SUPREME COURT OF CANADA

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Case Law in Brief: *The Standard of Review (taken from Vavilov in the "Administrative Law Trilogy")*

Judgments of December 19, 2019 | On appeal from the Federal Court of Appeal
Neutral citations: 2019 SCC 65 and 2019 SCC 66

The Supreme Court has changed how courts look at administrative (non-court) decisions, to make the law clearer and more predictable.

Decisions made by governments, or those acting on their behalf, are called "administrative decisions." They are part of "administrative law." Most legal decisions that affect people are administrative decisions, not court ones.

An administrative decision can be anything from a letter from a benefits agency, to a town by-law, to a decision by a tribunal. Administrative decision-makers often aren't judges or lawyers. Their decisions usually don't look like court decisions. But judges and courts have a role. Under the Constitution, courts can make sure administrative decision-makers follow the rules. They do this through a process called "judicial review."

When a court looks at an administrative decision, it applies a certain "standard of review." The standard of review is the legal approach to analyzing the decision. Which standard applies depends on what kind of decision it is. But there was a lot of debate about which standard of review applied in which situation. There was also debate about how each standard should be applied.

The majority of judges at the Supreme Court confirmed there are two standards of review when a court looks at administrative decisions. These are "reasonableness" and "correctness."

"Reasonableness" and "correctness" may sound like normal everyday words. But they have special meanings in law. A "reasonable" decision is based on a logical chain of reasoning. It has to *make sense* in light of the law and the facts. A "correct" decision is the *only right answer* in light of the law and the facts.

The majority set out a new way for courts to decide whether they need to ask if a decision is "reasonable," or whether it needs to ask if it is "correct." It also gave courts guidance for looking at "reasonableness."

The majority said that the default (usual) standard of review should be "reasonableness." This means a court has to look at whether the decision is "reasonable." There can be more than one "reasonable" outcome. Courts have to accept any decision that's "reasonable." They have to accept it even if they would have decided something different themselves. If a decision isn't "reasonable," a court should normally send it back to the decision-maker for another look. The decision-maker may come to the same result, or something different. Rarely, a court may just decide to replace the decision-maker's outcome with its own.

The majority said there are some cases where decision-makers don't have to give reasons. But people need to understand the decisions that apply to them. So it's usually important for decision-makers to explain why they made the decision they did.

The majority said there are two exceptions where the standard won't be "reasonableness." The first exception is where lawmakers specifically say something different. There are two ways they can do this. The first is by saying in a law which standard applies. The second is giving a right of appeal to a court. An appeal is different than judicial review, so different standards apply. These are called "appellate" standards. They are the same standards courts use to decide appeals from lower court decisions. An "appellate" standard ends up being a "correctness" standard if a decision is about the law or the decision-maker's power to decide the question.

The second exception where the standard won't be "reasonableness" is for the rule of law. The rule of law is the principle that everyone should follow the same basic legal rules in society. This includes constitutional questions. It includes general questions of law that affect the legal system as a whole. It also includes cases where powers of two administrative bodies overlap. For all of these, courts have to ask whether the decision is "correct." There can only be one "correct" decision. If a decision isn't "correct," the court will always change it without sending it back to the decision-maker.

The Supreme Court creates "precedents" that other courts have to follow. It is the only court that can overturn these precedents. But this is rare. In most cases, the Court interprets laws or decides what to do when something isn't clear. In this case, the Court overturned (changed) some of its past precedents. Precedents are important because they make the law certain and predictable. But some of the precedents on standard of review weren't doing that. The majority overturned those precedents to make the law clearer and more predictable.

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Breakdown:

- Chief Justice Richard Wagner and Justices Michael Moldaver, Clément Gascon, Suzanne Côté, Russell Brown, Malcolm Rowe, and Sheilah Martin set out the new approach
- Justices Rosalie Silberman Abella and Andromache Karakatsanis said administrative decision-makers should be given more deference and that the majority's approach gave judges too much room to substitute their own decisions for those of experts

Cases in Brief for Individual Decisions:

- *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
- *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66 (two appeals)