

AN UPDATE

# STANDARD OF REVIEW

To accompany Chapter 15 of Liz Nastasi, Deborah Pressman & John Swaigen, *Administrative Law: Principles and Advocacy*, 4th ed (Toronto: Emond, 2020)

ISBN 978-1-77255-502-8

August 4, 2021

- On December 19, 2019, the Supreme Court of Canada (SCC) in *Vavilov*<sup>1</sup> established a new standard of review framework.
- This change came just over ten years after the release of *Dunsmuir*.<sup>2</sup> 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 was previously 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

1 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

2 *Dunsmuir v New Brunswick*, 2008 SCC 9.

- 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 of law can be isolated, in which case the question should be reviewed for correctness.
- Where the **rule of law demands correctness** review, such as 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

Page 347, Question 7 should now read:

7. Since *Vavilov*, in what circumstances will the court apply a reasonableness and correctness standard?

