SCC File No.: 39855

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

EARL MASON

APPELLANT
(Respondent)

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(Appellant)

AND BETWEEN:

SEIFESLAM DLEIOW

APPELLANT
(Respondent)

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(Appellant)

- and -

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This appeal is an opportunity to continue *Vavilov's*[1] promise of clarifying administrative law to promote access to justice.

2. *Vavilov* did not address the internal standard of review in situations where the Legislature has established a right of appeal or review to another administrative decision-maker ("appellate decision-maker").

3. Confusion persists on this issue: some tribunals and courts say that appellate decision-makers should apply appellate standards of review, while others champion a "full statutory interpretation exercise" akin to the contextual analysis, which was soundly rejected in *Vavilov*.

4. A contextual analysis that *Vavilov* deemed too "unwieldy" and impractical for reviewing courts[2] is even less suited to appellate decision-makers who are often not lawyers and to parties who are often not represented by lawyers.

5. Saskatchewan submits that a presumptive standard of review should be established for appellate decision-makers, which can be displaced only if the Legislature has prescribed the standard of review.

6. The presumptive standard of review would depend on the court's role in the "administrative pyramid."[3] Where the Court exercises its appellate oversight function, the appellate decision-maker should also presumptively employ appellate standards of review. Where the Court exercises its judicial review function, the appellate decision-maker should also presumptively employ the judicial review standards of review.

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[1] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[2] *Ibid* at para 28.

[3] Paul Daly, *Vavilov on the Road*, 2021 CanLIIDocs 13539 at p 21. Professor Daly uses the term "administrative pyramid" in the article to describe the levels of decision-makers in a particular administrative scheme, and Saskatchewan has adopted that term in this factum.

7. In this case, because the Court is conducting judicial review, the Immigration Appeal Division ("IAD") would presumptively employ reasonableness when analyzing the Immigration Division's ("ID") decision.

PART II – RESPONSE TO QUESTIONS IN ISSUE

8. Saskatchewan takes no position on the merits of this appeal. Rather, its submissions will focus on the question of how to approach standard of review when the Legislature has assigned an appellate or review function to another administrative decision-maker.

PART III – ARGUMENT

A. *The Current Approach to Internal Standard of Review*

9. Since *Vavilov* focused on a reviewing court's selection and application of a standard of review when conducting judicial review, it did not address situations where the Legislature has established an appeal or review of a decision to another administrative decision-maker.

10. In *Vavilov*, this Court listed several reasons why the Legislature chooses to delegate authority to administrative decision-makers. These reasons also apply to appellate decision-makers: (1) administrative decision-makers are proximate and responsive to stakeholders, (2) administrative decision-makers render decisions promptly, flexibly, and efficiently, and (3) administrative decision-makers are able to provide simple and streamlined proceedings that promote access to justice.[4]

11. Courts and administrative decision-makers have taken different approaches to determining the standard of review an appellate decision-maker should apply, introducing confusion to the promise of simple and streamlined administrative proceedings.

12. For example, the Law Society of Ontario Tribunal Appeal Division found that *Vavilov* required an appellate decision-maker to apply the presumptive standards of review for statutory appeals.[5] This approach was subsequently affirmed by the Divisional Court of the Ontario Superior Court

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[4] *Vavilov*, *supra* note 1 at para 29.

[5] *Law Society of Ontario v De Rose*, 2021 ONLSTA 9 at paras 19-21, *Amendola v Law Society of Ontario*, 2022 ONLSTA 3 at paras 63-4.

of Justice.[6] Perrell J. noted that this method "supports adjudicative comity and consistency" and "avoids unnecessary confusion, given that appeals may proceed to the Appeal Division and then to the Divisional Court and then to the Court of Appeal."[7]

13. The same approach was also adopted by the Saskatchewan Labour Relations Board.[8] The Saskatchewan Court of Appeal initially agreed with this approach.[9]

14. More recently, however, the Saskatchewan Court of Appeal determined that the Saskatchewan Labour Relations Board "[had] fallen victim to temptation by applying the statutory appeal presumption to determine the internal standard of review."[10]

15. In *EZ Automotive*, the Saskatchewan Court of Appeal concluded that the appellate standards of review employed by courts "have no parallel in correlation to internal appellate tribunals"[11] and cautioned against presumptively applying appellate standards of review where the governing legislation provides for an appeal to an appellate decision-maker.[12]

16. Instead, the Court of Appeal stated that the appropriate standard of review for an appellate decision-maker should be determined by "conducting a full exercise in statutory interpretation" to discover the Legislature's intent regarding the roles the various administrative decision-makers are intended to play.[13]

17. The Saskatchewan Court of Appeal's approach has also been used by other courts, in both pre- and post-*Vavilov* decisions.[14] For example, the Federal Court of Appeal conducted a statutory interpretation analysis of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*")

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[6] *Khan v Law Society of Ontario*, 2022 ONSC 1951 at paras 79-94.

[7] *Ibid.* at para 87.

[8] *Lepage Contracting Ltd v McCutcheon*, 2020 CanLII 10515 at paras 29-34 (SK LRB).

[9] *Lepage Contracting Ltd v Saskatchewan (Employment Standards)*, 2020 SKCA 29 at para 15.

[10] *EZ Automotive Ltd v Regina (City)*, 2021 SKCA 109 at para 50 [*EZ Automotive*].

[11] *Ibid.* at para 69.

[12] *Ibid*.

[13] *Ibid.* at para 73.

[14] *Moffat v Edmonton (City) Police Service*, 2021 ABCA 183 at para 54, *Workers Comp of PEI v Dyment*, 2016 PECA 10 at para 40.

to determine the standard of review the Refugee Appeal Division ("RAD") must apply to the Refugee Protection Division ("RPD"). The Federal Court of Appeal concluded that the RAD must apply the correctness standard to findings of fact and mixed fact and law where no issue of credibility of oral evidence arises.[15]

18. Given the varying approaches discussed above, this Court should offer guidance on internal standard of review for litigants, appellate decision-makers themselves, and courts.

B. ***The Statutory Interpretation Approach to Internal Standard of Review Introduces Unnecessary Confusion for Litigants***

19. Saskatchewan submits that requiring litigants to conduct a "full exercise in statutory interpretation" to determine the internal standard of review introduces problems like those posed by the former contextual analysis.

20. As established in *Dunsmuir*, the former contextual analysis to determine standard of review required scrutiny of the following factors: (1) the presence or absence of a privative clause, (2) the purpose of the tribunal as determined by interpreting the tribunal's enabling statute, (3) the nature of the question at issue, and (4) the expertise of the tribunal.[16]

21. The contextual approach was soundly rejected in *Vavilov*. This Court recognized that the approach "proved to be unwieldy and offered limited practical guidance for courts" attempting to determine the standard of review.[17] The practical result was that "courts sometimes struggle in conducting the standard of review analysis, and costly debates surrounding the appropriate standard and its application continue to overshadow the review on the merits in many cases, thereby undermining access to justice."[18]

22. *Dunsmuir* required litigants (and courts) to conduct the contextual analysis for each separate administrative tribunal. *Vavilov* disposed of this step by introducing presumptive standards of review.

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[15] *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103.

[16] *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 64.

[17] *Vavilov*, *supra* note 1 at para 28.

[18] *Ibid.* at para 21.

23. However, some litigants are now expected to perform an exercise similar to the contextual analysis for each appellate decision-maker.

24. For example, in *EZ Automotive*, the Saskatchewan Court of Appeal spent thirty paragraphs of its decision analyzing the applicable statutes to determine the appropriate standard of review.[19] Its standard of review analysis required an interpretation of the Zoning Bylaw, *The Planning and Development Act, 2007*, SS 2007, c P-13.2, *The Municipal Board Act*, SS 1988-89, c M-23.2, and *The Public Inquiries Act, 2013*, SS 2013, c P-38.01.

25. Following *EZ Automotive*, the Saskatchewan Court of Appeal released *Affinity Holdings Ltd*, where it spent nearly 44 pages of its 103-page judgment discussing the interpretation of the applicable legislative scheme and the internal standard of review.[20]

26. The access to justice concerns noted in *Vavilov* are even more acute at the internal appeal level. A contextual analysis that was deemed in *Vavilov* to be too impractical for a reviewing court is even less suited to appellate decision-makers who are often not lawyers and to parties who are often not represented by lawyers.

27. With the lack of certainty regarding standard of review, litigants may need to judicially review or appeal decisions so the court can clarify what standard of review the appellate decision-maker must apply. This also creates barriers for access to justice, as litigants will not be able to make informed decisions on the likely success of their appeals to appellate decision-makers.

28. Therefore, it is preferable to have a concise approach to standard of review to ensure that parties focus on what matters to them: the merits of the decision.

C. *The Presumptive Standard of Review for Internal Appeals Should Take Its Cue From the Court's Role in the Administrative Pyramid*

29. Saskatchewan's proposed framework extrapolates the approach articulated in *Vavilov* to internal standards of review: there are presumptive standards of review that reflect the court's role in the administrative pyramid, subject to explicit rebuttal in the legislation.

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[19] *EZ Automotive, supra* note 10 at paras 74-104.

[20] *Affinity Holdings Ltd v Shaunavon (Town)*, 2022 SKCA 83.

30. Under Saskatchewan's proposed framework, appellate decision-makers would choose from the following standards of review:

    a. Where the governing legislation provides for a statutory right of appeal to a court, an appellate decision-maker would also apply appellate standards of review (correctness and palpable and overriding error).

    b. Where the legislation does not provide for a statutory appeal, an appellate decision-maker would apply judicial review standards of review (typically reasonableness).

31. These presumptions would be rebutted where the Legislature has explicitly prescribed the appellate decision-maker's standard of review.

32. *Vavilov* changed the landscape when it held that appellate standards of review apply where the Legislature has provided for a statutory appeal to a court.

33. This Court further clarified that sentiment in *Abrametz*, stating that where questions of procedural fairness are dealt with through a statutory appeal to a court, they are subject to appellate standards of review: "the direction that appeals are to be decided according to the appellate standards of review was categorical."[21]

34. This direction further emphasized the importance of legislative intent regarding a court's involvement in a particular administrative scheme.[22]

35. Saskatchewan proposes that appellate decision-makers should take their cue on standard of review from the court's supervisory role to ensure consistency across the administrative pyramid.

36. Professor Daly, while noting his support for the *EZ Automotive* approach, nonetheless recognized that a statutory right of appeal to a court "is relevant to determining the role to be played by the decision-makers at different levels of the administrative pyramid – put another way, the pyramid must be coherent."[23] In *EZ Automotive*, in the context of performing a complete statutory

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[21] *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 27.

[22] *Vavilov*, *supra* note 1 at para 33.

[23] Daly, *supra* note 3 at p 21.

interpretation exercise, the Saskatchewan Court of Appeal recognized that a statutory right of appeal to a court is one factor that is relevant to the internal standard of review.[24]

37. Where the Legislature has not invited the Court to exercise its appellate function by way of a statutory right of appeal, Saskatchewan suggests that an internal appellate decision-maker should deploy the reasonableness standard of review to maintain consistency in the administrative pyramid.

38. This Court noted in *Vavilov* that reasonableness is a "robust" form of review.[25] The application of the reasonableness standard of review would extend *Vavilov*'s culture of justification all the way down to the very bottom of the administrative pyramid.

39. An alternative approach is to apply appellate standards of review to all internal appeals. However, such an approach may create inconsistency where internal appeals are limited by the legislation, either on the types of questions that can be appealed or on which party can appeal to another decision-maker.

40. For example, in the present case, Parliament has created differing rights of appeal to the IAD for the parties. The Minister may appeal to the IAD against a decision of the ID in an admissibility hearing (*IRPA*, s.63(5)). However, foreign nationals who hold permanent resident visas, permanent residents, or protected persons may only appeal to the IAD from a decision to make a removal order against them (*IRPA*, ss.63(2), 63(3)). In addition, an individual who has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality cannot appeal to the IAD (*IRPA*, s.64(1)).

41. If appellate standards of review were applied by the IAD, this would result in the Minister having the benefit of a correctness standard of review for questions of law, while foreign nationals, permanent residents, and protected persons would be restricted to judicial review on a reasonableness standard.

42. For the purposes of this appeal, it is not necessary to determine whether Parliament could expressly legislate different standards of review for different parties. However, if Parliament or

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[24] *EZ Automotive*, *supra* note 10 at para 94.

[25] *Vavilov*, *supra* note 1 at para 13.

a Legislature intends to take that course of action, requiring that they use express language to do so would facilitate public feedback and possible court challenges.

43. Where the Legislature has not expressly dictated the standard of review, different standards of review should not apply to different parties. In particular, individuals who are often in vulnerable positions and may not have access to legal representation should not be subject to a more onerous standard of review simply because their access to the courts occurs by judicial review rather than a right of appeal.

44. Focusing on the court's role in the administrative pyramid ensures that restrictions on internal rights of appeal do not dictate the standard of review unless the standard of review is legislated explicitly.

45. Where the governing legislation directs a different decision-maker to conduct an entirely new hearing, Saskatchewan's proposed framework would not apply. In that instance, the Legislature has essentially established two first-level administrative decision-makers. The second decision-maker does not need to conduct a standard of review analysis because it is not reviewing the initial decision, but rather is making its own decision.

46. It is important to note that while many appellate decision-makers are able to receive new evidence (often in limited circumstances), this should not be interpreted as an indication that the appellate decision-maker is holding an entirely new hearing. Rather, appellate decision-makers should appropriately use those powers in conducting their review of the initial decision-maker's decision. Indeed, an appeal, whether to a court or to an appellate decision-maker, is generally not intended to be a "re-trial" of the initial case or decision.

47. Saskatchewan's proposed framework is intended to introduce predictability and consistency for litigants seeking review by appellate decision-makers.

D. ***Application of the Proposed Framework***

48. In the case at bar, Saskatchewan's proposed framework would require the IAD to employ the reasonableness standard to their review of the ID's decision.

49. The *IRPA* does not provide for a statutory appeal to the Federal Court. Rather, it stipulates that parties may apply for leave to judicially review decisions made pursuant to the *IRPA*: s.72.

50. Parliament has not legislated a standard of review for the IAD.

51. However, as noted above, Parliament has restricted access to the IAD for some foreign nationals or permanent residents, while providing comprehensive access to the IAD for the Minister.

52. This uneven access to the appellate decision-maker should not impact the standard of review that the IAD should apply. In other words, the IAD should not be able to apply the correctness standard of review (or hold a hearing *de novo*) if only one party has broad access to the appeal mechanism.

53. Instead, deference should accrue to the ID, being the initial decision-maker entrusted with determining whether a person is able to remain in Canada.

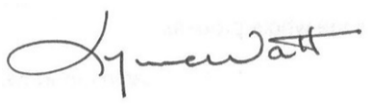
54. In conducting its review on appeal, the IAD should defer to the ID's decision, informed by the IAD's specific statutory powers to receive and assess new evidence.

55. Saskatchewan submits that this proposed framework would improve predictability and consistency and thereby promote access to justice.

PART IV – COSTS

56. The Intervener Attorney General of Saskatchewan does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of September, 2022.



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