YOUNG ANDERSON
BARRISTERS & SOLICITORS

December 19, 2019

BULLETIN

DONE WITH DUNSMUIR – SCC RE-THINKS THE STANDARD OF REVIEW

This morning the Supreme Court of Canada released reasons for judgment in a trilogy of cases, including *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65, wherein its stated purpose was to reconsider its framework for standard of review. The facts of *Vavilov* are exciting. Alexander Vavilov is the son of Russian spies who were part of the 'Illegals Program' (on which the hit FX TV series *The Americans* was based). Unfortunately for readers of this Bulletin, that is the last you will hear about Mr. Vavilov or the underlying facts of this case, which is only of interest to local governments for its legal commentary.

The concept of 'standard of review' broadly refers to the level of scrutiny to which a court will subject a statutory decision made by a statutory decision-maker. In the local government context, there are various kinds of statutory-decision makers, ranging from municipal staff such as building inspectors and approving officers to municipal council itself. Constitutionally, every statutory decision must be subject to judicial review. The courts supervise exercises of statutory power, ensuring that decision-makers do not exceed the powers granted to them by the legislature.

The first innovation of *Vavilov,* which overturns much of the Court's last decade of jurisprudence (including its 2008 decision in *Dunsmuir*), is that there is now a presumption of reasonableness review. This means that, on judicial review, as long as the impugned statutory decision is 'reasonable', the reviewing court may not overturn it. This presumption applies even to questions of law and statutory interpretation. In other words, as long as the particular statutory provision under which the decision is made can bear the interpretation given to it by the decision-maker, the court will not interfere. This presumption can be rebutted in two circumstances: (1) where there is a statutory appeal clause present in the statute; and (2) where "the rule of law demands correctness". Without getting into too much detail, suffice it to say these exceptions to the presumption of reasonableness are narrow.

For local governments, this could have a profound effect on the scope of bylaw-making powers. Previously, courts would quash municipal bylaws which were, in the court's view, passed on the basis of an incorrect interpretation of the statute. Now, as long as there is a reasonable interpretation of the statute – even one with which the judge disagrees – courts are bound to defer to that interpretation.

The second novel feature of *Vavilov* is its discussion of the *content* of the reasonableness standard. The reasonableness standard had previously been ill-defined, with different courts across the country using different approaches. Now, courts must answer a threshold question of whether reasons, as a matter of fairness, are required at all for a given decision. If the answer to that question is 'yes', then the reviewing court must look to both the decision-making process as

well as its outcome. We are told by the Court that a reasonable decision is one that is "based on internally coherent reasoning and justified in light of the legal and factual constraints that bear on the decision". This means, among other things, that a reasonable decision must be responsive to the issues raised by the parties. The reviewing court must be satisfied that the reasoning of the decision-maker "adds up".

Where there is no duty to give formal reasons, which is often the case for many lower-level municipal administrative decisions, the court must "look to the record as a whole to understand the decision". This means that the reviewing court must be able to glean the reasons for a particular decision from its background. This could include communications between the affected party and the decision-maker, as well as any information that was before the decision-maker when it made the decision.

In sum, *Vavilov* is something of a double-edged sword for local governments. On the one hand, council decisions, which were previously not given deference, are now reviewed on the reasonableness standard. On the other hand, the Court's formulation of that reasonableness standard is without question more exacting and specific. This could be particularly relevant for lower level municipal decision-makers who, simply from an operational perspective, cannot give reasons to the level of a formal tribunal, let alone a court.

Nick Falzon