Impact of the Supreme Court of Canada's decision in Vavilov on Tests to be Applied in Judicial Reviews of Administrative Decisions

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On December 19, 2019, the Supreme Court of Canada delivered its reasons for judgement in *Canada (Minister of Citizenship and Immigration) v. Alexander Vavilov*, 2019 SCC 65, along with a companion case, *Bell Canada v. Canada (Attorney General),* 2019 SCC 66. The *Vavilov* case involved an unreasonable decision under the *Citizenship Act* (Canada) by the Registrar of Citizenship, and the *Bell Canada* case involved an unreasonable decision by the CRTC. Because those cases have nothing whatever to do with the *Income Tax Act* (the "**Act**") or the Canada Revenue Agency ("**CRA**"), this blog will not address the facts or reasons involved in those decisions themselves.

Instead, the important aspect of those decisions is that the majority of the Supreme Court of Canada decided to "clarify the law applicable to the judicial review of administrative decisions," having decided that the current framework was flawed concerning:

a. the analysis used for determining the standard of review to be adopted by a reviewing court, as between the "correctness" standard and the "reasonableness" standard, and
b. reviewing courts requiring better guidance from the Supreme Court of Canada on the proper application of the reasonableness standard.

Where a reviewing court (usually the Federal Court of Canada in our present context) applies the correctness standard to a decision made by an administrative body, it means that the court determines whether it would have reached the same conclusion as the administrative body – namely, whether the decision was correct in law. Where a reviewing court applies the reasonableness standard, on the other hand, it means that the court determines only whether the approach taken by the administrative body in reaching its conclusion was a reasonable one for that body to have reached. Applying a reasonableness standard involves a reviewing court deferring to the expertise of the administrative body. The court must also ensure that the administrative body's decision contains no fundamental flaws, such as a failure of rational reasoning, that would render the decision unreasonable for the administrative body to have reached.

The *Vavilov* case addressed judicial reviews of administrative decisions made by hundreds of different government boards and agencies, such as the Information and Privacy Commissioner, Citizenship and Immigration, Securities Commissions, Worker's Compensation Boards, the National Energy Board, Law Societies and Patent and Trademark Offices. The context of this blog is limited to judicial reviews of decisions of the Minister of National Revenue and her delegates.

At the outset, it is important to appreciate that in the context of income tax matters, judicial review of administrative decisions is a remedy available only in limited circumstances. That is because the Tax Court of Canada has exclusive jurisdiction to hear and determine references and appeals under the Act. The Federal Court of Canada generally has exclusive original jurisdiction to hear all applications for judicial review of any federal board, commission or other tribunals, including the CRA.[1] Consequently, the realm for seeking judicial review is available primarily in the following tax-related circumstances:

a. failure to act lawfully when making information demands in tax audits (subsection 220(2.1));
b. failure to issue refund notices of assessment, notices of assessment to reduce tax payable under Part I, and reassessments or determinations when the Act imposes a positive duty on the Minister to do so in a timely fashion (subsection 152(4.2) and subsection 152(6) for loss carrybacks);
c. failure to pay refunds with interest in a timely manner when such amounts are not in dispute before the Tax Court of Canada, the amount is not being contested by the CRA and tax legislation permits the payment (subsection 220(2.1));
d. failure to act lawfully in attempting to collect tax debts (see *James Walker v. The Queen*, 2005 FCA 393 (FCA), which held that an application for judicial review may be made to the Federal Court to challenge the legality of collection measures taken by the Minister to collect taxes allegedly due, but that the Federal Court's jurisdiction does not extend to an application involving an attack on the underlying reassessment on which collection measures are based, which properly would be the subject of an appeal to the Tax Court of Canada); and
e. failure to exercise discretion in a reasonable manner in circumstances involving the "fairness" provisions of the Act, including the waiver of interest and/or penalties (subsections 204.1(4) and 204.91(2), section 207.06 and subsection 220(3.1)), the late filing of prescribed forms, receipts (subsection 220(2.1)), returns (subsection 220(3)), designations or elections (subsections 85(7.1), 122.62(2) and220(3.201)), and the late provision of prescribed information (subsection 220(3)). Decisions of CRA representatives under the fairness provisions are the most common decisions subject to judicial review.

Tests to be Applied in Judicial Reviews of Administrative Decisions

Before the *Vavilov* and *Bell Canada* cases, the leading case on judicial reviews of administrative decisions was the Supreme Court of Canada's 2008 decision in *David Dunsmuir v. Her Majesty the Queen in Right of the Province of New Brunswick*.[2] That case and predecessor cases had adopted a complex and unwieldy "contextual analysis" approach for determining what standard of review (correctness vs. reasonableness) should be applied by a reviewing court in assessing a decision of an administrative tribunal. This determination was based on the relative expertise of administrative decisionmakers. The Supreme Court of Canada concluded in *Vavilov* and *Bell Canada* that reasonableness should be the presumed applicable standard in all cases. Additionally, the relative expertise of administrative decisionmakers is no longer relevant to a determination of the standard of review.

However, the presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard to apply, including by providing for a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate "correctness" standards apply when a court reviews the decision. Where a legislature has provided a statutory appeal mechanism, it has subjected the administrative regime to appellate oversight, and it expects the court to scrutinize such administrative decisions on an appellate basis. The applicable standard is, therefore, to be determined with reference to the nature of the question and the jurisprudence on appellate "correctness" standards of review. Where, for example, a court hears an appeal from an administrative decision, it would apply the standard of correctness to questions of law, including on statutory interpretation and the scope of a decision maker's authority. Where the scope of the statutory appeal includes questions of fact or questions of mixed fact and law, the standard is a palpable and overriding error for such questions.

Two justices of the Supreme Court of Canada vehemently dissented from this aspect of the Court's decision in *Vavilov*, stating:

> [251] *The result reached by the majority means that hundreds of administrative decision-makers subject to different kinds of statutory rights of appeal – some in highly specialized fields, such as broadcasting, securities regulation and international trade – will now be subject to an irrebutable presumption of correctness review. This has the potential to cause a stampede of litigation. Reviewing courts will have license to freely revisit legal questions on matters squarely within the expertise of administrative decision-makers, even if they are of no broader consequence outside of their administrative regimes. Even if specialized decision-makers provide reasonable interpretations of highly technical statutes with which they work daily, even if they provide internally consistent interpretations responsive to the parties' submissions and consistent with the text, context and purpose of the governing scheme, the administrative body's past practices and decisions, the common law, prior judicial rulings and international law, those interpretations can still be set aside by a reviewing court that simply takes a different view of the relevant statute. This risks undermining the integrity of administrative proceedings whenever there is a statutory right of appeal, rendering them little more than rehearsals for a judicial appeal – the inverse of the legislative intent to establish a specialized regime and entrust certain legal and policy questions to non-judicial actors.*
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> [emphasis added]

The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole (e.g. solicitor-client privilege issues) and questions related to the jurisdictional boundaries between two or more administrative bodies.

Importance of Written Reasons

The Supreme Court of Canada indicated that it expects an administrative body or tribunal to provide written reasons for its decision. That is how a decision-maker shows that its decision is reasonable and has fully considered arguments presented by the affected parties. Those reasons enable a reviewing court to assess whether the decision as a whole is reasonable. Where, however, written reasons are not provided, a reviewing court must examine the record and context that was before the administrative decision-maker (i.e. the facts and legal constraints) to assess whether the decision is reasonable.

Two fundamental flaws that would render a decision of an administrative body (including the CRA) unreasonable are (a) failure to be rational in the reasoning used to reach a conclusion (i.e., the reviewing court must be able to trace the decision-maker's thinking without encountering any failure of logic); and (b) failure to follow a statutory scheme, apply correct principles of statutory interpretation, take into account the evidence before the decision-maker or to follow previous decisions of the administrative body. Here is the kind of guidance provided by the Supreme Court of Canada:

> [106] *It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given*

decision is reasonable, namely 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. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[107] A reviewing court may find that a decision is unreasonable when examined against these contextual considerations.

[emphasis added]

Administrative Decisions on Tax-Related Issues

Decisions made by the Minister or other delegated CRA representatives generally are not the subject of any right of appeal; consequently, they will be subject to judicial review based on a reasonableness standard. In my view, the effect of such a standard is to impart higher authority to CRA decisions than would be the case if judicial reviews of them were to be conducted based on a correctness standard. This means that so long as a CRA decision-maker provides written reasons for his or her decision that are internally coherent and contain no fatal flaws in logic, they likely will stand up to the scrutiny of a reviewing court.

One potential exception to that point of view, however, can be found in the following passages from the reasons for judgement in *Vavilov*:

(*c) Principles of Statutory Interpretation*

[115] Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. …

[116] … Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a de novo analysis of the question or "ask itself what the correct decision would have been". … Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached. …

[118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An

> *approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation. …*
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> *[120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise. … Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements. …*
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> *[122] It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. … If, however, it is clear that the administrative decision maker may well, had it considered a key element of the statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker. …*
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> [emphasis added]

Only time will tell whether I am correct in thinking that a decision made by the CRA may be able to be the subject of judicial review based on the decision maker's an arguably incorrect interpretation of a material provision of the Act. The above passages should enable reasonably compelling arguments to be made in support of seeking a judicial review of a CRA auditor's or other CRA representative's interpretation that is one-sided, clearly self-serving or neglects to reflect material interpretive precedents.

A technical interpretation issued by the CRA that is contrary to established precedent or proper statutory interpretation may be challengeable by a judicial review where it can be shown to adversely impact a real issue facing a particular taxpayer or group of taxpayers. It is common practice for taxpayers and their professional advisors to pose technical questions to the CRA to ascertain whether the CRA would accept a particular filing position proposed to be taken by the taxpayer in a future tax return. It is a valuable service rendered by the CRA to express its views to taxpayers on these technical issues. The ability to have a technical interpretation issued by the CRA tested by having the taxpayer apply for judicial review of it should save taxpayers considerable expense compared with having the taxpayer file its tax return, be reassessed by the CRA and appeal the assessment to the Tax Court of Canada. The cost-saving would increase substantially if the issue impacts numerous taxpayers.

We at Moodys Tax will gladly be available to advise on whether a judicial review of a CRA decision may be an available remedy.

[1] Paragraph 18(1)(b) of the *Federal Courts Act*.

[2] [2008] 1 S.C.R. 190.