act, 1996* provides that a party to a proceeding before the Registration Appeals Committee, the Discipline Committee or the Fitness to Practise Committee may appeal to the Divisional Court. Section 35(4) permits appeals on questions of law or fact or both.

Therefore, for appeals involving questions of law, the standard of review is correctness. For appeals involving questions of fact and mixed fact and law, the standard of review is palpable and overriding error.

Conclusion

The Supreme Court's decision in *Vavilov* provides clarity on the standard of review applicable to decisions rendered by administrative bodies and tribunals.

The presumption is that the reasonableness standard applies. However, the reasonableness standard will not apply where the statute in issue specifies otherwise. Further, if the statute provides for an appeal mechanism, appellate standards of review govern. On questions of law, the standard of review is correctness. On questions of fact and mixed fact and law, the standard of review is palpable and overriding error.

As indicated by the majority, "administrative justice" will not always look like "judicial justice". Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge.

However, the majority stated that reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible, and transparent, not in the abstract, but to the individuals subject to it.

To be reasonable, a decision must be based on reasoning that is both rational and logical.

The majority noted that many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable.

With that power comes a heightened responsibility on the part of administrative decision makers to ensure that they have considered the consequences of a decision and that those consequences are justified in light of the facts and the law.