

Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response

By: Nigel Bankes

Decision Commented On: *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#)

The Supreme Court of Canada used *Vavilov* and its companion cases *Bell Canada v Canada (Attorney General)*, [2019 SCC 66 \(CanLII\)](#) (the *Super Bowl Case*) and *Canada Post Corp. v Canadian Union of Postal Workers*, [2019 SCC 67 \(CanLII\)](#) as an opportunity to re-examine its approach to judicial review of administrative decisions. The Court reaffirmed much of the *Dunsmuir* approach (*Dunsmuir v New Brunswick*, [2008 SCC 9 \(CanLII\)](#), [2008] 1 SCR 190) as refined in the subsequent case law. In particular, it has reaffirmed that in most cases the standard of review is reasonableness. The Court also reaffirmed a series of exceptions to that presumption namely where the legislature has indicated that a different standard should apply, and where the rule of law requires that a correctness standard should apply (i.e. constitutional questions, general questions of law of central importance to the legal system as a whole, and jurisdictional boundaries between two or more administrative bodies).

The majority recognized two manifestations of legislative intent that might rebut the presumption of reasonableness. The first example is the situation in which a legislature expressly adopts a particular standard of review such as is the case under British Columbia's the [Administrative Tribunals Act, S.B.C. 2004, c. 45](#) sections 58 and 59. There must be limits as to this power. For example, it seems doubtful that a legislature could specify that the standard of review for constitutional questions was reasonableness. The second example is more far reaching and unexpected. In effect, the majority considers that wherever the legislature has chosen to provide for judicial supervision of an administrative tribunal by way of a statutory appeal rather than by way of judicial review, then the Court will treat this as a statement of statutory intent that judicial supervision should be based on an appellate standard of intervention rather than on a standard of reasonableness (except as replaced by correctness in the three exceptional categories outlined in the paragraph above).

This does *not* mean that the standard of review will always be correctness – rather, the standard will simply follow the same rules for appellate intervention as apply in the ordinary course. The leading authority on these rules is *Housen v Nikolaisen*, [2002 SCC 33 \(CanLII\)](#), [2002] 2 S.C.R. 235. The majority (at para 37) summarized the implications of *Housen* as follows:

- Where a court is hearing an appeal from an administrative decision on questions of law, (including questions of statutory interpretation as well as questions concerning the scope of a decision maker's authority) the relevant standard is correctness.
- Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of



mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. [10, 19 and 26-37](#). (my paraphrase)

Thus, all extricable questions of law, including questions as to the interpretation of a tribunal's home statute, will be reviewed according to the standard of correctness and not reasonableness in any situation in which the court's judicial supervisory role is framed in terms of an appeal rather than judicial review. This represents a significant change of direction for the Court. Previous authorities had affirmed a more deferential standard of review in such cases (*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016 SCC 47 \(CanLII\)](#), [2016] 2 SCR 293) and did not draw a bright line between statutory appeal cases and judicial review.

The balance of this post examines the arguments pro and con the new treatment of statutory appeals and then examines one option available to legislatures to respond to this change. The post does not address the important and welcome guidance that the Court offers on the proper (and more searching) application of the reasonableness standard. I anticipate that one or more of my colleagues will comment on this aspect of the decision.

The Arguments for the New Presumption

The majority offered four arguments for its conclusion that coherence and conceptual balance required the Court to reverse its position.

First, it observed that the failure to give meaning to an appellate review clause had come under significant judicial and academic criticism which the majority summarized as follows (at para 39):

These critiques seize on the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. This criticism observes that legislative choice is not one-dimensional; rather, it pulls in two directions. While a legislative choice to delegate to an administrative decision maker grounds a presumption of reasonableness on the one hand, a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts on the other hand.

Second, the majority's assessment is that (at para 41) "there is no satisfactory justification for the recent trend in this Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis absent exceptional wording ...". Indeed, under the pre-*Dunsmuir* pragmatic and functional approach the existence of an appeal right (at para 41) "was understood to be a key factor indicating that the legislature intended that a less deferential standard of review be applied ...". The majority in *Dunsmuir* was silent on this issue and yet the standard rules of statutory interpretation require that a court should respect that the words appeal and judicial review have different meanings (at paras 43-44).

Third, the "comprehensive and considered examination" conducted by the Court in this and the related cases revealed the need for greater conceptual clarity. In particular, the majority considered that, insofar as the current framework presumed expertise, expertise alone could no

longer be viewed as sufficient reason for “looking past” an appeal clause. In a world in which the presumption in favour of reasonableness is based on “respect for the legislature’s institutional design choice, according to which the authority to make a decision is vested in an administrative decision maker rather than in a court” it would be inconsistent (at para 46) “to disregard clear indications that the legislature has intentionally chosen a more involved role for the courts.” Furthermore, the adoption of a bright line rule was consistent with the Court’s rejection of a contextual approach to the assessment of standard of review (at para 47).

Finally, the majority offered three glosses to its discussion of standard of review in the context of statutory appeals. First, the majority made it clear that the position was the same whether there was an appeal as of right or only with leave. Second, the majority emphasized that legislatures would be free to rebut the presumed standard of review consequences of selecting a statutory appeal. Third, the majority noted that a statutory appeal would not always exhaust the possibility of judicial review and in such a situation the presumption of reasonableness would apply to that judicial review application and could not be rebutted by reference to the statutory appeal mechanism. (at paras 50–52).

Reasons Offered by the Concurring Justices (Dissenting on this Point)

Justices Abella and Karakastanis gave several reasons for rejecting the majority’s approach to the standard of review. First and foremost, the dissenting justices conclude that correctness review on points of law affords no weight to the legislature’s decision to delegate authority to administrative decision-makers based on their expertise. Historically this had been a key reason for the Court’s deference to administrative decision-makers (at paras 230–235). The minority summarized the point this way (at para 236):

Although the majority’s approach extolls respect for the legislature’s “institutional design choices”, it accords no weight to the institutional advantages of specialization and expertise that administrative decision-makers possess in resolving questions of law. In so doing, the majority disregards the historically accepted reason *why* the legislature intended to delegate authority to an administrative actor.

Second, the minority rejects the view that the adoption of a statutory appeal should be read as a conclusive statement of legislative intent with respect to standard of review. They suggest that such provisions are far more equivocal and reflect different policy choices including efficiency and access to justice (at paras 245–250).

Third, a correctness standard for points of law could lead to a “stampede of litigation” and the risk that proceedings before a tribunal could be “little more than rehearsals for a judicial appeal” (at para 251).

Finally, the minority accuses the majority of departing from past jurisprudence with insufficient regard for the doctrine of *stare decisis*.

Commentary

For me the minority is much more persuasive on the issue of statutory appeals. Agreeing with the minority, it is not at all clear to me that it is legitimate to conclude that a legislature that makes provision for a statutory appeal presumptively intends that the decisions of that entity should be subject to a greater degree of judicial scrutiny than they would be in the ordinary course of judicial review. I prefer to think of these appeal provisions as “channelling” judicial “supervision” rather than changing its character (see my earlier post on the [Judicial Supervision of the National Energy Board](#)). I say this because in many cases appeal provisions are coupled with strong privative clauses, narrow grounds for review (point of law or jurisdiction) frequently only with leave, provisions designed to by-pass trial level courts, and truncated commencement times. This is the case for example with the appeal provisions of sections 29 and 30 of the *Alberta Utilities Commission Act*, [SA 2007, c A-37.2](#) (AUCA). The only element of this package of these two sections that points in the direction of greater judicial scrutiny is the single word, “appeal”. See also the [ABlawg post by Shaun Fluker](#) “A Closer Look at Leave to Appeal Requirements Under the *Municipal Government Act* (Alberta)”.

Tribunals subject to appeal provisions frequently deal with complex areas of regulation. The AUC for example has to grapple with classical utility regulation, performance-based regulation and regulation for markets as well as technical issues pertaining to the electricity sector, including such matters as the need for new transmission lines and transmission line losses. It is responsible for multiple statutes and regulations that need to be construed as a coherent whole. Its decisions may cover as much as several hundred pages and each may raise multiple questions of statutory interpretation. For the most part, these interpretive issues are not ones for which the courts have *any* expertise; nor are they issues that, for most part, were ever given to the courts in the first place, i.e. there is no transfer of responsibilities from the courts to the tribunal (there is no “line-loss” cause of action nor an inherent transmission line approval authority, and there is little in common between the *quantum meruit* remedy of a common carrier and the details of utility regulation). In these circumstances why would one prefer correctness as a standard for reviewing the AUC’s interpretation of its multiple home statutes and regulations? If one considers those rare cases in which the courts have applied a correctness test in this area of the law the results of correctness review have hardly been encouraging. Consider for example, the decade long fall-out (and still continuing) from the majority judgment of the Court in *Stores Block, ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006 SCC 4 \(CanLII\)](#), [2006] 1 SCR 140 (and see my post on that fall-out [here](#)) which imposed a straightjacket on the AUC.

As the minority suggests, a correctness standard of review can only serve to encourage the re-argument of issues of statutory interpretation before the court - in addition to the internal review and variance proceedings that are already standard practice before a tribunal such as the AUC.

There are also more technical reasons for thinking that the majority’s line drawing exercise will not necessarily produce the clarity and consistency that the majority anticipates. For example, one can anticipate that much energy will be invested in distinguishing between pure questions of law (subject to a correctness review) and mixed questions of fact and law (subject to review on the basis of palpable and overriding error – or not reviewable on appeal at all). Related to this,

Paul Daly's recent blog post ([Concluding Thoughts](#)) draws attention to the likelihood that review on the basis of palpable and overriding error is likely a more deferential standard of review than review on the more searching reasonableness grounds endorsed by both the majority and the minority. It is hard to see the rhyme and reason in the application of an appellate standard of review that is on the one hand less deferential and on the other more deferential.

Another reason for being skeptical as to the majority's claim of greater coherence in its treatment of statutory appeals relates to the possibility of concurrent appeal and judicial review entitlements (mentioned by the majority at paras 50–52 and the minority at para 252). In theory this is always a possibility. A statutory appeal can only displace an entitlement to judicial review to the extent that the statutory appeal provides an equally effective remedy. In those cases in which parties commence both appeals and judicial review the usual conclusion is that an appeal on a point of law or jurisdiction offers a remedy that is procedurally and substantively equivalent to an application for judicial review: see for example *Rozander v. Alberta (Energy Resources Conservation Board)*, [1978 ALTASCAD 391 \(CanLII\)](#) and *Milner Power Inc. v. Alberta (Energy and Utilities Board)*, [2007 ABCA 265 \(CanLII\)](#). But there is one well known set of examples in which parties who have no appeal right may have a right to apply for judicial review. These are cases involving section 18.5 of the *Federal Courts Act*, [RSC 1985, c F-7](#), which expressly provides that:

18.5 Despite [sections 18](#) and [18.1](#), if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, *to the extent that it may be so appealed*, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act. (emphasis added)

While this section seems at first glance to rule out judicial review applications covering the same ground it also contains an internal exception to the effect that judicial review is only precluded *to the extent that* the decision or order “may be so appealed”: see, for example *Union of Nova Scotia Indians v. Maritimes and Northeast Pipeline Management Ltd.*, [1999 CanLII 7556 \(FCA\)](#). To give but one example, if a person affected by a decision does not participate in that decision that person will have no right of appeal but may have a right of judicial review. In such a case the standard of review for an appeal by a participating party in relation to a question of statutory interpretation would be correctness; the standard of review for the judicial review application would be reasonableness with respect to the same question. There may be reasons for thinking that a party that fails to participate in the process before the tribunal should not be entitled to a remedy on discretionary grounds but it is not clear why a different standard of review should apply to the same question of statutory interpretation.

A Challenge (or an Opportunity) for Legislatures?

It is possible to read the majority's judgment as a challenge to legislatures along the following lines: (1) the courts, citizens, regulatory tribunals, legislatures would all prefer to see greater

certainty in the law pertaining to the judicial supervision of administrative decisions; (2) but the courts cannot achieve that certainty alone; (3) one mechanism for achieving a greater degree of certainty is to establish a bright line rule by way of a presumption or series of presumptions while at the same time acknowledging that legislatures have some significant authority to rebut those presumptions – however, they must do so, otherwise they will be taken to have acknowledged the validity of such presumptions.

In other words - this is what we (the Court) think you mean when you (legislatures) provide for a statutory appeal. If this is not what you mean then you need to speak more clearly, and in the interests of certainty it would be best if you spoke quickly and definitively. It doesn't really matter if you agree with the presumptions that we have just created (and it will take far too long to revisit that question) but if you consider that the presumption is inappropriate you have the authority (subject to some limits) to instruct us otherwise. Any further conversation on the subject is best carried out by means of legislative enactments and not through further litigation.

While I have provided my reasons for preferring the position of the minority, I have framed this issue of a potential legislative response contingently. *If* a legislature considers that the majority has read too much into the enactment of a statutory appeal in some (or all) cases it would seem to have at least two options. One option would be a general enactment covering all statutory appeals within a particular jurisdiction. A second option would require examination of the statute book to identify each statutory appeal mechanism with a view to asking the question whether the applicable rules should be the appellate rules as adumbrated by the majority or judicial review rules. I am sure that there are pros and cons to each of these two possible responses (although the second option seems to me to be much more logical and calibrated) and at some point they might blend together in a miscellaneous statutes amendment act. Provincial law reform agencies may wish to (or be asked to) weigh in on the choice of these or other approaches, but I think that there is considerable merit to moving quickly, indeed very quickly.

To further illustrate what option two might look like here is an example of how a statutory appeal provision could be amended to address the standard of review in light of *Vavilov* if the legislature was of the view that the decision had misconstrued its intent. The example makes use of the *Alberta Utilities Commission Act* (simply to continue with the example that I have been using to this point). The following is a proposed new section to be added to the AUCA:

Standard of Review on Appeal

29A Notwithstanding the use of the word "appeal" in section 29, the Court of Appeal shall apply the same standard of review to an appeal as it would apply to an application for judicial review under Part 3, Division 2 of the Rules of Court.

Proposed effective date of amendment, December 18, 2019

The proposed amendment does not stipulate a standard of review other than by comparison with the general law on judicial review. In this way the section will be constantly speaking. It will evolve as the general law on judicial review evolves and it will not be frozen in time. It is designed to automatically pick up both the presumption in favour of reasonableness as the

default standard of review as well as the correctness exceptions to that standard as identified by the Court.

Of course, if a government concurs with the majority's assessment of the presumption then it need do nothing with respect to the new status quo. But if it wishes to return to the status quo as it existed prior to this decision then it needs to act.

In sum, I think that the majority's decision in *Vavilov* rests upon a false premise and to that extent will not achieve, *on its own*, the coherence and conceptual balance desired by the majority. That said, the decision does draw a bright line and legislatures and parliamentary drafters can take advantage of that line when deciding whether to confirm or deny the presumption that statutory appeal provisions require review on correctness grounds. Responsive engagement with the decision along these lines may yet deliver the coherence and conceptual balance that the majority seeks (and to which we all aspire) in this part of its decision. Whether it will be possible to gain the attention of the relevant legislatures for long enough to further this engagement remains to be seen. Perhaps the "stampede of litigation" (an interesting choice of collective noun for two Ontario judges) forecast by the minority might focus attention – although others who might stand to gain from the promise of such a stampede might well lobby for the new status quo (after all we're still living, at least in this province, with *Stores Block*).

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