

## Case notes on the SCC trilogy by John Isfeld\*

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

Judgment Delivered: December 19, 2019

Reasons for Judgment by: Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.

Concurring Reasons by: Abella and Karakatsanis JJ.

For the Appellant: Marianne Zorić

For the Respondent: Hadayt Nazami, Barbara Jackman and Sujith Xavier

**Facts:** Vavilov (V) was born in Toronto in 1994. At the time of his birth, his parents were posing as Canadians under assumed names, but were foreign nationals working on assignment for the Russian foreign intelligence service. V did not know that his parents were not who they claimed to be and believed that he was a Canadian citizen by birth. In 2010, V's parents were arrested in the United States and plead guilty to espionage. Following their arrest, V was not permitted to renew his Canadian passport. V was issued a certificate of Canadian citizenship in 2013, which was cancelled by the Canadian Registrar of Citizenship under s. 3(2)(a) of the *Citizenship Act*. This provision exempts children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" from the general rule that individuals born in Canada acquire Canadian citizenship by birth. The Registrar concluded that because V's parents were employees or representatives of Russia at the time of V's birth, the exception to the rule of citizenship by birth in s. 3(2)(a), as she interpreted it, applied to V. V's application for judicial review of the Registrar's decision was dismissed by the Federal Court. The Court of Appeal allowed V's appeal, saying the Registrar's decision was unreasonable. The Minister of Citizenship and Immigration appeals.

**Issue:** Does s.3(2)(a) apply to children of individuals who have not been granted diplomatic privileges and immunities at the time of the child's birth?

**Conclusion:** Appeal dismissed. It was not reasonable for the Registrar to interpret s. 3(2)(a) of the *Citizenship Act* as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the child's birth.

#### **Law:**

The Supreme Court of Canada in its reasons attempted to provide clarification on two aspects of judicial review: first, the analysis for determining the standard of review; and second, the proper application of the reasonableness standard.

#### Standard of Review

The Supreme Court presented a revised standard of review analysis, beginning with a presumption that reasonableness is the applicable standard in all cases, for all aspects of administrative decisions. The

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Court stated that where a legislature has not explicitly provided that a court is to have a more involved role in reviewing decisions, it can be assumed that the legislature intended minimum judicial interference and included in the decision maker's mandate the interpretation of the law applicable to all issues that come before it. As a result, it is no longer necessary for courts to engage in a contextual inquiry in order to identify the appropriate standard. As well, the Court stated that due to the reasonableness presumption, the relative expertise of administrative decision makers is no longer relevant to a determination of the standard of review. However, Relative expertise remains a relevant consideration in conducting reasonableness review.

According to the Supreme Court, the presumption of reasonableness can be rebutted in two types of situations:

The first is where the legislature has explicitly prescribed the applicable standard of review in clear statutory language or provided for a statutory appeal mechanism. In the case of a statutory appeal, an appellate standard will apply, which shall be determined with reference to the nature of the question and to the jurisprudence on appellate standards of review.

The Second is where the rule of law requires that the standard of correctness be applied. This will be the case for constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. The Court stated that the application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.

The Supreme Court stated that although it is possible for another category of exception, it would need to be consistent with this framework and the overarching principles set out in this decision. Any new correctness category based on legislative intent would require a signal of legislative intent as strong and compelling as a legislated standard of review or a statutory appeal mechanism, and a new correctness category based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner similar to the three situations described in this decision.

#### The Reasonableness Standard

The Supreme Court held that in conducting reasonableness review, a court must consider the outcome of the decision considering its underlying rationale to ensure that the decision as a whole is transparent, intelligible and justified. The court must focus on the actual decision made and the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was reasonable.

In cases where reasons are required, they are the starting point for reasonableness review. Reasons explain how and why a decision was made, help to show affected parties that their arguments have been considered and that the decision was made in a fair and lawful manner, and shield against

arbitrariness. Even without reasons, it is possible for the record and the context to reveal that a decision was made based on an improper motive or for another impermissible reason. In situations where neither the record nor the larger context sheds light on the basis for the decision, the reviewing court must still examine the decision in light of the relevant factual and legal constraints on the decision maker in order to determine whether the decision is reasonable.

The Court outlined two types of fundamental flaws that tend to render a decision unreasonable:

First, to be reasonable, a decision must be based on an internally coherent reasoning that is both rational and logical. Although reasonableness review is not a means to seek out every error in a decision, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its logic. A decision will be unreasonable if the reasons for it, read holistically and in the context of the record and administrative regime, fail to reveal a rational chain of analysis or reveal an irrational chain of analysis. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point. The internal rationality of a decision may also be called into question if the reasons exhibit clear logical fallacies.

The second type of flaw outlined by the Court arises when a decision is unsound considering the relevant legal and factual context. The reviewing court must look to the space in which the decision maker may act and the types of solutions it may adopt. Elements that will generally be relevant in evaluating reasonableness include 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. Such elements are not exhaustive, may vary in significance depending on the context and will necessarily interact with one another.

The Court stated that administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case, but an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. Although they are not required to respond to every argument or line of possible analysis, the decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, including the central issues and concerns raised by the parties. While administrative decision makers are not bound by their previous decisions, they must be concerned with the general consistency of administrative decisions. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must explain why its decision best reflects the legislature's intention.

### Remedies

The question of whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker must be guided by the rationale for applying the reasonableness standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, concerns related to the proper administration of the justice system, the need to ensure access to justice and the goal of expedient and cost-efficient decision making. It will most often be appropriate to remit the matter to

the decision maker for reconsideration. However, there are limited scenarios in which remitting the matter would impede the timely and effective resolution of matters. Declining to remit a matter to the decision maker may be appropriate where it becomes evident that a particular outcome is inevitable. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and efficient use of public resources may also influence the exercise of a court's discretion to remit the matter.

### **Application:**

The Supreme Court in this case decided that there was no basis for departing from the standard of reasonableness, as there was no statutory right to appeal and no indication that the legislature intended any other standard of review. There were no constitutional questions, general questions of law of central importance to the legal system or questions regarding jurisdictional boundaries.

The Supreme Court held that the decision was unreasonable. The Registrar's interpretation of s.3(2)(a) was not justified considering the statutory context of s.3, its relation to international treaties, jurisprudence which contradicted her interpretation and the consequences of her arbitrary interpretation. The Registrar failed to properly consider these factors even though they were raised by V and conducted only a cursory review of the legislative history of the provision. The Supreme Court found that no purpose would be served by remitting the matter back to the Registrar as there were no relevant facts in dispute.

### **Concurring Reasons:**

#### Standard of Review

Although all the Justices agreed that the appeal should be dismissed, Justices Abella and Karakatsanis (the "Minority") disagreed regarding the "new" standard of review framework. They agreed with the presumption of reasonableness but stated that the elimination of the contextual factors analysis and the abolishment of the true questions of jurisdiction as a separate category requiring correctness does not support the foundational changes to judicial review outlined in the majority's framework. They stated that by removing the consideration of an administrative body's specialized expertise, the majority's framework ignores the post-*Dunsmuir* consideration of expertise as connected to legislative intent. In interpreting their enabling statutes, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular interpretations, of statutory context, of the purposes that a provision or legislative scheme are meant to serve, and of specialized terminology.

The Minority stated that the majority's reformulation of "legislative intent" invites courts to apply an irrebuttable presumption of correctness review whenever an administrative scheme includes a right of appeal. The Minority stated that the mere fact that a statute contemplates an appeal says nothing about the degree of deference required in the review process. Further, the idea that appellate standards of review must be applied to every right of appeal is entirely unsupported by the jurisprudence. According to the Minority, appeal clauses have played little or no role in the standard of review analysis for at least 25 years. The majority's approach also has the potential to disturb settled interpretations of many statutes that contain a right of appeal; every existing interpretation of such statutes that has been affirmed under a reasonableness standard will be open to fresh challenge. The Minority stated that if

the Court, in its past decisions, misconstrued the purpose of statutory appeal clauses, legislatures were free to clarify this interpretation through legislative amendment. In the absence of legislative correction, these decisions should not be overturned.

### Reasonableness Review

According to the Minority, rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the Court's prior jurisprudence. The majority's multi-factored, open-ended list of constraints on administrative decision making will encourage reviewing courts to dissect administrative reasons in a line-by-line hunt for error. The Minority stated that structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than on trial judges.

The Minority outlined three aspects of deference in reasonableness review. First, they stated that deference is the attitude a reviewing court must adopt towards an administrative decision-maker. Reviewing courts must pay respectful attention to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction. The Minority further stated that deference affects how a court frames the question it must answer and the nature of its analysis. A reviewing court does not ask how it would have resolved an issue, but rather whether the answer provided by the decision-maker was unreasonable. Ultimately, whether an administrative decision is reasonable depends on the context, and a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised, among other factors. Finally, the Minority stated that deferential review impacts how a reviewing court evaluates challenges to a decision. The party seeking judicial review bears the onus of showing that the decision was unreasonable.

### ***Bell Canada v. Canada (Attorney General), 2019 SCC 66***

Judgment Delivered: December 19, 2019

Reasons for Judgment by: Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.

Dissenting Reasons by: Abella and Karakatsanis JJ.

For the Appellants: Steven G. Mason, Brandon Kain and Richard Lizius

For the Respondent: Michael H. Morris and Ian Demers

**Facts:** Because the Canadian broadcast of the Super Bowl has traditionally been subject to a simultaneous substitution regime, allowing for a television service provider to temporarily delete and replace the signal of a distant (usually national or international) television station with the signal of another (usually local) television station that is airing the same program at the same time, Canadians were prevented from viewing high-profile American commercials that were aired in the U.S. broadcast of the game. In 2013, the CRTC initiated a broad public consultation for the purpose of reviewing the framework, through which Canadians expressed frustration over their inability to see high-profile commercials aired on the U.S. broadcast of the Super Bowl. In August 2016, pursuant to s. 9(1)(h) of the *Broadcasting Act*, the CRTC issued an order prohibiting simultaneous substitution for the Super Bowl as of January 1, 2017. Bell and the NFL sought leave to appeal the decision to the Federal Court of Appeal.

pursuant to s. 31(2) of the *Broadcasting Act*. Leave was granted but their appeals were unanimously dismissed. Both Bell and the NFL now appeal to the Supreme Court of Canada.

**Issue:** Whether the CRTC lacked the authority under s. 9(1)(h) to issue the order.

**Conclusion:** Appeal allowed. The Supreme Court held that the decision was issued on the basis of an incorrect interpretation by the CRTC of the scope of its authority under s. 9(1)(h) of the *Broadcasting Act*. Properly interpreted, this provision does not empower the CRTC to impose terms and conditions on the distribution of programming services generally.

**Analysis/Law:**

The Supreme Court referred to the framework set out in *Vivalov* to determine the appropriate standard of review. Due to the statutory appeal mechanism provided for in s. 31(2) of the *Broadcasting Act*, the Court held that the appellate standards of review apply in this case. Under these appellate standards, questions of law should be determined on a correctness standard and the standard for questions of fact or mixed fact and law is a palpable and overriding error. Because the issues in these appeals raise legal questions that go directly to the limits of the CRTC's statutory grant of power, the applicable standard is correctness.

The Court stated that the scope of the CRTC's authority must be determined by interpreting the relevant provision in accordance with the modern approach to statutory interpretation. This approach requires the words of the statute be read in their entire context and in their grammatical and ordinary sense harmonious with the scheme of the Act, the object of the Act, and the intention of Parliament. The Court held that under s. 9(1)(h), the CRTC is limited to issuing orders that require television service providers to carry specific channels and attaching terms and conditions to such orders, and does not have a broad power to impose conditions outside the context of a mandatory carriage order.

**Dissent:**

In this case, Justices Abella and Karakatsanis dissented, stating that the appeals should be dismissed. The dissent stated that the presumption of reasonableness should be applied, and that none of the correctness exceptions applied to the decision. The dissent stated that the majority disregarded the significance of specialized expertise as outlined in their concurring opinion in *Vivalov* (above), and that reasonableness review is consistent with the highly specialized expertise of the CRTC.

The dissent stated that under reasonableness review, Bell and the NFL bear the onus of demonstrating that the CRTC's decision, as a whole, is unreasonable. The reasons provided by the CRTC set out a rational and logical line of reasoning which clearly outlines the consequences, operational implications and challenges that motivated its decision. The dissent pointed out that the CRTC's reasoning engaged its specialized and technical knowledge, leading to an interpretation that was reasonable in this operational context. The CRTC also evidently considered s. 9(1)(h) in its context, including not only the objectives of the *Broadcasting Act* but also its broader statutory framework. The CRTC made clear that its decision was weighed considering much broader policy determinations and the CRTC's duty to regulate the system as a whole. The dissent stated that it is not for a court to engage in weighing competing policy objectives and substituting its own view in deciding which should be pursued.