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BULLETIN

TO: Clients
FROM: James Yardley
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RE: Standard of Review Under *Vavilov*
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The recent decision by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (“*Vavilov*”) marks a substantial shift in the direction taken by Canada’s highest court with respect to the law governing the standard of review to be applied by courts undertaking judicial review of administrative decisions, including bylaws and resolutions of municipal councils. This is critical in relation to the courts’ consideration of the validity of municipal bylaws and resolutions when these are under attack.

Standard of review is a key legal aspect of judicial review as it sets out the principles that are to be used by reviewing courts, including the extent to which those courts are to defer to the decision maker whose decision is being challenged. One notable aspect of the law concerning standard of review in recent years is that it has been in a continual state of flux as courts try to develop an approach that is sound in theory and effective in practice.

Prior to *Vavilov*, it was often difficult to determine which standard of review should apply to the review of a given decision. Accordingly, the Supreme Court of Canada concluded that the time was ripe to again clarify the law on standard of review. It did so in three judgments issued in December 2019, with the main statement of the governing principles being given in *Vavilov*.

The underlying facts in *Vavilov* were unusual, if not unique, and concerned whether it was lawful for the government to cancel the Canadian citizenship of Canadian born children of Russian spies after the parents had been arrested in the United States and returned to Russia.

The majority of the court held that *reasonableness* shall now be presumed to be the standard of review in judicial review proceedings. Further, the reasonableness standard is to apply to not only the merits of the decision but also to aspects of decisions that previously might have led to the application of the correctness test, including questions of law and the interpretation of statutes.

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The main rationale given by the majority of the court for adopting the reasonableness standard is that legislatures that grant enabling powers to decision makers such as municipal councils intend those decision makers to fulfill their respective mandates, including with respect to interpreting applicable laws.

The majority of the court stated that in determining whether a decision is reasonable, “a reviewing court must develop an understanding of the decision maker’s reasoning process in order to determine whether the decision as a whole is reasonable”. Drawing upon earlier decisions of the court, the majority held that this requires consideration by a reviewing court of whether “the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision”.

The burden in any case to show that a decision is unreasonable will be on the party attacking the bylaw or resolution by showing that there are “sufficiently serious shortcomings” in the decision. The majority identified two types of fundamental flaws upon which such shortcomings can be found. The first is a lack of internally coherent reasoning. While the majority said that a court is not to conduct a “line-by-line treasure hunt for error”, a court should still be able to “trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic”, and that an irrational chain of analysis or the lack of a rational chain of analysis will make a decision unreasonable.

The second type of fundamental flaw identified is if the decision is not justified “in relation to the constellation of law and facts that are relevant to the decision”. This “constellation” includes the governing statutory scheme, other applicable law (including the common law), principles of statutory interpretation, the evidence that was before the council or other such decision maker, the submissions of the parties before the decision maker, past practices and decisions of the decision maker, the impact of the decision on the affected individual, and the lack of formal reasons for the decision where such reasons are required by statute or procedural fairness.

In what may be one of the more significant practical outcomes of the decision of the judgment, the majority stated that where a decision cannot be upheld on the reasonableness standard, “it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court’s reasons”. That is, the majority stated that rather than quashing a decision (such as a bylaw or resolution) found to be unreasonable, the matter should instead be sent back to the decision maker to be reconsidered in light of the reviewing court’s comments.

While there was a marked lack of agreement by the majority and the minority in this matter, the lack of agreement identifies a potential issue that may have to be addressed in judicial review, which is that the approach accepted by the majority may invite greater intervention by the courts in the judicial review process in the sense that reviewing courts are being invited to examine the entire process and context concerning the decision under

review. Whether this will result in more bylaws being referred back to Councils or overturned remains to be seen, but it could make cases involving judicial review lengthier, more complex, and more costly to litigate.

The decision in *Vavilov* has implications for municipalities.

- The court has provided a comprehensive and arguably expansive explanation of what makes a decision reasonable which gives greater certainty to decision makers about what needs to be addressed when making a decision. However, it may also increase the number of things that need to be considered by decision makers that might not have been part of the decision making process until now, such as past practices and decisions of the decision maker, and the impact of the decision on the affected individual. In turn, this may increase the potential for a decision to be found to be unreasonable because it failed to meet the broad set of factors that the court says can be relevant. At a minimum, staff reports to councils must now be expanded to include the data and analysis necessary to provide reasonable grounds for a decision, including for choosing among alternative decisions.
- The continued emphasis of the court that decision makers provide reasons for decisions may not always be in accord with the practices of local governments. In that regard, the majority observed that requiring reasons may be difficult for bodies such as municipalities, whose decision making processes for matters such as passing bylaws does not easily lend itself to producing a single set of reasons. While the majority stated that in such instances “a reviewing court must look to the record as a whole to understand the decision”, and referred to its decision in *Catalyst Paper Corp. v. North Cowichan*, 2012 SCC 2 for the proposition that the reasons for a municipal bylaw “are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw”, this approach may create problems in instances where such a record does not exist, or it is minimal. At a bare minimum, local governments should consider whether a sufficient record will be created to help explain the basis for a decision, and that the record show that the decision has internally coherent reasoning and addresses the “constellation” of issues that may be relevant to the decision.