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VAVILOV : CHANGES TO ADMINISTRATIVE LAW IN CANADA

Standard of Review, Statutory Appeals, and Impact on Canada's IP Regime

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In late December, the Supreme Court released its decision in Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65. Quite apart from the colourful facts of the case (involving the citizenship of children of Russian spies born in Canada whose family was apparently the inspiration for the television series "The Americans") it is an important decision which re-casts many fundamental principles of administrative law and the law of judicial review in Canada. As explained by the majority of the Court in Vavilov, the decision is intended to be a "holistic revision" and a "recalibration of the governing approach" with the express purpose of providing "future doctrinal stability" over a turbulent area of Canadian law.

Like many jurisdictions, in Canada provincial and federal governments delegate much of the power to administer and implement the laws to administrative agencies, boards, tribunals, and other decision-makers. These administrative decision-makers are involved in virtually every area of government activity, including Canada's intellectual property (IP) regime. Under Canada's various intellectual property statutes, Parliament has delegated various decision-making powers to administrative decision-makers such as the Registrar of Trademarks, the Trademarks Opposition Board, and the Commissioner of Patents. As is the case under many Canadian statutes, some of the decisions made by decision-makers under Canada's IP statutes are subject to express statutory rights of appeal to Canada's Federal Court - so-called "statutory appeals". In other cases, while there is no statutory right of appeal, decisions are nonetheless subject to "judicial review" by the Courts. In either case, administrative decision-making is reviewed by the Courts both as it concerns the merits of the decision, as well as for breaches of procedural fairness (natural justice). In either case, the review of the merits administrative decision-making in Canada often focuses on the applicable standard of review to be applied - either a non-

deferential "correctness" standard or alternatively a deferential "reasonableness" standard.

Prior to Vavilov, the distinction between statutory appeals and judicial review mechanisms had become blurred, with the effect that in either a statutory appeal or judicial review proceeding, reviewing Courts would generally take the same often deferential approach to the review of the merits of administrative decisions. Among many other things, the decision in Vavilov fundamentally changes the law concerning so-called "statutory appeals". Now, appeals from many types of decisions made by administrative decision-makers (including those made under Canada's IP statutes) will now be reviewed according to ordinary appellate standards of review rather than the potentially more deferential standards that are applied on judicial review.

The full practical impact of these changes on Canada's IP regime remains to be seen. However, it can be expected that at least in the short term there will be uncertainty concerning the application of Vavilov to statutory appeals and judicial review of decision-making under Canada's Trademarks Act, Patent Act, and Copyright Act, which will only likely be resolved through subsequent litigation under those statutes.

Judicial Review - Standard of Review and Reasonableness Analysis

The Vavilov decision represents the Supreme Court's first wholesale reconsideration of its landmark 2008 decision in Dunsmuir v New Brunswick, 2008 SCC 9 which itself had attempted to simplify and streamline administrative law in Canada.

Nonetheless, the Court in Vavilov noted that many aspects of the Dunsmuir framework were unclear and unduly complex. As a consequence, in the decade since Dunsmuir, Courts and litigants have struggled with the standard of review analysis and debates surrounding the appropriate standard and its application have continued to overshadow the review of decisions on their merits in many cases.

As a result, in a 7-2 decision in Vavilov, the majority of the Court has expressly departed from Dunsmuir and earlier cases, and in so doing has attempted to provide clearer guidance and a new approach to determine the standard of review when administrative decision-making is reviewed. Where the standard of review is determined by the Court to be reasonableness, the Court in Vavilov has attempted to provide additional insight as to how that reasonableness analysis should be conducted.

The new approach for determining the standard of review of the merits of an administrative decision begins with the presumption that the standard of review will be reasonableness, unless there is clear legislative direction that a different standard was intended (e.g. the statute specifies that the correctness standard applies on judicial review), or in cases where the rule of law requires a "singular, determinate, and final answer" to the question raised on judicial review. This approach replaces the unwieldy "contextual analysis" approach set out in Dunsmuir which the Court in Vavilov has stated should no longer be followed.

More particularly, the Court in Vavilov has now articulated five specific categories where derogation from the presumption of reasonableness is warranted when reviewing the merits of an administrative decision:

1. A specific standard of review has been set out in the statute.
2. A statutory right of appeal has been set out in the statute.
3. Constitutional questions.
4. General questions of law of central importance to the legal system as a whole.
5. Questions regarding the jurisdictional boundaries between administrative bodies.

The Court has indicated that this list is not necessarily exhaustive, but noted that future Courts should be reluctant to identify other categories. As stated by the Court, "we would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case. But our reluctance to pronounce that the list of exceptions to the application of a reasonableness standard is closed should not be understood as inviting the routine establishment of new categories requiring correctness review … That being said, the recognition of any new basis for correctness review would be exceptional and would need to be consistent with the framework and the overarching principles set out in these reasons."

In a welcome move, the Supreme Court has also finally eliminated the historical concept of "jurisdictional questions" or "true questions of jurisdiction" as a distinct category of issues attracting correctness review, given persistent difficulties faced in articulating the scope of this category.

In terms of conducting a reasonableness review, the Court has expressly attempted to provide additional guidance for what is entailed. As stated by the Court, "The approach we set out is one that focuses on justification, offers methodological consistency and reinforces the principle 'that reasoned decision-making is the lynchpin of institutional

legitimacy'".

Contrary to how some had interpreted Dunsmuir, the Court in Vavilov has clarified that a reasonableness review is concerned not just with the reasonableness of the **outcome** of the administrative decision, but also the reasonableness of the decision maker's **reasoning process** itself:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, 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 … "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did" … Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.
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> [84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion.
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> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or

> significant to render the decision unreasonable.
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> [101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

As a result, the Court in Vavilov has clarified that an administrative decision may be unreasonable (and set aside by the Court on judicial review) if the reasoning process was flawed, even if the outcome itself may have been reasonable. Similarly, a decision may be set aside by the Court if, notwithstanding a proper reasoning process, the outcome does not follow from that reasoning.

Statutory Appeals

Perhaps most notably, in one fell swoop the Supreme Court has overturned decades of precedent and practice and held that where a statutory right of appeal is provided from an administrative decision maker, the standard of review applied on that statutory appeal will be the ordinary appellate standard (such as that applied by an appellate Court on appeal from a trial Court). As set out by the Supreme Court of Canada in Housen v Nikolaisen, 2002 SCC 33, the appellate standards of review are "correctness" for questions of law, and "overriding and palpable error" for questions of fact or mixed fact and law. As explained by the Court in Vavilov:

> [37] **It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review.** Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. 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. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.
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> [38] **We acknowledge that giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. However, after careful consideration, we are of the view that this shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by a weighing of the values of certainty and correctness**: Craig, at para. 27… [emphasis added]

As explained by the Court in Vavilov, "a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts" and that "there is no convincing reason to presume that legislature mean something entirely different when they use the word 'appeal' in an administrative law statute than they do in, for example, a criminal or commercial law context".

As a result, going forward, the standard of review analysis and type of reasonableness review prescribed by Vavilov will **not** be applicable to any administrative decision-making where there is a statutory right of appeal.

Application to Canada's IP Regime

The Court in Vavilov has recognized that its decision represents a sharp departure from precedent, and so the Court has directed that going forward reviewing courts should look to the reasons in Vavilov for guidance, and that doing so "may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance". The Court has also recognized that long-established precedents in the area may no longer be useful and that in certain cases "including those on the effect of statutory appeal mechanisms, true questions of jurisdiction or the former contextual analysis - will necessarily have less precedential force". The Supreme Court has also directed reviewing courts that where they are not certain how these reasons relate to the case before it, they should request submissions from litigants on both the appropriate standard of review and the application of that standard.

There are still questions, however, concerning how Vavilov will apply to Canada's IP

regime.

For example, under the Trademarks Act, trademark opposition and cancellation proceedings are decided by the Trademarks Opposition Board. Section 56 of the Trademarks Act provides for a statutory right of appeal from those decisions to the Federal Court. While previously such statutory appeals were reviewed by Canada's Federal Court according to judicial review standards of review, it is clear now following Vavilov that those decisions will instead be reviewed according to the ordinary appellate standards. Unusually, section 56 of the Trademarks Act also provides for the ability of parties to file additional evidence on appeal to supplement the evidentiary record. Under the existing jurisprudence, the filing of additional evidence that would or could have affected the decision below allows for the Court to reconsider the issues de novo on the basis of the expanded record. It therefore appears that in cases where no additional evidence is filed on appeal, the ordinary appellate standards would be applied. In cases where additional evidence is filed that would or could have affected the decision below, it can be expected that those appeals would continue to be treated as a hearing de novo on the basis of the expanded evidentiary record - however, this specific issue will have to be clarified in subsequent cases. Other decisions of the Registrar of Trademarks are not subject to statutory rights of appeal and so are reviewed through the judicial review process. These types of decisions will be subject to the new "recalibrated" approach to judicial review and the reasonableness standard set out in Vavilov.

Similar to the Trademarks Act, delegated decision-making under the Patent Act (including by the Commissioner of Patents) and Copyright Act (including by the Copyright Board) contains statutory rights of appeal in some cases but not in others.

In practical terms, under the prior approach the Federal Court would typically defer to administrative decision-makers on statutory appeals, even concerning issues related to the interpretation of Canada's IP statutes (questions of law), and review such matters on a deferential reasonableness standard given the decision-maker's expertise in the IP area and familiarity with its "home" statute. Now, under the approach prescribed by Vavilov, no deference will be shown to IP decision-makers on such issues with questions of law being reviewed in all statutory appeals according to the correctness standard. Importantly, however, under the Vavilov approach where decisions by the Registrar of Trademarks or Commissioner of Patents are only subject to judicial review and not a statutory appeal, such decisions will presumptively be reviewable on the deferential reasonableness standard (even in most cases concerning questions of law).

The full practical impact of Vavilov and the newly established differential treatment of

statutory appeals and judicial review in Canadian law remains to be seen and will be the subject of further litigation in subsequent cases.

Conclusion

While aiming to provide "doctrinal stability" and greater certainty, the Supreme Court's decision in Vavilov is not without controversy given the Court's dramatic "recalibration" of Canadian administrative law and its departure from many of its own precedents. As is becoming more common in recent years with the Supreme Court, an extremely critical dissent was written in Vavilov by Justices Abella and Karakatsanis, objecting to the majority's approach, including among other things the treatment of statutory appeals, warning that rather than provide promised stability, the majority's approach has "the greatest potential to undermine both the integrity of this Court's decisions, and public confidence in the stability of the law."

It is clear that the impact of these changes on Canadian administrative law (including Canada's IP regime) will be the source of much debate and judicial consideration for years to come.

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