Standard of Review (Bell Canada; NFL; Vavilov)

BACKGROUND

- Three recent appeals before the Supreme Court of Canada gave the Court an opportunity to reconsider the nature and scope of judicial review of administrative action, as it was addressed in *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 and subsequent cases.

- The three appeals – *Bell Canada, et al. v. Attorney General of Canada, National Football League, et al. v. Attorney General of Canada and Minister of Citizenship and Immigration v. Alexander Vavilov*, were heard together as each raised fundamental questions about how and when courts should defer to administrative decision-maker's interpretations of law.

CURRENT STATUS

- The CBA was granted leave to intervene at the Supreme Court of Canada. Jonathan Coady and Justin Milne of Stewart McKelvey LLP represented the CBA *pro bono.* The appeals were heard in December 2018. The CBA argued that the standard for reviewing administrative decision-making requires further simplification and proposed incremental changes which preserve the operating principles distilled in *Dunsmuir* – deference, context, legislative supremacy and the rule of law.

- The CBA further argued that deferential review, which insists on reasoned justifications from both administrative decision-makers and reviewing courts, is consistent with predictability, consistency and finality. While courts continue to have the last word, administrative decision-makers also have a legitimate role in interpreting and applying the law.

- In its December 2019 decision in the three appeals, the Supreme Court of Canada clarified the standard of review. The majority judgment stated that reasonableness is the default standard of review. This default rule does not apply where the legislature has indicated it intends a different standard of review to apply, including where there is a statutory right to appeal. The majority also held that a correctness standard will apply when required by the rule of law, including constitutional questions, general questions of the law, and questions about jurisdictional boundaries between administrative bodies.

- The Administrative Law Section presented a webinar in spring 2020 on A New Approach to the Standard of Review: Working with the Vavilov Framework. In February 2021, it presented another webinar, The Vavilov Impact: One Year Later.

- In *Mason v. Canada (Citizenship and Immigration*), 2023 SCC 21, the Supreme Court of Canada applied the reasonableness standard for the first time since *Vavilov*, re-affirming the principles that all reviewing courts must apply when assessing the reasonableness of an administrative decision.

- In *Yatar v. TD Insurance Meloche Monne*x 2024 SCC 8, the SCC clarified that limited rights of appeal do not restrict the availability of judicial review.

- In November 2024, the Supreme Court issued unanimous decisions in *Auer v. Auer*, 2024 SCC 36 and *TransAlta Generation Partnership v. Alberta,* 2024 SCC 37 clarifying that the reasonableness standard set out in *Vavilov* is the presumptive standard for reviewing the validity (vires) of subordinate legislation, including regulations, rules, policies, and bylaws

NEXT STEPS

- The CBA will monitor the impact of these decisions.