Unresolved Issues after *Vavilov*

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Abstract

In its decision in *Canada (Citizenship and Immigration) v Vavilov* the Supreme Court of Canada fundamentally altered Canadian administrative law. For the most part, the Court's analysis was comprehensible and comprehensive. But on a number of key issues, the implications of Vavilov are obscure. In order of importance, these unresolved issues are: how does Vavilov apply to internal statutory appeals; what framework governs procedural fairness in administrative law; is arbitration subject to administrative law principles; are administrative decisions touching the Charter of Rights and Freedoms still to be reviewed deferentially; and what are the constitutional foundations of *Vavilovian* judicial review? In my lecture I will explain the importance of these issues and lay out answers and solutions which are faithful to the Vavilov framework.

Biography

Associate Professor Paul Daly holds the University Research Chair in Administrative Law & Governance at the University of Ottawa, to which he was recruited from the Faculty of Law, University of Cambridge. Previously, he was successively Assistant Professor, Associate Dean and Associate Professor at the Faculté de droit, Université de Montréal and held visiting positions at Harvard Law School and Université Paris II, Panthéon-Assas. A graduate of University College Cork (B.C.L., LL.M.), the University of Pennsylvania Law School (LL.M.) and the University of Cambridge (Ph.D.), his influential scholarly work on public law – dozens of books, peer-reviewed journal articles, book chapters and shorter pieces – has been widely cited, including by the Supreme Court of Canada, various other Canadian courts and tribunals, the Irish Supreme Court and the High Court of Australia. His blog, *Administrative Law Matters*, was the first blog ever cited by the Supreme Court of Canada.

Dr. Daly's practice and research interests span the broad field of public law, with a particular emphasis on judicial review, advice and training for regulatory agencies and administrative tribunals, public authority liability and complex constitutional issues. He has worked for numerous public and private sector clients including the Attorney General of Canada, Bell Canada, Canadian Heritage, the Canadian Nuclear Safety Commission, the Immigration and Refugee Board, the Law Society of Saskatchewan and the National Football League. Since September 1, 2019 he has been a part-time Review Officer of the Environmental Protection Tribunal of Canada.

Introduction

In granting leave to appeal in a trilogy of cases in 2018, the Supreme Court of Canada departed from its practice of never giving reasons to explain its leave decisions. The Court explained that it was minded to reconsider the framework for judicial review set out a decade earlier in *Dunsmuir v New Brunswick*.[1] Having been battered for several years by critiques from the bench, bar and academy,[2] the Court – finally and publicly – signalled its intent to comprehensively revisit its administrative law jurisprudence.[3] The resulting decision in *Canada (Citizenship and Immigration) v Vavilov*[4] was the 'big bang' of Canadian administrative law: from now on, every issue must be analyzed with *Vavilov* as the starting point, prior jurisprudence playing a supporting role only to the extent it can fit within the *Vavilov* framework.[5]

Concerned about the complexity which existed in terms of selecting the standard of review (correctness or reasonableness) and the lack of clarity on how to apply the reasonableness standard, the majority in *Vavilov* set out to simplify the selection of the standard of review and clarify the application of the reasonableness standard. As they explained, they sought "to bring greater coherence and predictability" to the selection of the standard of review[6] and "to more clearly articulate what [the reasonableness standard] entails and how it should be applied in practice".[7] The goal of *Vavilov* was, therefore, to simplify and to clarify.[8]

In terms of selecting the standard of review, the majority relied on a simple, rules-based formula provided by "institutional design" and the "rule of law". By virtue of the institutional choice to delegate decision-making authority to an administrative decision-maker, the presumptive standard of review is reasonableness; deviations from reasonableness review are justifiable only where there is a statutory right of appeal or legislated standard of review – "institutional design choices" – or where the "rule of law" requires the courts to furnish a final, definitive answer on a question of transcendent importance for the integrity of the legal system – constitutional questions, questions of central importance to the legal system and questions of overlapping jurisdiction. Statutory appeal rights henceforth attract the well-established framework of *Housen v Nikolaisen*:[9] extricable questions of law are for the courts, but determinations of fact or mixed law and fact can only be interfered with if the appellant can demonstrate a palpable and overriding error on the part of the decision-maker. Notably, although the concepts of "institutional design" and the "rule of law" are potentially capacious, for the purposes of

[1] 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].
[2] See especially Paul Daly and Léonid Sirota, *The Dunsmuir Decade/Les 10 ans de Dunsmuir: Special Issue of Canadian Journal of Administrative Law & Practice* (Carswell, Toronto, 2018).
[3] See generally, Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) 33 C.J.A.L.P. 111.
[4] 2019 SCC 65 [*Vavilov*].
[5] *Ibid* at para 143: "A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case…As for cases that dictated how to conduct reasonableness review, they will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons". See *e.g. Lamoureux c Cour du Québec*, 2020 QCCS 619 at paras 5-11. The companion appeals in the Trilogy resulted in the Court's decision in *Bell Canada v Canada (Attorney General)*, 2019 SCC 66 [*Bell Canada*], but this decision simply represented the first application of the *Vavilov* framework.
[6] *Vavilov*, *supra* note 4 at para 10.
[7] *Ibid* at para 12.
[8] In their concurring reasons, Abella and Karakatsanis JJ accepted that it was important to "steady the ship" (*ibid* at para 199) but rejected the course set by the majority.
[9] 2002 SCC 33, [2002] 2 SCR 235 [*Housen v Nikolaisen*].

Vavilovian judicial review, they contain only limited content: statutory appeals, legislated standards of review and questions which demand a uniform answer. The "vexing" contextual factors,[10] such as expertise, have been excised from the standard of review selection exercise.

Whereas the concepts underpinning the new approach to selecting the standard of review are thin, the conception of reasonableness review developed by the majority in *Vavilov* is thick. A decision will be unreasonable where "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency".[11] This may arise in at least two ways. First, the absence of "reasoning that is both rational and logical",[12] such as reasons which "fail to reveal a rational chain of analysis", ones which "read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point",[13] or ones which "exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise".[14] Second, a decision which is not "justified in relation to the constellation of law and facts that are relevant to the decision",[15] in terms, for example, of the governing statutory scheme, the particular situations and submissions of the parties and the desirability of consistent decision-making. Reasonableness review is at once robust in policing the limits of administrative decision-making authority and also respectful in appreciating that "'[a]dministrative justice' will not always look like 'judicial justice'".[16] Although *Vavilovian* reasonableness review is "inherently deferential", it is nonetheless more demanding than the articulation of the reasonableness standard developed in previous cases: decisions must be justified, not merely justifiable; decision-makers must demonstrate their expertise; a decision must be responsive to the particularities of and presented by the parties; and only contemporaneous reasons can be offered in support of the reasonableness of a decision.[17]

What, then, about the issues left unresolved by *Vavilov*? Two points seem crucially important to me. First, *Vavilov* is the product of sustained deliberation by the country's apex court. Judges who had rarely agreed on any administrative law matters prior to *Vavilov* coalesced around the solution outlined in the majority reasons: a thin approach to selecting the standard of review; a thick approach to reasonableness review. To achieve this consensus, judges who prefer clear categories (forms) and non-deferential review on questions of law had to water down their wine; so, too, did their colleagues who have a penchant for contextual (substantive) analysis and accept that on many issues administrative decision-makers deserve deference on the basis of the meaningful advantages specialists on the front lines of public administration have relative to generalist judges.[18] Rather than reasoning on every issue, in every case, from first principles, these judges coalesced around the consensus memorialized in the majority reasons in *Vavilov*. The lesson for those applying the *Vavilov* framework is that it privileges

[10] *Vavilov*, *supra* note 4 at para 200, per Abella and Karakatsanis JJ.
[11] *Ibid* at para 100.
[12] *Ibid* at para 102.
[13] *Ibid* at para 103.
[14] *Ibid* at para 104.
[15] *Ibid* at para 105.
[16] *Ibid* at para 92.
[17] Paul Daly, "One Year of *Vavilov*", CLEBC Administrative Law Conference, November 20, 2020, available online <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3722312>.
[18] See generally Paul Daly, "A Week of Arguments about Deference" (18 June 2018), online (blog): *Administrative Law Matters* <https://www.administrativelawmatters.com/blog/2018/06/18/a-week-of-arguments-about-deference/>.

neither form over substance nor deference over non-deference but instead requires a "balancing act".[19] None of us will have everything we want; we shall have to compromise. Second, *Vavilov* is an exercise in simplification and clarification. In applying the framework and addressing unresolved issues, we should choose simple solutions over more complex ones and we should avoid applying glosses to the *Vavilov* framework which are theoretically appealing but might give rise to future uncertainty and further litigation.

Keeping these two points in mind is the best way to ensure that the *Vavilov* framework is as workable and durable as its creators intended.

I. Internal Statutory Appeals

There are three observations to make about internal statutory appeals post-*Vavilov*, that is, appeals from a first-instance administrative decision-maker to an appellate administrative tribunal. The issue was not addressed at all by the Court in *Vavilov*. This is not surprising as the Court was not asked to address it (save by the Attorney General for Quebec, as mentioned below). Nonetheless, it is an issue of perennial importance as appellate administrative tribunals around the country try to define their functions.

First, I have long argued in this context that borrowing from the law of judicial review is a category error.[20] There will be a temptation to argue after *Vavilov* that appeals from a first-instance administrative decision-maker to an appellate administrative tribunal should attract the *Housen v Nikolaisen* framework just like an "appeal" from an administrative decision-maker to a court. This temptation should be resisted, in my view. *Vavilov*, just like *Dunsmuir* before it, addresses a problem in the area of judicial review – that is, the relationship between administrative decision-makers and reviewing courts. *Vavilov* is not concerned with the relationship between different parts of the administrative decision-making structure. *Vavilov* is a judicial review case and thus in a different category to an internal administrative appeal. That similar words or phrases are used should not blind us to this categorical difference.[21]

Second, the scope of an internal "appeal" is unique to each administrative appellate regime. In each case, it is important to interpret the particular statutory provisions at issue to identify the role of the appellate tribunal.[22] There are three general types of statutory appeal: an appeal *de novo*, an appeal from one specialist tribunal to another specialist tribunal and an appeal from a specialist tribunal to a generalist tribunal.[23] Of course there are particularities in any internal appellate regime – which makes

[19] *Bancroft v Nova Scotia (Lands and Forests)*, 2020 NSSC 175 at para 27, *per* Brothers J. The point was about statutory interpretation but it has broad application.
[20] Paul Daly, "Les appels administratifs au Canada" (2015) 93 Can Bar Rev at 71 ["Les appels administratifs"].
[21] See *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98 at para 32; *Szawlowski v Edmonton (Police Service)*, 2020 ABLERB 6 at para 12.
[22] *Larochelle c Comité de déontologie policière*, 2015 QCCA 2105; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93; *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98.
[23] See generally, "Les appels administratifs", *supra* note 20. See also Frank A V Falzon, "Appeals to Administrative Tribunals" (2005) 18 C.J.A.L.P. 1; Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland*, 5th ed. (Dublin, Roundhall, 2019), chapter 11.

for their uniqueness – but they will invariably revolve around these types. In all events, the nature of an internal appeal "is to be determined from the language of the enabling legislation".[24]

Third, deference on questions of fact or mixed questions of fact and law ***may*** be appropriate in some appellate tribunals. Typically, this will arise where the appellate tribunal is a generalist body and/or simply reviews the record produced by the first-instance decision-maker. Here, a palpable and overriding error standard may be the best way to capture legislative intent as expressed in the relevant statutory provisions.[25] Alternatively, in situations where both the first-instance administrative decision-maker and the appellate tribunal are similarly specialist, ***some*** conclusions of fact, such as those based on credibility, may be owed deference on the basis that the first-instance administrative decision-maker had first-hand exposure to the testimony given.[26]

This last observation should help to resolve any lingering controversy about the role of the Court of Quebec, currently being considered by the Court on an appeal from a reference decision of the Quebec Court of Appeal.[27] One of the issues raised in the reference related to the Court of Quebec's appellate jurisdiction over a variety of administrative tribunals. Since 2008, the Court of Quebec has been performing judicial reviews of these tribunals.[28] But the Court of Quebec's judicial reviews are subject to judicial review in the Superior Court (or, depending on the statutory scheme, to appeal to the Court of Appeal). This was problematic.[29]

Vavilov has, however, helped to resolve these problems. The Court of Quebec, being a court, now applies the *Housen v Nikolaisen* framework in statutory appeals and its conclusions can be judicially reviewed in the Superior Court.[30] It is true that the Superior Court's role will be limited in situations where the Court of Quebec applies the palpable and overriding error standard. But, as per the framework I laid out above, the Court of Quebec is a generalist appellate body and, as such, should defer to expert administrative tribunals.

Does the fact that the Superior Court will review applications of the palpable and overriding error standard for reasonableness create its own constitutional difficulties? I am inclined to think not. The Superior Court should be capable on judicial review of correcting any misapplication of the palpable and overriding error standard. It is difficult to see how a misapplication would not contain the sorts of

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[24] *Ottawa Police Services v Diafwila*, 2016 ONCA 627 at para 59.
[25] *City Centre Equities Inc. v Regina (City)*, 2018 SKCA 43 at paras 98-101.
[26] See e.g. *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 70.
[27] *Renvoi à la Cour d'appel du Québec portant sur la validité constitutionnelle des dispositions de l'article 35 du Code de procédure civile qui fixent à moins de 85 000 $ la compétence pécuniaire exclusive de la Cour du Québec et sur la compétence d'appel attribuée à la Cour du Québec*, 2019 QCCA 1492.
[28] On the authority of *Association des courtiers et agents immobiliers du Québec v Proprio Direct inc.*, 2008 SCC 32, [2008] 2 SCR 195 (dubious authority in my view: Paul Daly, "The Unfortunate Result of the Court of Quebec Reference [2019] QCCA 1492" (15 October 2019), online (blog): *Administrative Law Matters* < https://www.administrativelawmatters.com/blog/2019/10/15/the-unfortunate-result-of-the-court-of-quebec-reference-2019-qcca-1492/>).
[29] Paul Daly, "Is Deference Constitutional in Canada?" (12 October 2017), online (blog): *Administrative Law Matters*, <https://www.administrativelawmatters.com/blog/2017/10/12/is-deference-constitutional-in-canada/>; "Les appels administratifs", *supra* note 20 at Part III-C; "Section 96: Striking a Balance between Legal Centralism and Legal Pluralism" in Richard Albert, Paul Daly and Vanessa MacDonnell eds., *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) at 84 at pp 99-100 (discussing reconsideration but the same principles apply).
[30] See *e.g. Ville de Longueuil c Côté*, 2020 QCCQ 1224.

fundamental flaw or disregard of factual and legal constraints identified in *Vavilov*. For instance, a misapplication of the palpable and overriding error standard would mean "the conclusion reached cannot follow from the analysis undertaken";[31] and the Court of Quebec applying the palpable and overriding error standard is as likely as the first-instance decision-maker to breach the factual and legal constraints on it by, for example, fundamentally misapprehending the evidence.[32] There is, therefore, little or no fear that defective administrative decisions will be sheltered from judicial oversight by virtue of Quebec's unique administrative appeals structure.

II. The Standard of Review on Questions of Procedural Fairness

Several years ago, there was lively debate about the standard of review of questions of procedural fairness.[33] For one thing, the *Dunsmuir* framework was general in nature, presumptively covering the whole field of judicial review of administrative action. In a large number of cases, procedural fairness issues would have fallen into *Dunsmuir's* reasonableness categories, as some astute appellate judges noted.[34] For another thing, the Court's enigmatic pronouncements on procedural fairness suggested not only that procedural fairness had to be addressed as part of the "standard of review" framework but that a measure of "deference" would be appropriate in addressing such questions.[35] Prior to *Vavilov*, there was a divergence of views amongst lower courts on the standard of review applicable to matters of procedural fairness: some courts applied correctness review;[36] others applied correctness review with some deference;[37] reasonableness review had adherents at least in some circumstances;[38] and some suggested that standard of review was irrelevant as all that mattered was an overall assessment of fairness.[39]

Yet the debate largely petered out. By the time of *Vavilov*, most courts had accepted that issues of procedural fairness are free-standing, to be addressed using the factors set out in *Baker v Canada (Citizenship and Immigration)*;[40] this was sometimes dressed up as "correctness" review, sometimes as an "overall assessment of fairness". There was, nonetheless, some disagreement. As Stratas JA noted in *Vavilov v Canada (Citizenship and Immigration)*, the proper approach to procedural fairness was "in dispute" in the Federal Court of Appeal, with a "number of different approaches" competing for

[31] *Vavilov*, *supra* note 4 at para 103.
[32] *Ibid* at para 126.
[33] See Paul Daly, "Deference on all Types of Procedural Fairness Question? Maritime Broadcasting System Ltd. v Canadian Media Guild, 2014 FCA 59" (11 March 2014), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2014/03/11/deference-on-all-types-of-procedural-fairness-question-maritime-broadcasting-system-ltd-v-canadian-media-guild-2014-fca-59/> discussing *Maritime Broadcasting System Ltd. v Canadian Media Guild*, 2014 FCA 15 [Daly blog: *Maritime Broadcasting*].
[34] See Paul Daly, "Deference on Questions of Procedural Fairness" (9 May 2013), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2013/05/09/deference-on-questions-of-procedural-fairness/> discussing *Syndicat des travailleuses et travailleurs de ADF – CSN c Syndicat des employés de Au Dragon forgé Inc.*, 2013 QCCA 793; and Paul Daly, "Deference, Weight and Procedural Fairness" (5 March 2014), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2014/03/05/deference-weight-and-procedural-fairness/>.
[35] *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 89.
[36] See *e.g. J.D. Irving, Limited v North Shore Forest Products Marketing Board*, 2014 NBCA 42 at para 6.
[37] See *e.g. Re:Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 42.
[38] See *e.g. Syndicat des travailleuses et travailleurs de ADF - CSN c Syndicat des employés de Au Dragon forgé inc.*, 2013 QCCA 793; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245.
[39] See *e.g. Ontario Provincial Police v MacDonald*, 2009 ONCA 805 at para 37.
[40] [1999] 2 SCR 817 [*Baker*].

primacy.[41] And in Quebec,[42] many first-instance judges continued to defer on procedural issues relating to matters within an administrative decision-maker's specialized domain.

In *Vavilov*, the majority summarily put the debate and disagreement to rest. First, the *Vavilov* framework applies "[w]here a court reviews the *merits* of an administrative decision" but not to "a review related to a breach of natural justice and/or the duty of procedural fairness".[43] Second, where procedure but not merits are in issue, "the specific procedural requirements that the duty [of procedural fairness] imposes are determined with reference to all of the circumstances" consistent with the factors set out in *Baker*.[44] Some deference is built into this framework but, presumably, we are not to mistake respect for a decision-maker's procedural choices (the fifth *Baker* factor) with reasonableness review.

That would seem to be that. In the interests of simplification and clarification, there is much to be said for creating a clear line between matters of procedure, subject to *Baker*, and matters of substance, subject to *Vavilov*. Of course, difficult questions of classification will arise. The line between merits and procedure is "blurry": for instance, "[a] decision based on a deficient investigation can be characterized as one that is not substantively acceptable or defensible because it is based on incomplete information, thereby triggering the standard of review for substantive defects".[45] To take a post-*Vavilov* example, in *Hildebrand v Penticton (City),*[46] Weatherhill J applied the *Vavilov* framework to a decision not to grant an adjournment. It is debatable whether this was a matter going to the "merits" of the underlying decision, to which *Vavilov* clearly applies, or related to procedure, in which case *Vavilov* would not apply.

Although there is no easy answer to this question of classification, one analytical short-cut is provided by the presence or absence of reasons. This distinction is functional, not metaphysical; it does not explain what is "merits" and what is "procedure" (and the history of judicial review suggests that any such explanation will prove elusive). It aims to simplify and to clarify, not to obfuscate.

Where reasons have been given for a particular difficult-to-classify decision, *Vavilovian* reasonableness review can be employed: reviewing courts can examine the rationality and logic of the reasons in light of the relevant factual and legal constraints. Moreover, if a decision-maker has provided reasons on a particular point, this fact suggests that the point was important and therefore relates to the merits of the matter before the decision-maker.

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[41] 2017 FCA 132 at para 11.
[42] Paul Daly "Confusion and Contestation: Canada's Standard of Review" (23 April 2019), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2019/04/23/confusion-and-contestation/>.
[43] *Vavilov*, *supra* note 4 at para 23 [emphasis added].
[44] *Ibid* at para 77.
[45] *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 70 *per* Stratas JA. See also Paul Daly "Investigating Process, Substance and Procedural Fairness" (2 October 2014), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2014/10/02/investigating-process-substance-and-procedural-fairness/> discussing *Robertson v British Columbia (Teachers Act, Commissioner)*, 2014 BCCA 331; Paul Daly "Process, Substance and the Influence of Judicial Review on Public Administration: Ofsted v Secretary of State for Education [2018] EWCA Civ 2813" (10 September 2019), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2019/09/10/process-substance-and-the-influence-of-judicial-review-on-public-administration-ofsted-v-secretary-of-state-for-education-2018-ewca-civ-2813/> discussing *Ofsted v Secretary of State for Education* [2018] EWCA Civ 2813.
[46] 2020 BCSC 353 at paras 29-30.

Where no reasons have been given for a particular difficult-to-classify decision, the reviewing exercise will invariably focus on the outcome.[47] Here, the *Baker* factors can be applied. Indeed, it is difficult to see how else a reviewing court could determine whether the procedures in issue were fair. Without reasons to review, the *Baker* factors will have to be applied. In applying the *Baker* factors some deference will be due to the decision-maker's choice of procedures but the reviewing court will retain the final word on the overall fairness of the process.

Put simply, my suggestion is that the "merits"/"procedure" distinction should track the availability of reasons: where reasons have been provided in attempt to justify a particular difficult-to-classify decision, the reasons can be reviewed for reasonableness; where no reasons have been provided, the *Baker* factors would govern. To my mind, this is an attractive solution to what might otherwise be an intractable problem.

III. Arbitration Appeals

In *Sattva Capital Corp. v Creston Moly Corp.*,[48] Rothstein J noted the commonalities between arbitration and administrative decision-making and held that the *Dunsmuir* framework would support the application of the reasonableness standard to arbitral decisions not raising constitutional questions or questions of central importance to the legal system.[49] Subsequently, in *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*,[50] the Court rolled *Sattva* back somewhat, holding that arbitral interpretation of a standard-form contract does not attract deferential review. Arbitration appeals were not mentioned at all in *Vavilov*. Post-*Vavilov*, there has been disagreement on the issue of whether arbitration decisions are subject to the appellate review framework or the judicial review framework.

In *Buffalo Point First Nation et al. v Cottage Owners Association*,[51] and *Allstate Insurance Company v Her Majesty the Queen*,[52] the courts took the view that *Sattva* has been superseded by *Vavilov*. But in *Cove Contracting Ltd v Condominium Corporation No 012 5598 (Ravine Park)*,[53] it was held that *Sattva* continues to bind.[54] Bennett JA recognized the importance of the issue in *Nolin v Ramirez*: "there is an issue percolating in courts across the country as to whether *Vavilov* applies to commercial arbitration, or arbitration generally. To date, and to my knowledge, no appellate court has considered the issue".[55] Alas, she determined that it was not necessary to address it in the instant case: "In my opinion, it makes no difference in this case whether the standard of review is reasonableness or palpable and overriding error, as the result would be the same. Since it is unnecessary to decide the obviously complex question, I will leave it to another day".[56]

When that day comes, what answer should the courts provide? Subject, obviously, to the details of the statutory provision in a given jurisdiction, I think the better view must be that the use of the word

[47] *Vavilov*, *supra* note 4 at paras 136-138.
[48] 2014 SCC 53 [*Sattva*].
[49] *Ibid* at para 106.
[50] 2016 SCC 37, [2016] 2 SCR 23 [*Ledcor*].
[51] 2020 MBQB 20 at para 56.
[52] 2020 ONSC 830 at para 19.
[53] 2020 ABQB 106 at para 10.
[54] See also *Freedman v Freedman Holdings Inc.*, 2020 ONSC 2692 at para 102-103 on the commonalities between review of administrative decisions and arbitration decisions.
[55] 2020 BCCA 274 at para 36.
[56] *Ibid* at para 39.

"appeal" in relation to arbitration decisions now carries with it the appellate review framework set out in *Housen v Nikolaisen*. This is the simplest solution to the "obviously complex question" of the standard of review in arbitration matters. Not only that, but reconciling *Sattva* and *Ledcor* with *Vavilov* would be quite difficult. In the *Vavilov* framework, the rule-of-law basis for correctness review is a narrow one: it is not obvious that the interpretation of standard-form contracts requires uniform treatment by superior court judges to safeguard the integrity of the legal system. By contrast, *Sattva* and *Ledcor* fit the *Housen v Nikolaisen* framework like a glove. Extricable questions of law (such as those arising from the interpretation of standard-form contracts) will be reviewed for correctness,[57] with mixed questions of fact and law requiring detailed contextual analysis[58] or engaging the expertise of the arbitrator[59] subject to the highly deferential palpable and overriding error standard.

Hainey J doubted this view in *Ontario First Nations (2008) Limited Partnership v Ontario Lottery And Gaming Corporation*, reasoning that the institutional design component of the *Vavilov* framework did not apply because the right of appeal was found in an agreement between the parties, not the provincial arbitration statute.[60]

To my eye, this distinction is far too fine. It is true that s. 45 of the *Arbitration Act* does not explicitly provide for appeals, but it does draw distinctions between the treatment of questions of law (s. 45(1) and (2)) and questions of fact and questions of mixed fact and law (s. 45(3)).[61] The natural reading, in light of *Vavilov*, is that the legislature has proceeded on the basis that the courts will apply the appellate review framework. To introduce the additional concept of party autonomy into an otherwise simple framework is to add complexity where none is needed.

IV. Judicial Review for *Charter* Compliance

In *Doré v Barreau du Québec*,[62] the Court held that alleged infringements of *Charter* rights by administrative decision-makers should be reviewed on the deferential reasonableness standard. What matters is not whether the decision survives the rigours of the proportionality test set out in *R v Oakes*[63] but whether it represents an appropriate balance between *Charter* values and the decision-maker's statutory objectives. In *Vavilov*, the continued survival of *Doré* was argued but the Court declined to take a position, merely noting that a "reconsideration of that approach is not germane to the issues in this appeal".[64]

I criticized *Doré* at the time[65] and, although I recognize that *Doré* provides valuable guidance to administrative decision-makers (especially on the front lines),[66] I continue to think that the *Doré*

[57] *Ledcor*, *supra* note 50 at paras 24-45.
[58] *Sattva*, *supra* note 48 at paras 50-55.
[59] *Ibid* at para 105.
[60] 2020 ONSC 1516 at para 61-75.
[61] SO 1991, c 17.
[62] 2012 SCC 12 [*Doré*].
[63] [1986] 1 SCR 103.
[64] *Vavilov*, *supra* note 4 at para 57.
[65] Paul Daly, "The Charter and Administrative Adjudication" (15 May 2012), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2012/05/15/the-charter-and-administrative-adjudication/> discussing *Doré v Barreau du Québec*, 2012 SCC 12.
[66] Paul Daly, "The Inevitability of Discretion and Judgement in Front-Line Decision-Making in the Administrative State" [2020] *Journal of Commonwealth Law* 100.

approach to judicial review is insufficiently protective of *Charter* rights.[67] It is true that more recent applications of *Doré* have hewed quite closely (in substance if not in rhetoric) to the *Oakes* test,[68] but this simply provides further ammunition for those who would return to the pre-*Doré* position: the law as stated by the Court should be in line with the law as applied by the Court. In the meantime, especially on lower courts, there is a risk that *Doré* will lead to under-protection of fundamental rights.[69]

Appreciated, however, in the light of the consensus achieved in *Vavilov*, the question is not whether *Doré* is good, bad or indifferent as a matter of first principles but whether it is compatible with *Vavilov*. I am not at all persuaded by the argument that the decision in *Vavilov* kicks the conceptual legs from under *Doré*.[70] Mark Mancini argues that, one, the demise of expertise in *Vavilov* and, two, *Vavilov's* relatively formalist, Diceyan approach to reasonableness review mean that *Vavilov* and *Doré* are in serious tension:

> On one understanding, *Vavilov* tends to revert to a Diceyan understanding of administrative law, under which courts reserve to themselves the final say on certain issues. It also shows a focus on justification, as a doctrinal requirement in most cases. However, *Doré* is rooted in a more functionalist understanding of administrative law, under which expertise is taken as a given and administrators are seen as competent to contribute to the content of the law.

By contrast, I would say that *Doré* emerges strengthened from *Vavilov*, not weakened.

First, the excision of expertise from the process of selecting the standard of review means that the presumption of reasonableness review certainly applies to *Charter* issues. In *Vavilov*, the majority makes a distinction between judicial review of the "merits" of an administrative decision and issues of "procedural fairness" or "natural justice".[71] On *anything* to do with the merits of an administrative decision, the *Vavilov* framework applies and, in that framework, reasonableness is the presumptive standard.[72] Expertise and other substantive or contextual considerations are, simply, unnecessary. Reasonableness review is the "starting point" whether the decision-maker has any relevant expertise or not.[73] Inasmuch as expertise was a conceptual basis for deference in *Doré*, its removal is irrelevant, as it has simply been replaced by another conceptual basis – institutional design choice – which is (at least) equally solid.

In fact, the conceptual framework of *Vavilov* supports the continued application of *Doré*. Exceptions to the presumption of reasonableness review can only be based on institutional design or the rule of law.[74] In the absence of federal or provincial legislation requiring correctness review for *Charter* questions, it is only where the rule of law is engaged that *Charter* issues will be subject to correctness review under the

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[67] Paul Daly, "Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the Canadian Charter of Rights and Freedoms" (2014) 65 *Supreme Court Law Review* (2d) 247.
[68] See *e.g. Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293.
[69] See *e.g.* Paul Daly; "The Court and Administrative Law: Models of Rights Protection" in Matthew Harrington ed., *The Court and the Constitution: A 150-Year Retrospective* (LexisNexis, Toronto, 2017) 57; Peter Lauwers, "What Could Go Wrong with Charter Values?" (2019) 91 *Supreme Court Law Review* (2d) 1.
[70] Mark Mancini "The Conceptual Gap Between Doré and Vavilov" (2020) Dal LJ (forthcoming).
[71] *Vavilov*, *supra* note 4 at para 23.
[72] *Ibid* at para 23.
[73] *Ibid*.
[74] *Ibid* at para 32.

Vavilov framework. But the rule of law, as defined in *Vavilov*, is engaged only where a "final and determinate" judicial interpretation is necessary to ensure "consistency".[75] This rule-of-law exception applies very narrowly, to constitutional questions, questions of central importance to the legal system and questions of overlapping jurisdiction.

What unites these circumstances, conceptually, is the need for judicially imposed uniformity. Professional privilege is an example of a question of central importance to the legal system: if the scope of privilege were to vary depending on whether it was invoked in professional discipline proceedings or access to information proceedings, professional privilege would be undermined; a uniform approach is necessary.[76] Questions of overlapping jurisdiction, similarly, require judicially imposed 'right answers': problems would quickly result were Tribunal A and Tribunal B both to claim, concurrently, jurisdiction over the same subject matter.

As to constitutional questions, the same logic suggests facial challenges to the constitutionality of legislation should be given a uniform answer — for the constitutionality of a statute should not depend on whether the statute is relied upon in front of Tribunal A or Tribunal B — and, accordingly, reviewed on a correctness standard.[77] It is also arguable (and, I think, consistent with the jurisprudence) for questions relating to the scope of *Charter* rights to be dealt with on a correctness standard. There is nothing novel in treating threshold questions of constitutionality as requiring correctness review: see, on the scope of the duty to consult, *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*,[78] and on the scope of a *Charter* right, s. 2(a), *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*.[79] Perhaps it will soon be made clear that these threshold questions fall into one of the correctness categories: they are, after all, situations in which the courts ought to provide a final, definitive answer, as the application of the Constitution or the scope of *Charter* rights should not vary as between different regulatory regimes.

But the discussion in *Doré* is oriented towards the question of the proportionality of individualized exercises of discretion which infringe the *Charter*. Here, it seems to me, answers can legitimately vary as between different regulatory regimes: for example, what is a proportionate restraint on freedom of expression in the workplace may not be proportionate in a municipal election campaign.[80] I can see how professional privilege would be undermined by variations in approach in different regulatory regimes; I can see how incoherence might result from different approaches to jurisdictional overlaps; and I can see how the constitutionality of a statute, or the scope of a *Charter* right, must be the same across the board. Correctness review in such instances rests solidly on the narrow rule-of-law basis established in *Vavilov*. With regret, however, I cannot see why the presence of a *Charter* right *requires* uniform answers to be furnished by judges in respect of decisions made in different settings by different decision-makers.

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[75] *Ibid* at para 53.
[76] *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, [2016] 2 SCR 555 at para 20.
[77] *Doré*, *supra* note 62 at para 38.
[78] 2010 SCC 43, [2010] 2 SCR 650 at para 67.
[79] 2017 SCC 54, [2017] 2 SCR 386 at paras 68-75.
[80] *Doré*, *supra* note 62 at paras 54, 56.

Indeed, I would observe in this regard that the application of a proportionality test to individualized decisions would be no guarantor of uniformity. Proportionality review is not correctness review.[81] A superior court determination of whether there were alternative means of achieving the same regulatory objective and whether an appropriate balance was struck in a given case might be very different in, say, the legal-professional context than in the context of a healthcare professional. Put another way, the degree of deference built into the proportionality test undermines any argument that proportionality must be applied by superior court judges to all alleged *Charter* violations by administrative decision-makers in order to achieve uniformity.

I accept Mancini's point that the scope/application distinction may not be extremely robust. But the question for present purposes is not the robustness of the distinction but whether *Doré* and *Vavilov* are compatible. Given the replacement of expertise as the conceptual basis for deference with an across-the-board presumption of reasonableness review and the narrowness of *Vavilov's* rule-of-law exception, I do not think there is any incompatibility between *Doré* and *Vavilov*.

Second, I do not think *Vavilovian* reasonableness review can fairly be described as formalist or Diceyan. As I have suggested, *Vavilov* is an example of the "culture of justification" in administrative law.[82] There is nothing formalist about the detailed articulation of reasonableness in *Vavilov*. Indeed, the repeated references to the "demonstrated expertise" of administrative decision-makers strike an unmistakeably functionalist tone.[83] Expertise might now be irrelevant to selecting the standard of review but it is very much relevant to surviving the standard of review.

It is true, as I noted in my commentary on *Vavilov*, that there are tensions in the majority's articulation of reasonableness review.[84] *Some* components of *Vavilovian* reasonableness review can fairly be described as formalist or Diceyan: the emphasis on the importance of the governing statutory scheme, for example. But reasonableness review post-*Vavilov* is to begin with the reasons provided by the administrative decision-maker, even where the reasons touch on jurisdictional issues.[85] There is nothing formalist or Diceyan about this. Read fairly, *Vavilovian* reasonableness review has both formal and functional, Diceyan and non-Diceyan components.

The discussion of the principles of statutory interpretation is perhaps the best example. On the one hand, administrative decision-makers are to apply the principles as courts would.[86] On the other hand, a "formalistic" statutory interpretation exercise is not required in every case .[87] The majority in *Vavilov*

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[81] Lord Kerr explained this point very well in *Keyu v Foreign Secretary* [2015] UKSC 69; [2015] 3 WLR 1665 at para 272:

> it is important to start any debate on the subject with the clear understanding that a review based on proportionality is not one in which the reviewer substitutes his or her opinion for that of the decision-maker. At its heart, proportionality review requires of the person or agency that seeks to defend a decision that they show that it was proportionate to meet the aim that it professes to achieve. It does not demand that the decision-maker bring the reviewer to the point of conviction that theirs was the right decision in any absolute sense.

[82] Paul Daly, "*Vavilov* and the Culture of Justification in Contemporary Administrative Law" (2020) 100 *Supreme Court Law Review* (2d) (forthcoming).
[83] *Vavilov*, *supra* note 4 at para 93. See also *ibid* at paras 14, 81.
[84] "The *Vavilov* Framework", *supra* note 3 at 128-132.
[85] *Vavilov*, *supra* note 4, at paras 81, 83-84, 108-110.
[86] *Ibid* at para 118.
[87] *Ibid* at para 119.

does not go as far as I would advocate[88] but I find it very doubtful that Dicey would have rejoiced at the idea that judicial review would begin, not with the judge's view of the best reading of a statute but with the reasons provided by the administrative decision-maker "applying its particular insight into the statutory scheme at issue".[89]

At the core of reasonableness review in *Doré* was "balancing *Charter* values against broader objectives,"[90] with courts obliged to uphold an appropriate balance struck by the decision-maker.[91] This is just as possible post-*Vavilov* as it was before. Administrative decision-makers can continue to contribute to our collective understanding of the *Charter* in its application to particular regulatory settings. The thick conception of reasonableness review developed in *Vavilov* will, in addition, ensure meaningful judicial oversight of any alleged *Charter* infringements. For in assessing the reasonableness of decisions touching on the *Charter*, reviewing courts will determine whether the decision was justified in respect of the legal and factual constraints on the decision-maker, in particular, whether the decision adequately responds to the stakes for and submissions of the parties.[92] Where the *Charter* is in play, the burden of justification will be a heavy one, with administrative decision-makers required to demonstrate that they gave serious consideration to the relevant *Charter* implications, justifying the balance struck in the light of effect on the individual and the availability of alternative means of achieving the same objective.[93]

In sum, I have long thought that *Doré* was a misstep in the Canadian law of judicial review of administrative action. But a post-*Vavilov* correction is not at all inevitable. Those who wish to see the back of *Doré* will have to attack it directly and hope their attacks resonate with a majority of the Court. In the interests of simplicity and clarification, I hope they do not.

V. The Constitutional Foundations of *Vavilov*[94]

In *Dunsmuir v New Brunswick*, Bastarache and LeBel JJ framed their rearticulation of the standard of review analysis by reference to the constitutional foundations of judicial review. In their view, the law of judicial review seeks "to address an underlying tension between the rule of law and the foundational democratic principle".[95] On the one hand, the rule of law imposes on courts a "constitutional duty to ensure that public authorities do not overreach their lawful powers".[96] On the other hand, judicial review has "an important constitutional function in maintaining legislative supremacy"[97] and in fashioning the law of judicial review the courts must avoid "undue interference with the discharge of

[88] Paul Daly, "Unreasonable Interpretations of Law" (2014) 66 SCLR (2d) 233.
[89] *Vavilov*, *supra* note 4 at para 121.
[90] *Doré*, *supra* note 62 at para 57.
[91] *Ibid* at para 58.
[92] *Vavilov*, *supra* note 4 at paras 126-128, 133-135.
[93] See *e.g. Loyola High School*; *Trinity Western University*, *supra* note 68.
[94] The following section owes a great deal to David Mullan, who prompted this idea in his "Judicial Scrutiny of Administrative Decision Making: Principled Simplification or Continuing Angst?" (2020) 50 *Advocates' Quarterly* 423 and has discussed the point further with me. See also Nigel Bankes, "Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response", *ABlawg*, 3 January 2020, available online: <https://ablawg.ca/2020/01/03/statutory-appeal-rights-in-relation-to-administrative-decision-maker-now-attract-an-appellate-standard-of-review-a-possible-legislative-response/>.
[95] *Dunsmuir*, *supra* note 1 at para 27.
[96] *Ibid* at para 29.
[97] *Ibid* at para 30.

administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures".[98] But undue interference could never mean abstinence, as "judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits".[99]

By contrast, *Vavilov* is pitched at the level of practice, not constitutional theory. The Court was most concerned by criticism from the judiciary, the academy, litigants and civil society organizations, critiques going "to the core of the coherence of our administrative law jurisprudence and to the practical implications of this lack of coherence".[100] The majority's efforts were designed to respond to these critiques. The constitutional foundations of judicial review did not warrant a mention; the Constitution barely figured. The constitutional basis of *Vavilov* is obscure.

This opacity is problematic. At least since *Crevier v Attorney General of Quebec*,[101] the constitutional basis of judicial review in Canadian administrative law has been taken to be the judicature provisions of the *Constitution Act, 1867*, in particular s. 96. A great oak has sprouted from this acorn: s. 96 simply provides that the federal government shall appoint superior court judges but judicial exegesis, first by the Privy Council and subsequently by the Court, means its branches cast an imposing shade over encroachments on the supervisory powers of the superior courts. Most importantly, as Laskin CJ explained in *Crevier*, "[i]t cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review".[102] Ensuring that administrative decision-makers stay within their jurisdiction is, then, a core task of the superior courts; judicial review is how they discharge that task. As Cromwell J observed in his dissenting reasons in *Alberta Teachers*, "this constitutional guarantee does not merely assure judicial review for reasonableness; it guarantees jurisdictional review on the correctness standard".[103]

The difficulty presented by *Vavilov* is that in the course of the majority's simplification exercise, it whittled the remaining correctness categories down to almost nothing and eliminated jurisdictional error as a distinct correctness category altogether. The narrow rule-of-law basis for correctness review means that the starting point of reasonableness review will typically also be the end point as far as selecting the standard of review is concerned. There is no category of "jurisdictional" error which allows a reviewing court to police, on a correctness basis, what Laskin CJ described as the "limits" of an administrative decision-maker's jurisdiction.[104]

The difficulty thereby presented can be appreciated by reference to Gleason JA's analysis in *Canada (Attorney General) v Public Service Alliance of Canada*.[105] At issue here was s. 34(1) of the *Federal Public Sector Labour Relations and Employment Board Act*.[106] Pursuant to this provision, the grounds of review of the Board are limited to jurisdictional error, breach of natural justice and bad faith. The legislation

[98] *Ibid* at para 27.
[99] *Ibid* at para 31.
[100] *Vavilov*, *supra* note 4 at para 9.
[101] [1981] 2 SCR 220.
[102] *Ibid* at 238.
[103] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 103.
[104] *Vavilov*, *supra* note 4 at paras 65-67.
[105] 2019 FCA 41 [*Public Service Alliance*].
[106] SC 2013, c 40, s 365.

specifically excludes the grounds of review of legal error, factual error or acting contrary to law. Gleason JA refused to accept that the exclusion was effective. Giving effect to the exclusion "runs afoul of the rule of law concerns that provide the constitutional underpinning for judicial review of administrative action by the independent judicial branch",[107] because "the scope of jurisdictional issues that arise in administrative law cases is exceedingly limited, if such issues may still even be said to exist at all".[108] Post-*Vavilov*, jurisdictional issues indeed no longer "exist at all". As Gleason JA explained, the result would be that decisions of the Board would be "largely unreviewable", but given the constitutional basis of judicial review in Canadian law: "This cannot be".[109] Rather, the exclusion of several grounds of review indicated that decisions of the Board should be reviewed deferentially.[110]

Let me put the difficulty in stark terms. There is nothing, on the face of *Vavilov*, to prevent a legislature from eliminating reasonableness review. As the majority puts it, "where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law".[111] But the "rule of law" here means only that limited class of cases in which correctness review applies to allow the courts to furnish a final, definitive answer to a question in the interests of uniformity. As long as the courts are able to review constitutional questions, questions of central importance to the legal system or questions of overlapping jurisdiction for correctness, nothing seems to stand in the way of legislation to eliminate reasonableness review.

This is not merely a theoretical difficulty. There are a couple of ways in which reasonableness review could be eliminated, directly or indirectly. In Alberta, s. 539 of the *Municipal Government Act* provides: "No bylaw or resolution may be challenged on the ground that it is unreasonable".[112] Meanwhile, in various provincial statutes[113] and, most famously, British Columbia, patent unreasonableness has been prescribed as the standard of review of some types of administrative action.[114] Indirectly, reasonableness review could be ousted by providing for a limited right of appeal. For example, the Federal Court of Appeal has interpreted various provisions relating to statutory appeals on issues of "law or jurisdiction" as excluding the consideration of factual matters.[115] Where an appellate court whose jurisdiction is circumscribed in this way refuses to grant leave or finds that a matter raised by a party is outside the scope of the appeal clause, reasonableness review is unavailable. This would be a simple solution and would provide significant clarity. Here, however, I would invoke Einstein: everything should be made as simple as possible, but no simpler.

Appearances, moreover, may be deceptive. On the face of it, *Vavilov* would permit legislative ouster of reasonableness review. But only on the face of it. Indeed, *Hamlet* springs to mind: "God hath given you one face, and you make yourself another".[116]

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[107] *Public Service Alliance*, *supra* note 105 at para 30.
[108] *Ibid* at para 30.
[109] *Ibid* at para 31.
[110] *Ibid* at para 34.
[111] *Vavilov*, *supra* note 4 at para 35.
[112] RSA 2000, c M-26.
[113] *Traffic Safety Act*, RSA 2000, c T-6, s 47.1(3); *Environmental Assessment Act*, RSO 1990, c E-18, s 23.1; *Labour Relations Act, 1995*, SO 1995, c 1, Sch A, s 163.3(39); *Health Professions Act*, SY 2003, c 24, s 29.
[114] *Administrative Tribunals Act*, SBC 2004, c 45, ss 58-59.
[115] See e.g. *Bell Canada v British Columbia Broadband Association*, 2020 FCA 140.
[116] William Shakespeare, *Hamlet*, Act 3 Scene 1 Line 155.

First, in the same paragraph that eliminated jurisdictional error as a category of correctness review one finds the following assertion: "A proper application of the reasonableness standard will enable courts to fulfill their *constitutional duty* to ensure that administrative bodies have acted within the scope of their lawful authority".[117] The language of constitutional duty is the language of *Crevier* and *Dunsmuir*. It suggests that reasonableness review *cannot*, in fact, be ousted, for its elimination may prevent courts from doing their constitutional duty.

Second, although the point is not expressed in constitutional terms, the majority was very clear that it was directing administrative decision-makers to henceforth "adopt a culture of justification and demonstrate that their exercise of delegated public power can be 'justified to citizens in terms of rationality and fairness.'"[118] If reasonableness review has been eliminated, administrative decision-makers need never demonstrate that their exercise of public power can be justified in terms of rationality and fairness. This would knock the legs from under a central pillar of the architecture of *Vavilov*.

The result, I submit, is that *Vavilov* establishes a core constitutional minimum of reasonableness review. With respect, the insistence that correctness review – and only correctness review – must be constitutionally entrenched is, and has been, misplaced. Julius Grey put the point with admirable clarity in the mid-1980s:

> What *Crevier* does entrench is *some* degree of review. The courts will not interfere at the same moment on all issues or against all tribunals. However, they now clearly possess a constitutional right to step in when the bounds of tolerance are exceeded by any decision-maker. Clearly, the precise location of the bounds of tolerance is left to the court and that is quite consistent with the general trends in modern administrative law.[119]

In short, the "bounds of tolerance" are supplied in *Vavilov* by reasonableness review. Inasmuch as constitutional questions, questions of central importance to the legal system and questions of overlapping jurisdiction have a "constitutional dimension,"[120] correctness review is also constitutionally entrenched.

Indeed, this description of the constitutional foundations of *Vavilov* provides an explanation for an otherwise mysterious passage in the majority reasons. Having established institutional design as a key, grounding concept in the selection of the standard of review, the majority considered limited rights of appeal – such as those restricted to questions of law or jurisdiction – and observed: "the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal".[121] If respect for institutional design choices is so important, why can unappealable aspects of decisions nonetheless be judicially reviewed? The answer is that reasonableness review is constitutionally entrenched. A limitation of a right of appeal cannot, constitutionally, effect the elimination of reasonableness review of aspects of a decision.

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[117] *Vavilov*, *supra* note 4 at para 67 [emphasis added].
[118] *Ibid* at para 14, citing the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998) 12 CJALP 171 at 174 [emphasis deleted].
[119] Julius Grey, "Sections 96-100: A Defense" (1985) 1 Admin LJ 3 at 11.
[120] *Bank of Montreal v Li*, 2020 FCA 22 at para 28.
[121] *Vavilov*, *supra* note 4 at para 52.

How, then, should courts address direct and indirect limitations on reasonableness review post-*Vavilov*? Consider first direct limitations, that is those imposed by eliminating grounds of review or specifying a deferential ground of review. Here, the legislative language can be taken as an indication that the decision-maker should benefit from a wider margin of appreciation. As was the case with privative clauses prior to *Vavilov*, they would not be enforced to the letter, but their spirit would be respected. *Vavilovian* reasonableness review is capacious enough to accommodate this solution. In *Vavilov*, the majority recognized that "the language chosen by the legislature in describing the limits and contours of the decision maker's authority" may differ from case to case, sometimes allowing "greater flexibility", sometimes "tightly constraining the decision maker".[122] Where a ground of review has been eliminated, or patent unreasonableness specified as the standard of review, these statutory provisions can be taken as "language chosen by the legislature" to give "greater flexibility" to the decision-maker. In this way, reasonableness review is preserved and the constitutionally entrenched core minimum of judicial review safeguarded.[123] This is a fairly simple solution, which takes advantage of the thick conception of reasonableness review set out in *Vavilov*, and provides crystalline clarity about the scope of judicial review.

The second question, of indirect limitations, is slightly more complex. Where an appeal is limited to questions of law or jurisdiction, it is arguable that any issue relating to the "constitutional duty" to ensure that administrative decision-makers remain within the boundaries of their authority will fall within the appeal clause. Historically, this was certainly the case, as such clauses respected the constitutional boundaries set out in *Crevier*. However, the core constitutional minimum I have ascribed to reasonableness review includes matters which go beyond questions of law or jurisdiction. For example, the harsh consequences a decision visits upon an individual as a matter of fact – perhaps leaving them homeless[124] – would probably not fall within a limited appeal clause; to exclude any such issues would be problematic, as it would limit the courts' ability to police the boundaries of administrative decision-makers' authority and ensure that exercises of state power are publicly justified. Similarly, the responsiveness of a decision to the arguments of the parties and evidence presented is a key feature of *Vavilovian* reasonableness review but again would not necessarily come within the scope of a limited appeal clause. The contemporaneity requirement might also be in play in some cases, as on appeal a decision-maker may seek to defend its position by relying on documents and other material not referenced in its decision; on a statutory appeal, the court's analysis will be of the correctness of the outcome,[125] whereas on reasonableness review, the question for the court will be whether the reasons adequately justify the outcome.[126]

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[122] *Vavilov*, *supra* note 4 at para 110.

[123] Equally, one could do as the Ontario courts have (so far) done and simply assimilate patent unreasonableness to reasonableness: *Intercounty Tennis Association v Human Rights Tribunal of Ontario*, 2020 ONSC 1632 at para 30-38; *Ontario v Association of Ontario Midwives*, 2020 ONSC 2839 at para 88. I do not think this is a viable strategy in British Columbia, however, where patent unreasonableness has long been considered to have content which is distinct from the Court's reasonableness standard. See *e.g. Speckling v British Columbia (Workers' Compensation Board)*, 2005 BCCA 80 at para 33; *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para 28. See further "One Year of *Vavilov*", *supra* note 17 at pp 30-33.

[124] See *e.g. Residential Tenancies Act*, 2006, SO 2006, c 17, ss 30(1) and 32.

[125] See *e.g. Bell Canada*, *supra* note 5.

[126] *Ortiz v Canada (Citizenship and Immigration)*, 2020 FC 188 at para 22.

These considerations help to explain why the majority in *Vavilov* refused to accept that a limited appeal clause could oust judicial review of matters not falling within the clause. Doing so would be unconstitutional.

This has significant practical consequences, but the resulting inconveniences can be addressed relatively straightforwardly. Where a question of law or jurisdiction is appealable only with leave of the appellate court and leave is refused, the appellant should be able to make an application for judicial review; and where an appeal is provided for on a question of law or a question of law or jurisdiction, an appellant should also be able to make an application for judicial review of matters falling outside of the appeal clause. Indeed, it might be wise to make the application for judicial review and an appeal (or application for leave to appeal) simultaneously, with the judicial review stayed pending the disposition of the appeal (if leave is granted). Where the appeal and judicial review can be made to the same court, the files can be consolidated pursuant to the relevant procedural rules. Where the appeal is to a court of appeal but judicial review jurisdiction resides in a superior court, consolidation is obviously not an option. Instead, consistent with the principle that an applicant for judicial review should exhaust alternative remedies (most obviously, a right of appeal),[127] the appeal should be considered first of all, with the judicial review application stayed in the interim. Inasmuch as stays lie in the discretion of the judge seized of the matter, the discretion should be exercised largely and liberally: as long as the applicant has made an application for judicial review in a timely manner, stays pending the disposition of the parallel appeal should be readily granted.

This, I think, is the simplest possible set of solutions, perhaps not the one which I or anyone else would have woven from whole cloth but the best available design from the fabric provided by *Vavilov*. It will require some compromises, perhaps, but *Vavilov* was all about compromise.

There is one final point to make about the constitutional foundations of judicial review post-*Vavilov*. It concerns the relationship between *Vavilovian* reasonableness review and the standard of palpable and overriding error applicable on statutory appeals to questions of fact and mixed law and fact. If *Vavilovian* reasonableness review is constitutionally entrenched, should palpable and overriding error at least match it? My view is that palpable and overriding error is a more deferential standard than *Vavilovian* reasonableness review. Therefore, it may not always rise to the level of the core constitutional minimum. I would hesitate to say that this means that the provision of a statutory appeal and corresponding application of the *Housen v Nikolaisen* framework are unconstitutional. This conclusion is implausible. I would say, however, that the mismatch between palpable and overriding error and *Vavilovian* reasonableness review is likely to prompt arguments that the standards should converge in administrative law matters. As I have written elsewhere, "if the palpable and overriding error standard on appeal is less generous to appellants than reasonableness review would be, there will inevitably be pressure to expand the scope of the palpable and overriding error standard".[128] If these arguments also have a constitutional foundation, they will prove difficult to resist.

Conclusion

Vavilov is a landmark decision in Canadian law. As far as administrative law is concerned, it is the 'big bang'. It left some issues unresolved but, as I have sought to demonstrate, there is enough in the letter

[127] See generally *Milner Power Inc. v Alberta (Energy and Utilities Board)*, 2007 ABCA 265.
[128] "One Year of *Vavilov*", *supra* note 17 at footnote 144.

and spirit of *Vavilov* to allow us to address them. In simplifying the selection of the standard of review and in clarifying the content of the reasonableness standard, the majority in *Vavilov* provided a framework which can be adapted to resolve the outstanding questions the majority left open: the scope of internal statutory appeals; the standard of review for procedural fairness issues; the place of arbitration appeals; the continued health (or otherwise) of *Doré*; and the constitutional foundations of judicial review. Taking the search for simplicity and the maintenance of consensus as my guides, I navigated these unresolved issues, suggesting solutions which are simple as possible though not necessarily those I or anyone else would have developed starting from first principles.