

Post-Vavilov Case Law Review

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Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
Essentially the same standard of review for appeals and judicial review	The standard of review on judicial review is similar to pre- <i>Vavilov</i> but appeals to a court are governed by the usual principles (<i>Housen v. Nikolaisen</i> , 2002 SCC 33) - correctness on extricable questions of law, palpable and overriding error for questions of fact or mixed law and fact



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
Relatively little guidance on how to conduct a reasonableness review	A detailed description of a robust process to conduct a reasonableness review



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
?? A requirement to follow court-established principles of statutory interpretation for it to be reasonable ??	Not required to follow a formalistic statutory interpretation but tribunals should interpret in a manner consistent with the text, context and purpose



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
Determining the correct standard of review requires a “contextual inquiry”	A correctness standard may be required by the “rule of law”. A “contextual inquiry” is not required



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
There isn't a presumptive standard of review	There is a presumption that the standard of review is reasonableness



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
A correctness standard of review for constitutional questions, issues of law of central importance to the legal system and the jurisdictional boundaries between administrative bodies	Similar, but with a clarification that this is based on the rule of law and with some clarification as to what is a question of the jurisdictional boundaries between administrative bodies



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
Correctness is required for true questions of jurisdiction	True questions of jurisdiction are no longer a basis for a correctness review



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
Possible expansion of the grounds for correctness review subsumed in contextual analysis	Any expansion of the grounds for correctness review must be exceptional and consistent with the principles from the decision



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
The tribunal's expertise is a relevant factor in a reasonableness review	Expertise can be a relevant factor but much less emphasis on it in assessing reasonableness



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
Presumption of expertise	Expertise can be considered if the tribunal has demonstrated how it has applied that expertise to the analysis



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
Some ability to “supplement” the reasons by a review of the record	There appears to be a higher bar to justify the reasoning process in the decision – a court should not disregard a flawed reasoning process and substitute its own reasoning process



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
Failure to address a party's arguments could result in a decision that the process was unfair or the decision did not permit appellate review	Reasonableness requires that the tribunal demonstrate that it grappled with the issues and addressed them



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
Uncertainty about the extent to which a tribunal was required to follow its previous decisions	Citizens are entitled to expect that like cases will generally be treated alike



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
Lack of clarity whether the effect of the decision on the parties was a relevant factor in assessing the reasonableness of the decision	A failure to grapple with the consequences on a party may be unreasonable



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
Uncertainty whether a party could bring both judicial review and an appeal to challenge a decision	If there is a circumscribed right of appeal a party may be able to bring both judicial review and an appeal (but see later lower court decisions limiting that principle)



Pre and Post *Vavilov* Comparison

Pre <i>Vavilov</i>	Post <i>Vavilov</i>
Remedies – lack of clarity on the extent to which a court could refuse a remedy	A court can refuse a remedy or refuse to remit a matter back to a tribunal if the result is inevitable



Principles of a reasonableness review (Paul Daly)

- Reasonableness review is...a robust form of review”
- “where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts”
- “The burden is on the party challenging the decision to show that it is unreasonable”



Principles of a reasonableness review (Paul Daly)

- “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 *de novo* analysis or seek to determine the “correct” solution to the problem...A principled approach to reasonableness review is one which puts [the decision-maker’s] reasons first”;



Principles of a reasonableness review (Paul Daly)

- “what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review”; and
- “In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker’s demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision”.





The effects of *Vavilov* on Judicial Review and appeals

I think that there will be a much more intensive scrutiny of the reasoning process in the reasons of the tribunal





The effects of *Vavilov* on Judicial Review and appeals

Vavilov places a much greater burden on administrative tribunals to clearly describe the reasoning process adopted, including demonstrating that the tribunal considered the arguments raised by the parties, the tribunal grappled with the issues raised by the parties, and the tribunal explained how it resolved the issues in dispute between the parties.



The effects of *Vavilov* on Judicial Review and appeals

Litigants who have a limited right of appeal in a statute are likely to consider bringing both an appeal under the statute and an application for judicial review (but see *Yatar v. TD Insurance Meloche Monnex*, 2021 ONSC 2507 and *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161).





The effects of *Vavilov* on Judicial Review and appeals

Appellants in a statutory appeal will be creative in attempting to characterize an alleged error by the tribunal as an “extricable question of law” as that will be subject to review on a standard of correctness.





The effects of *Vavilov* on Judicial Review and appeals

With an appeal from a tribunal subject to the same principles of appeal applicable in an appeal from a court judgment, tribunals will consider leading more evidence on issues that previously it left to the knowledge of the professional members of the tribunal.





The effects of *Vavilov* on Judicial Review and appeals

Courts that are less inclined to grant deference to a tribunal's decision will view the greater scrutiny prescribed in *Vavilov* as providing the tools to intervene.





The effects of *Vavilov* on Judicial Review and appeals

Courts that are less inclined to grant deference to a tribunal's decision will view the appeal principles from *Vavilov* as providing the tools to intervene.



Issues not resolved by *Vavilov*

- Internal statutory appeals
- Standard of review – questions of fairness
- Arbitration appeals
- Judicial review for Charter compliance (Doré)
- Review of a discipline committee decision that proven conduct is unprofessional
- Review of discretionary decisions

