THE VAVILOV FRAMEWORK AND THE FUTURE OF CANADIAN ADMINISTRATIVE LAW

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THE BUILD UP

- Three distinctions
- 1. Categories versus Context
- 2. Judicial Supremacy versus Administrative Supremacy
- 3. Outcomes versus Reasons

THE BUILD UP

- Two problems

- 1. Selecting the standard of review
  - Complexity and uncertainty

- 2. Applying the reasonableness standard
  - Methodology
  - Reasonableness in the absence of reasons
  - Defective reasons

VAVILOV

- Two solutions, one thin, one thick

- 1. Selecting the Standard of Review
  - "Institutional Design", "Legislative Intent" and the "Rule of Law"

- 2. The Reasonableness Standard
  - Robustness and respectfulness
  - Justification
  - Responsiveness

SELECTING THE STANDARD OF REVIEW

- Institutional design: existence of administrative decision-maker = rbl review

- Reasonableness review in all cases **unless**
  - Institutional design: legislated standard/appeal
  - Rule of law: uniformity from one final, determinate answer
    - Constitutional questions
    - Overlapping jurisdiction
    - Questions of central importance to the legal system

SELECTING THE STANDARD OF REVIEW

- Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis
  - *Vavilov* at para. 36

- **Any** "appeal" attracts the appellate review framework
  - *Vavilov* at para. 50

SELECTING THE STANDARD OF REVIEW

- Extricable questions of law = correctness
- Mixed questions of fact & law/fact = palpable and overriding error
  - *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235
- Will deference survive? New battlegrounds
  - Classification of question
  - Persuasive authority of administrative decisions

SELECTING THE STANDARD OF REVIEW

- What about **privative clauses**?
- **Irrelevant** to standard of review: only the **magic word** "appeal" matters
- May still have **residual** impact, e.g. on reconsideration/internal review

SELECTING THE STANDARD OF REVIEW

- **Legislated standards** of review must be respected
  - *Vavilov*, at paras. 34-35

- But they must be **comprehensive**
  - *Administrative Tribunals Act*, S.B.C. 2004, c. 45
  - Cf. *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41

- And they must set a **standard** of review
  - *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339

SELECTING THE STANDARD OF REVIEW

- The Rule of Law exceptions
  - Constitutional questions
  - Overlapping jurisdiction
  - General questions of law of central importance to the legal system

- Very **narrow conceptual basis**

- **Compare** the *Secession Reference*, [1998] 2 S.C.R. 217, at paras. 70-78

SELECTING THE STANDARD OF REVIEW

- **Possible** exceptions will expand
- **Possible** other exceptions will be added (*Vavilov* at paras. 69-72)
- But **unlikely**
  - See e.g. *Bank of Montreal v. Li*, 2020 FCA 22; *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101; *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34

REASONABLENESS REVIEW

- Six **shared propositions**:
  - Reasonableness review is robust
  - Always start with the reasons (where available)
  - Reasons are the primary means of demonstrating reasonableness
  - Burden on the applicant
  - Contextual analysis
  - Respectful analysis: administrative justice =/= judicial justice
- Majority: **No supplementation**
- **NB** *Vavilovian* reasonableness review is inherently deferential

REASONABLENESS REVIEW

- "two types of **fundamental flaws**"
  - *Vavilov*, at para. 101

- 1. Absence of **rational** and **logical** reasoning
  - Not much more to say about this…*Zenner v. Prince Edward Island College of Optometrists*, 2005 SCC 77, [2005] 3 SCR 645
- 2. Failure to **justify** in view of **factual and legal constraints**
  - The key area for counsel and courts to master

REASONABLENESS REVIEW

- **Compare** *Dunsmuir*
  - **Para 47**: justification, intelligibility, transparency & range
  - **Para 48**: reasons "which could be offered"

- **With** *Vavilov*
  - Justification
  - Responsiveness
  - Supplementation

REASONABLENESS REVIEW

- **Justification**

- Expertise irrelevant to selecting the standard of review
- Expertise ***very*** relevant to ***surviving*** the standard of review
- Note references to “demonstrated expertise”: paras 14, 81, 93

REASONABLENESS REVIEW

- **Responsiveness**

- *Listening*, not hearing (para 127)
- Grapple (paras 128, 134)
- "Harsh consequences" (para 133)
- Departures from prior decisions (paras 129-132)

REASONABLENESS REVIEW

- **Supplementation**

- Get it right first time: *Vavilov* at para **96**

- Very limited scope for help from:
  - Affidavits
  - Counsel
  - Reviewing court

REASONABLENESS REVIEW

- There are some important **tensions**

- **Jurisdiction** (paras 108-110)
  - No more correctness review on questions of jurisdiction
  - But decision-makers "must" comply with governing statutory scheme

- **Statutory interpretation** (paras 115-124)
  - Duty to consider *text*, *purpose*, *context*
  - But no need to do a formalistic exercise in every case

REMEDIAL DISCRETION

- *Vavilov* is clear that quashing and remitting is usually the appropriate course of action with an invalid decision

- *But…*

- "Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose"
  - *Vavilov*, at para. 142

BIG BANG

- *Vavilov* is now the starting point for analysis

- Important to note that *Vavilov* is a **compromise**
  - Correctness review on questions of law on appeal for some
  - Deferential judicial review on a vast range of issues

- It contains important **tensions**
  - Partly thin, partly thick
  - Categorical in Part II, Contextual in Part III
  - Sometimes interventionist, sometimes deferential

THE END

- Thank you and good luck in these trying times

- See also
  - Previous CIAJ Webinars: Six Months of *Vavilov* and *Vavilov* for Legislative Drafters
  - "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) CJALP (forthcoming)
  - "*Vavilov* Hits the Road", *Administrative Law Matters* (updated monthly)
  - "Unresolved Issues after *Vavilov*", *Administrative Law Matters*