

## The *Vavilov* Framework and the Future of Canadian Administrative Law

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### Introduction

When Benjamin Franklin was asked what sort of government the framers of the U.S. Constitution had created, he quipped: “A Republic, if you can keep it”. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*,<sup>1</sup> the Supreme Court of Canada reached something of a consensus. The question is: can the Supreme Court maintain it?

*Vavilov* represents a commendable attempt to comprehensively address two issues which have dogged Canadian administrative law (and the Supreme Court, in particular) for decades: selecting the standard of review and applying the reasonableness standard. However, there will be further issues to address, tensions to resolve and pressures to withstand in the coming years.

Granting leave to appeal in the *Bell Canada v. Canada (Attorney General)*<sup>2</sup> and *Vavilov*<sup>3</sup> appeals, the Supreme Court expressed itself:

...of the view that these appeals provide an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, and subsequent cases. To that end, the appellants and respondent are invited to devote a substantial part of their written and oral submissions on the appeal to the question of standard of review, and shall be allowed to file and serve a factum on appeal of at most 45 pages.

The formulation in the *National Football League v. Attorney General of Canada* appeal was slightly different, with no reference to devoting “a substantial part” of the submissions to standard of review, because the underlying issues arose out of the same controversy as the *Bell Canada* appeal.

It was not especially surprising that leave was granted, for both *Vavilov* and *Bell Canada/NFL* were very interesting, high-profile matters.

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<sup>1</sup> 2019 SCC 65 [*Vavilov*].

<sup>2</sup> 2017 FCA 249, leave to appeal to SCC granted, 37748 (10 May 2018).

<sup>3</sup> 2017 FCA 132, leave to appeal to SCC granted, 37896 (10 May 2018).

Vavilov was born in Canada to Russian parents who were spies. Normally, individuals born in Canada are Canadian citizens.<sup>4</sup> But there's an exception for children born to "a diplomatic or consular officer or other representative or employee in Canada of a foreign government".<sup>5</sup> When Vavilov was 16, by which point he and his parents had moved to the United States, the family home was stormed by armed FBI agents, who arrested his parents. From Russia, Vavilov sought the renewal of his Canadian passport. After much procedural wrangling,<sup>6</sup> the Registrar of Citizenship refused to accede to Vavilov's request. Indeed, relying on a report prepared by an analyst, the Registrar concluded that Vavilov's parents had been "employees of a foreign government" at the time of his birth and thus revoked Vavilov's certificate of Canadian citizenship. Vavilov sought judicial review: he was unsuccessful at first instance before convincing a majority of the Federal Court of Appeal to quash the Registrar's decision.

*Bell Canada/NFL* was the latest instalment of the long-running saga that is the CRTC's "simultaneous substitution" regime. For some time, the starting point has been that Canadian broadcasters who are retransmitting feeds from foreign broadcasters are not allowed to alter those feeds in any way *unless* the Canadian broadcasters have permission to do so under the simultaneous substitution regime. If so, a Canadian television station can require a broadcaster to substitute a Canadian feed for the foreign feed. From a consumer perspective, the most obvious result has been that for many years, during the Super Bowl Half Time Show, Canadian viewers have only had access to Canadian advertisements, not the high-profile American versions. From a commercial perspective, the result is that there is a larger advertising pie for the NFL (the copyright holder) and other actors to distribute, and a national platform for Canadian advertisers. After a series of consultations stretching over several years, the CRTC proposed to maintain the simultaneous substitution regime but to exclude the Super Bowl, specifically. This Order was the subject of an unsuccessful appeal to the Federal Court of Appeal.

It was surprising that the Supreme Court decided to signal openly its willingness to revisit its judicial review framework. The giving of reasons accompanying a leave decision was unprecedented. Certainly, when the Supreme Court last attempted to reformulate its administrative law doctrine in *Dunsmuir v. New Brunswick*, no warning was given to the parties

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<sup>4</sup> *Citizenship Act*, R.S.C. 1985, c. C-29, para. 3(1)(a).

<sup>5</sup> *Citizenship Act*, para. 3(2)(a), emphasis added.

<sup>6</sup> Summarized by Bell J. in the Federal Court, 2015 FC 960, at paras. 7-12.

or the wider world.<sup>7</sup> The reasons were almost certainly prompted by the widespread discontent in the Canadian legal community about the unsatisfactory way in which the law of judicial review of administrative action had evolved since *Dunsmuir*. In a 2018 symposium sitting and retired judges, practitioners and academics voiced a host of criticisms of the Supreme Court's recent jurisprudence.<sup>8</sup> Even the media took notice: on the eve of the release of the decisions in the Trilogy, the Supreme Court's administrative law meanderings were the subject of a detailed analysis piece in *Globe and Mail*.<sup>9</sup>

This area of law has been riven by uncertainty for many years, especially in the last decade,<sup>10</sup> and some lower court judges have been in open revolt against the Supreme Court.<sup>11</sup> The uncertainty is partly the fault of the Supreme Court.<sup>12</sup> On a number of occasions over the last decade the Supreme Court has said one thing in one case and then soon after said the exact opposite in another. And repeatedly the Supreme Court has instructed lower courts to defer to administrative decision-makers but has failed to follow its own advice in its own decisions. More deeply, the idea that judges should “defer” to non-lawyers (doctors, economists and patronage appointees to administrative tribunals) on questions of law is controversial and difficult for many lawyers to accept — indeed, the judges of the Supreme Court themselves are deeply divided on this key issue.<sup>13</sup> Understandably, lower courts, lawyers, litigants and ordinary Canadians have found themselves perplexed.<sup>14</sup>

What is most notable about the majority reasons in *Vavilov* is the identity of its authors. It is a broad coalition composed of some judges who are comfortable with deference to administrative decision-makers and some who are hawkish at best, judicial supremacists at worst. To bring

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<sup>7</sup> For the story of how the case of David Dunsmuir, a municipal clerk and part-time Elvis Presley impersonator, made it to Ottawa and shaped a decade of Canadian administrative law jurisprudence, see Clarence Bennett, “David Dunsmuir – An Unlikely Administrative Law Celebrity” in Paul Daly and Léonid Sirota eds., *The Dunsmuir Decade/Les 10 ans de Dunsmuir: Special Issue of Canadian Journal of Administrative Law & Practice* (Carswell, Toronto, 2018).

<sup>8</sup> Paul Daly and Léonid Sirota eds., *The Dunsmuir Decade/Les 10 ans de Dunsmuir: Special Issue of Canadian Journal of Administrative Law & Practice* (Carswell, Toronto, 2018).

<sup>9</sup> Sean Fine, *Globe and Mail*, 18/12/2019, “Supreme Court ruling could quell chaos around Canadian administrative law”.

<sup>10</sup> See generally Paul Daly and Léonid Sirota eds., *The Dunsmuir Decade/Les 10 ans de Dunsmuir: Special Issue of Canadian Journal of Administrative Law & Practice* (Carswell, Toronto, 2018).

<sup>11</sup> 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/](http://www.administrativelawmatters.com/blog/2019/04/23/confusion-and-contestation/)> [Daly, “Confusion and Contestation”].

<sup>12</sup> Paul Daly, “The Signal and the Noise in Administrative Law” (2017) 68 UNB L.J. 68.

<sup>13</sup> An excellent recent example is *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230, where the majority reasons of Gascon J. embrace deference whilst the concurring reasons of Côté and Rowe JJ. reject it.

<sup>14</sup> David Stratas, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” (2016) 42:1 Queen’s L.J. 27.

these judges together to coalesce around a set of reasons spanning a vast expanse of administrative law is a considerable achievement.

When I say “consensus”, I of course acknowledge that there is a powerful set of concurring reasons by Abella and Karakatsanis JJ., which are perhaps more accurately described as “disguised dissenting reasons”. Their reasons land some significant blows and they disagree strongly (with some justification) about the majority’s approach to selecting the standard of review. But on the methodology of reasonableness review, although there are important differences of detail and emphasis, all nine judges agreed on several fundamental propositions about how reviewing courts should identify unreasonable administrative decisions. And I suspect that most members of the Canadian legal community will be able to operate comfortably within the *Vavilov* framework.

In this paper, I lay out the *Vavilov* framework, describing in Parts I and II the new approaches to selecting the standard of review and to applying the reasonableness standard, before moving on in Part III to discussing how past precedents can be retrofitted to the *Vavilov* framework, and turning in Part IV to the role to be played by remedial discretion.

Underlying my analysis of the *Vavilov* framework, with its various strengths and weaknesses is a simple question: will the consensus hold? On both selecting the standard of review and applying the reasonableness standard, the majority reasons raise a number of issues, provoke several tensions and create multiple sources of pressure. In future cases, these will have to be addressed. Then, the consensus will be put to the test. In *Vavilov*, seven judges (on selecting the standard of review) and nine judges (on applying the standard of review) were of one mind. But their ideological preferences may cause them to diverge in cases to come and the same may prove true of lower court judges.

## **I. Selecting the Standard of Review**

In this part, I will focus on the Supreme Court’s “revised framework for selecting” the standard of review (adopted by a majority of 7-2).<sup>15</sup> The goal of the broad coalition of judicial review hawks and doves assembled in the majority is to “bring greater coherence and predictability to this area of law”.<sup>16</sup>

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<sup>15</sup> *Vavilov*, at para. 10.

<sup>16</sup> *Ibid.*

### A. Background Context

In Canada, for the last 40 years,<sup>17</sup> judges have either applied the correctness standard (no deference) or some form of reasonableness standard (defer to the administrative decision-maker unless the decision was demonstrably unreasonable). From 1988 to 2008, the Supreme Court advocated a *contextual* approach, where the selection of correctness or reasonableness depended on the interplay of a variety of factors. From 2008 onwards, the Supreme Court preferred to rely on a series of *categories* and then an outright *presumption* that in most situations the reasonableness standard would apply. But the relationship between *categories*, *context* and *presumptions* was never clarified.<sup>18</sup> The circumstances in which contextual factors would push a decision out of a category or rebut a presumption remained somewhat nebulous.<sup>19</sup> And the position in relation to regulations or by-laws — general norms adopted under statutory authority — has been hopelessly confused.<sup>20</sup> Writing in part about the tortuous evolution of Canadian administrative law, Stratas J.A. described it as “a never-ending construction site”.<sup>21</sup> In *Vavilov*, the Supreme Court rolled up its sleeves and created a new framework.

### B. The Approach in *Vavilov*

Under the *Vavilov* framework, reasonableness review is the starting point in all situations. But statutory appeals will now attract correctness review (at least on extricable questions of law). And in three other non-exhaustive scenarios correctness review is required by the rule of law: the resolution of constitutional questions, questions of central importance to the legal system as a whole and issues of overlapping jurisdiction. Jurisdictional questions, even in their purest form, will no longer attract correctness review.

All trace of nuance and context has been swept from this area. As the majority forthrightly states: “this decision conclusively closes the door on the application of a contextual analysis to determine the applicable standard, and in doing so streamlines and simplifies the standard of review framework”.<sup>22</sup> Where once the contextual pragmatic and functional approach, with its

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<sup>17</sup> Paul Daly, “The Struggle for Deference in Canada”, in Hanna Wilberg and Mark Elliott eds., *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford, Hart, 2015).

<sup>18</sup> Paul Daly, “The Unfortunate Triumph of Form over Substance in Canadian Administrative Law” (2012) 50 Osgoode Hall L.J. 317.

<sup>19</sup> Paul Daly, “Categories versus Rebuttable Presumptions: *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3” (24 January 2015), online (blog): *Administrative Law Matters* <[www.administrativelawmatters.com/blog/2015/01/24/categories-versus-rebuttable-presumptions-tervita-corp-v-canada-commissioner-of-competition-2015-scc-3/](http://www.administrativelawmatters.com/blog/2015/01/24/categories-versus-rebuttable-presumptions-tervita-corp-v-canada-commissioner-of-competition-2015-scc-3/)>.

<sup>20</sup> John Mark Keyes, “Rethinking Judicial Review of Delegated Legislation” (December 13, 2018).

<sup>21</sup> David Stratas, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” (2016) 42 Queen’s L.J. 27, at 29.

<sup>22</sup> *Vavilov*, at para. 47.

four interlocking factors, reigned supreme until dethroned by a presumption of reasonableness review rebuttable by reference to contextual factors, context will no longer play any role in the selection of the standard of review. Rather, the standard applied “must reflect the legislature’s intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law”.<sup>23</sup>

(i) *Institutional Design*

The starting point is a presumption of reasonableness review. Significantly, this presumption is based on the brute fact of a legislative choice to delegate decision-making authority to an administrative decision-maker. Other justifications, such as the expertise of the decision-maker in question, are irrelevant to the selection of the standard of review: “it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review”.<sup>24</sup> This is dressed up (in garb provided by the *amici curiae*) as respect for an “institutional design choice”<sup>25</sup> by the legislature but in reality reflects a judicial choice to do away with the complexities of a contextual approach.

Accordingly, where the legislature has legislated a standard of review,<sup>26</sup> or as is more common, provided for an appeal, the courts must respect this institutional design choice. Most importantly, where there is a right of appeal of any sort the appellate review regime laid out in *Housen v. Nikolaisen*,<sup>27</sup> applies in all circumstances:

Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis.<sup>28</sup>

This is a significant change. Some areas, admittedly, were only recently colonized by the marauding presumption of reasonableness review. Accordingly, *Vavilov* will represent a welcome return to the status quo ante in the municipal taxation regime considered in *Edmonton East* and other areas, such as expropriation, where the presumption was regarded as an invader.<sup>29</sup> More broadly, however, as Abella and Karakatsanis JJ. note, “the majority’s reasons

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<sup>23</sup> *Vavilov*, at para. 23.

<sup>24</sup> *Vavilov*, at para. 30, emphasis original.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Vavilov*, at paras. 34-35.

<sup>27</sup> *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*].

<sup>28</sup> *Vavilov*, at para. 36.

<sup>29</sup> See the discussion in *Nova Scotia (Attorney General) v S&D Smith Central Supplies Limited*, 2019 NSCA 22.

strip away deference from hundreds of administrative actors subject to statutory rights of appeal”.<sup>30</sup> Decisions of economic regulators, such as the federal CRTC<sup>31</sup> and the provincial securities commissions,<sup>32</sup> are typically subject to appeal clauses, as are the decisions of professional disciplinary tribunals.<sup>33</sup> Of course, the courts had managed, in respect of some bodies (the Competition Tribunal springs to mind<sup>34</sup>) to reason their way to correctness review notwithstanding the strong doctrinal currents which dragged them towards deference. But these are exceptions, not the rule and in general such entities have long been used to deference, even on questions of law. This has not been especially controversial, given widespread recognition that matters on which regulators have expertise can bleed into the interpretation of terms in their parent statutes.<sup>35</sup> With expertise shunted to the margins, however, deference will no longer be the starting point in respect of these bodies.

The majority’s rejoinder is essentially that there is “no principled rationale for ignoring statutory appeal mechanisms”.<sup>36</sup> With respect, however, this rejoinder is aimed at a straw man. The balance of the academic and judicial criticism cited by the majority<sup>37</sup> was not that statutory appeal provisions should *never* be taken into account. It has been more common to propose a nuanced approach which would take account of the difference between, say, an appeal on a point of law with leave of a court and a full *de novo* appeal right. As the *amici* observed in their factum, “not all rights of appeal are created equal”.<sup>38</sup> Such nuances are, on the majority’s view, irrelevant: “While the existence of a leave requirement will affect whether a court will hear an appeal from a particular decision, it does not affect the standard to be applied if leave is given and the appeal is heard”.<sup>39</sup> In the *Vavilov* framework, appeal rights equal correctness review on questions of law, context and nuance be damned, all in the name of “institutional design”.

This principle is, however, wafer thin. The thinness of the “institutional design” principle is illustrated by the fate of privative clauses in the *Vavilov* framework. That fate is brutal. Privative clauses count for nothing. A presumption of reasonableness review will apply

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<sup>30</sup> *Vavilov*, at para. 199.

<sup>31</sup> *Broadcasting Act*, S.C. 1991, c. 11, s. 31; *Telecommunications Act*, S.C. 1993, c. 38, s. 64

<sup>32</sup> See e.g. *Securities Act*, R.S.B.C. 1996, c. 418, s. 167; *Securities Act*, R.S.A. 2000, c. S-4, s. 38.

<sup>33</sup> See e.g. *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, s. 70; *Law Society Act*, 1999, S.N.L. 1999, c. L-9.1, s. 55.2(1); *Veterinarians Act*, S.B.C. 2010, c. 15, s. 64.

<sup>34</sup> See e.g. *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] 3 FC 185

<sup>35</sup> The discussion in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 remains compelling, in my view.

<sup>36</sup> *Vavilov*, at para. 45.

<sup>37</sup> *Vavilov*, at paras. 38-46.

<sup>38</sup> *Amici Factum*, at para. 109.

<sup>39</sup> *Vavilov*, at para. 50. See also the comments at para. 52.

whether or not there is a privative clause in an administrative decision-maker's home statute. Only a right of appeal matters for the purposes of the *Vavilov* framework. But what if a limited right of appeal is *combined* with a clause having privative effect?

In s. 31 of the *Broadcasting Act*, for example, briefly considered in *Bell Canada v. Canada (Attorney General)*,<sup>40</sup> there is an appeal (with leave) from the CRTC to the Federal Court of Appeal on a question of law or jurisdiction. But there is also a clause stating that decisions of the CRTC are “final and conclusive”.<sup>41</sup> Final and conclusive clauses were treated, in earlier eras, as indications that the legislature intended courts to engage in deferential judicial review.<sup>42</sup> Do they mean anything now? In the majority's view, “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”.<sup>43</sup> This seems to mean the final and conclusive clause in the *Broadcasting Act* excludes *appeals* on questions of fact but not *judicial review* on questions of fact. But this also seems to mean that that factual issues would be considered under the “robust” reasonableness standard, not the “palpable and overriding error” standard.

Although the appellate standard of review framework set out in *Housen v. Nikolaisen* calls for correctness on questions of law, it calls for the deferential standard of palpable and overriding error on everything else, including mixed questions of law and fact. Where there is a statutory appeal, any issue of fact, discretion or mixed law and fact will be subject to the palpable and overriding error standard. On judicial review, by contrast, “robust” reasonableness review will be applied to any such issue (as discussed further in Part II) and will, in some respects, go further than palpable and overriding error.<sup>44</sup> Furthermore, whereas the animating principle of

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<sup>40</sup> 2019 SCC 66.

<sup>41</sup> *Broadcasting Act*, S.C. 1991, c. 11, s 31(1).

<sup>42</sup> See e.g. *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890.

<sup>43</sup> *Vavilov*, at para. 52.

<sup>44</sup> See the considerations discussed in *Vavilov*, at paras. 105-138, especially consistency, responsiveness to the submissions of the parties and responsiveness to important individual interests. Compare the formulations of palpable and overriding error cited with approval by the Supreme Court in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352. First, Stratas J.A.'s formulation in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:

Palpable and overriding error is a highly deferential standard of review . . . . “Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

Second, Morissette J.A.'s formulation in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77: « une erreur manifeste et dominante tient, non pas de l'aiguille dans une botte de foin, mais de la poutre dans l'œil. Et il est impossible de confondre ces deux dernières notions ».

*Vavilovian* reasonableness review is responsive justification, the animating principle of the *Housen v. Nikolaisen* framework is judicial economy, designed to minimize appellate oversight.<sup>45</sup> More deference would be due, in other words, in situations where an appeal has been provided for. In respect of s. 31 of the *Broadcasting Act*, for example, by trying to confine the scope of judicial oversight, the legislature — perversely — has ended up expanding it.<sup>46</sup> The majority is unrepentant: “any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism”.<sup>47</sup> But I do wonder if this view will hold given the anomalies it seems to create. Not only does this make little sense as a matter of principle, it will make little sense in practice to, say, a securities trader whose livelihood is put at risk by a regulatory decision — good luck explaining to her why her prospects on appeal are less than her prospects would have been on judicial review; references to “institutional design” are unlikely to be compelling.<sup>48</sup>

In summary, I think the majority in *Vavilov* went too far, first, in applying *Housen v. Nikolaisen* to *all* statutory appeals regardless of context and nuance and, second, in importing *Housen v. Nikolaisen* wholesale when it could simply have imported correctness review on extricable questions of law. It is, nonetheless, difficult to be categorical about the likely consequences of *Vavilov* for economic regulation and professional discipline, where the expertise of decision-makers is well-established as a matter of social fact even if it is henceforth irrelevant as a matter of legal doctrine. Much will depend, therefore, on the willingness of first-instance judges to categorize matters coming within the expertise of regulators as questions of law (subject to correctness review) or as mixed questions (subject to review for palpable and overriding error).

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<sup>45</sup> See e.g. *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 37:

Deference to factual findings limits the number, length and cost of appeals, which in turn promotes the autonomy and integrity of trial proceedings. Moreover, the law presumes that trial judges and appellate judges are equally capable of justly resolving disputes. Allowing appellate courts free rein to overturn trial courts’ factual findings would duplicate judicial proceedings at great expense, without any concomitant guarantee of more just results.

<sup>46</sup> It also creates something of a procedural morass, as a party may decide to appeal matters which are within the scope of a limited appeal clause and also to judicially review matters which fall outside the appeal clause. See further Paul Daly, “Roadtesting the Vavilov Framework: *Bell Canada v. Canada* (Attorney General), 2019 SCC 66 and *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67”, *Administrative Law Matters* (blog), January 12, 2020, online <<https://www.administrativelawmatters.com/blog/2020/01/13/roadtesting-the-vavilov-framework-bell-canada-v-canada-attorney-general-2019-scc-66-and-canada-post-corp-v-canadian-union-of-postal-workers-2019-scc-67/>>

<sup>47</sup> *Ibid.*

<sup>48</sup> Whether *Vavilovian* reasonableness review is, in fact, more or less deferential than the palpable and overriding error standard is impossible to tell at this point. Detailed empirical analysis is necessary before any firm conclusions can be drawn. My initial view is that an applicant arguing *Vavilov* will have more strings to their bow than an appellant arguing *Housen*, but this is tentative.

In that regard, it is worth mentioning that *Housen* is actually an unfamiliar standard for first-instance judges. Those who have come of (judicial) age post- *C.U.P.E. v. N.B. Liquor Corporation*<sup>49</sup> may continue to incline towards deference. And one wonders whether, despite the injunction to perform correctness review on extricable questions of law, courts hearing appeals from specialized administrative decision-makers will nevertheless give significant or perhaps even dispositive weight to the decision-makers' views on matters within their expertise.<sup>50</sup> Deference might not be dead yet.

(ii) *The Rule of Law*

Any other departures from the starting point of the presumption of reasonableness review are only justifiable by reference to the rule of law. These are the categories set out in *Dunsmuir v. New Brunswick*,<sup>51</sup> minus true questions of jurisdiction: “respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies”.<sup>52</sup> The majority’s conception of the oft-controversial concept of the rule of law is as wafer thin as its conception of institutional design: the rule of law is engaged only in situations where “consistency” and thus “a final, determinate answer” to a legal question is necessary.<sup>53</sup>

Three points are notable here: the expansion of the “central questions” category, the elimination of jurisdictional questions and the letting of the door ever-so-slightly ajar to the possibility that a new rule-of-law category will be recognized in the future.

With expertise now out of the way, it no longer performs a limiting function in the definition of “questions of central importance to the legal system”. As the concurring judges warn, this “inevitably” widens the scope for intrusive judicial oversight of expert bodies: “Issues of discrimination, labour rights, and economic regulation of the securities markets (among many others) theoretically raise questions of vital importance for Canada and its legal system [and could require correctness review]”.<sup>54</sup> As it happens, the first application of the *Vavilov*

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<sup>49</sup> [1979] 2 S.C.R. 227.

<sup>50</sup> See e.g. Adrian Vermeule, *Law’s Abnegation: From Law’s Empire to the Administrative State* (Harvard University Press, Cambridge, 2016); Pablo Ibanez Colomo, *The Shaping of EU Competition Law* (Cambridge University Press, Cambridge, 2018).

<sup>51</sup> 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*].

<sup>52</sup> *Vavilov*, at para. 53.

<sup>53</sup> *Ibid.* Compare the rich discussion of the rule of law and constitutionalism in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 70-78.

<sup>54</sup> *Vavilov*, at para. 244.

framework by a Canadian court involved (amongst other things) the application of correctness review to a question of human rights law.<sup>55</sup> The majority insists that “questions of central importance are not transformed into a broad catch-all category for correctness review” simply “because expertise no longer plays a role in the selection of the standard of review”.<sup>56</sup> The thin conception of the rule of law employed by the *Vavilov* majority, triggered by questions requiring a final, determinate answer to be furnished by the courts supports this view. Notably, issues of international law are not, apparently, questions falling within this category.<sup>57</sup> Only time will tell, however, whether the broad coalition in the majority will fracture as future cases present enticing arguments that some question or other is one of vital national importance. Lower courts too will, undoubtedly, face such arguments in the near future.

Jurisdictional questions seem to have been finally consigned to the dustbin of history. It is not “necessary to maintain this category of correctness review” as the concerns about decision-makers overstepping the boundaries of their authority can be addressed by suitably robust reasonableness review.<sup>58</sup> Herein lies the rub. Jurisdictional questions have such a stubborn hold on the legal imagination that any measure short of a stake through the heart cannot be assured of success. In future cases, some members of the *Vavilov* majority coalition might use the insistence that reasonableness review “does not give [administrative decision-makers] licence to enlarge their powers beyond what the legislature intended” and that the “governing statutory scheme will *always* operate as a constraint on administrative decision makers and as a limit on their authority”,<sup>59</sup> as justification for non-deferential reasonableness review. This would represent an erroneous reading of *Vavilov*,<sup>60</sup> but it is not difficult to envisage circumstances in which such an error might be made by the Supreme Court or a lower court.

Portentously, the “rule-of-law” door is left slightly ajar. The majority “would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case”.<sup>61</sup> In language reminiscent of

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<sup>55</sup> *Peter v. Public Health Appeal Board of Alberta*, 2019 ABQB 989, at para. 12.

<sup>56</sup> *Vavilov*, at para. 61.

<sup>57</sup> According to the majority in *Vavilov*, at para. 114, sometimes, international law will be “an important constraint” on administrative decision-makers: “international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power”. For divergent views on whether questions of international law should attract correctness review (an issue never resolved by the Supreme Court), see *Hernandez Febles v. Canada (Citizenship and Immigration)*, 2012 FCA 324.

<sup>58</sup> *Vavilov*, at para. 67.

<sup>59</sup> *Vavilov*, at para. 68, emphasis added.

<sup>60</sup> See further Part II.B.(ii).

<sup>61</sup> *Vavilov*, at para. 70.

*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*<sup>62</sup> and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*,<sup>63</sup> the reader is warned that any new category would be “exceptional”.<sup>64</sup> If history is any guide, however, such equivocation will be treated by lawyers as a wedge with which to open another door to correctness review. Again, whether the coalition can hold and whether lower courts resist the temptation to take a peek behind the rule-of-law door is impossible to tell at this point.

For what it is worth, I think this conception of the rule of law (thin and all as it is) would have been a more effective organizing principle for the selection of the standard of review than the principle of institutional design. Rather than holding that *all* appeal clauses call for the application of the *Housen v. Nikolaisen* framework, the majority could have held that *some* appeal clauses – such as those allowing for appeals on issues of law or jurisdiction – require the courts to give a final, definitive answer. In this way, the Supreme Court could have retained its presumption of reasonableness review, subject to exceptions justified by a thin conception of the rule of law. Such an approach would have had a much stronger theoretical basis than the approach taken in *Vavilov*.

### C. Summary

In conclusion, the removal of the “vexing” contextual factors<sup>65</sup> will doubtless bring good cheer to many Canadian lawyers, as it delivers a fairly simple rule to determine the standard of review. I suspect the majority consensus also reflects a consensus in the country’s legal community. Time will tell, however, whether this consensus holds or fractures as context and nuance exert the pressure they will inevitably exert.

## II. Reasonableness Review

### A. Background Context

Despite all the fuss about selecting the standard of review, empirical studies have revealed that most of the time, Canadian courts apply the reasonableness standard of review.<sup>66</sup> But what does “reasonableness” *mean*? The Supreme Court has not provided much guidance in this area. Indeed, it has said little other than that ‘reasonableness depends on the context’. Other courts,

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<sup>62</sup> 2011 SCC 61 [*Alberta Teachers*].

<sup>63</sup> 2018 SCC 31.

<sup>64</sup> *Vavilov*, at para. 70.

<sup>65</sup> *Vavilov*, at para. 200.

<sup>66</sup> Diana Ginn and William Lahey, “How the Lower Courts are ‘Doing Dunsmuir’” in Daly and Sirota eds., *The Dunsmuir Decade/Les 10 ans de Dunsmuir*.

particularly the Federal Court of Appeal, have tried to flesh out what this might mean, perhaps broader or narrow ranges depending on the interplay of contextual factors (not unlike the 1988-2008 approach to selecting the standard of review) and a requirement to identify “badges” of unreasonableness tainting the decision complained of.<sup>67</sup> In the application of reasonableness review to questions of statutory interpretation, for example, the Supreme Court has said next to nothing. The result is that some lower courts (like the British Columbia Court of Appeal) have insisted that the principles of statutory interpretation must be applied rigorously to set a benchmark against which to measure the administrative decision-maker’s interpretation of law but others (like the Federal Court of Appeal) have preached a more restrained approach, in which statutory interpretation principles play a secondary role in determining whether the decision at issue was indeed demonstrably unreasonable. There is support for both of these wildly divergent approaches in the Supreme Court’s recent administrative law jurisprudence.<sup>68</sup> Against this unpromising backdrop the Supreme Court set out in *Vavilov* to provide “better guidance...on the proper application of the reasonableness standard”.<sup>69</sup>

#### B. The Approach in *Vavilov*

As the majority acknowledges, in its previous decisions the Supreme Court has provided “relatively little guidance on how to conduct reasonableness review in practice”.<sup>70</sup> It made up for this in *Vavilov*, setting out a detailed methodology which is bound to be welcomed by first-instance judges required to apply the reasonableness standard (especially in the provinces, where judicial review is a relatively small proportion of the workload of the superior courts).<sup>71</sup> In their hard-hitting concurring reasons, Abella and Karakatsanis JJ. charge the majority with “reviv[ing] the kind of search for errors that dominated the pre- *C.U.P.E. v. N.B. Liquor Corporation* era”.<sup>72</sup> Although there are some differences of detail, and some internal tensions in the majority’s articulation of a new methodology for reasonableness review, on balance the majority is right that the dissent’s approach is not “fundamentally dissimilar”.<sup>73</sup>

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<sup>67</sup> See *e.g. Delios v. Canada (Attorney General)*, 2015 FCA 117.

<sup>68</sup> Paul Daly, “Waiting for Godot: Canadian Administrative Law in 2019” (2019) [unpublished], online: SSRN <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2529264](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2529264)> [Daly, Paul, Waiting for Godot: Canadian Administrative Law in 2019 (December 2, 2019), at pp. 10-15.

<sup>69</sup> *Vavilov v. Canada (Citizenship and Immigration)* 2019 SCC 65, at para. 11.

<sup>70</sup> *Vavilov*, at para. 73.

<sup>71</sup> See, for example, the remarkable episode described in *Olineck v. Alberta (Environmental Appeals Board)*, 2017 ABQB 311, at paras. 15-33, where the parties were sent away by the judge to read academic literature on reasonableness review before making further submissions on the application of the standard to the decision at issue.

<sup>72</sup> *Vavilov*, at para. 199.

<sup>73</sup> *Vavilov*, at para. 75.

(i) *Methodology of Reasonableness Review*

On the key propositions underpinning the methodology of reasonableness review, all nine judges are in fact *ad idem*: reasonableness review is robust; reasons are fundamental to the legitimacy of administrative decision-making; unreasonableness must be demonstrated by the applicant; reasonableness review should begin with the reasons given by the administrative decision-maker; reasonableness review is contextual; and reasonableness review should be conducted with a healthy appreciation that “[a]dministrative justice’ will not always look like ‘judicial justice’”:<sup>74</sup>

- “Reasonableness review is...a robust form of review”;<sup>75</sup>
- “where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts”;<sup>76</sup>
- “The burden is on the party challenging the decision to show that it is unreasonable”;<sup>77</sup>
- “a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the ‘range’ of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the “correct” solution to the problem...A principled approach to reasonableness review is one which puts [the decision-maker’s] reasons first”;<sup>78</sup>
- “what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review”;<sup>79</sup> and
- “In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker’s demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime

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<sup>74</sup> *Vavilov*, at para. 92.

<sup>75</sup> *Vavilov*, at para. 13. See the concurring reasons, at para. 294.

<sup>76</sup> *Vavilov*, at para. 81. See the concurring reasons, at paras 291, 296.

<sup>77</sup> *Vavilov*, at para. 100. See the concurring reasons, at para. 312.

<sup>78</sup> *Vavilov*, at para. 83-84. See the concurring reasons, at para. 306, 313.

<sup>79</sup> *Vavilov*, at para. 90. See the concurring reasons, at para. 292-293.

and represents a reasonable approach given the consequences and the operational impact of the decision”.<sup>80</sup>

In addition, the majority insists that where reasons are defective, a reviewing court is not “to fashion its own reasons in order to buttress the administrative decision”.<sup>81</sup> Abella and Karakatsanis JJ. do not accept this proposition<sup>82</sup> but it is surely fair to say that even if it did not quite attract a consensus, it nonetheless reflects the recent direction of travel, which has moved the Supreme Court away from the *laissez-faire* attitude it had to defective reasons in the early part of this decade. *Alberta Teachers*, notably, is limited to its particular facts,<sup>83</sup> and there is no repetition of some of the more permissive language of the most recent leading precedent on defective reasons, *Delta Air Lines Inc. v. Lukács*,<sup>84</sup> which is cited instead for the principle that “it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome”.<sup>85</sup>

On the whole, the methodology of reasonableness review set out in *Vavilov* is inherently deferential. Of course, reasonableness review is robust and no page of the record will be left unturned, but judicial analysis *must* begin with the reasons for the decision and *respect* the expertise of the administrative decision-maker, with intervention *only* to be countenanced if the decision is *demonstrated* to be unreasonable. This is the essence of deference.

(ii) *Fundamental Flaws and Contextual Considerations*

Having set out the methodology of reasonableness review, the majority goes on, at some length, “to consider two types of fundamental flaws” but emphasizes that these flaws are simply “a convenient way to discuss the types of issues that may show a decision to be unreasonable”.<sup>86</sup> First, the absence of “reasoning that is both rational and logical”,<sup>87</sup> 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”,<sup>88</sup> or ones which “exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise”.<sup>89</sup> Plainly, these are intended as examples which

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<sup>80</sup> *Vavilov*, at para. 93. See the concurring reasons, at para. 297-299.

<sup>81</sup> *Vavilov*, at para. 96.

<sup>82</sup> *Vavilov*, at para. 302-305.

<sup>83</sup> *Vavilov*, at para. 98.

<sup>84</sup> 2018 SCC 2, [2018] 1 S.C.R. 6 [*Delta Air Lines*].

<sup>85</sup> *Vavilov*, at para. 96.

<sup>86</sup> *Vavilov*, at para. 101.

<sup>87</sup> *Vavilov*, at para. 102.

<sup>88</sup> *Vavilov*, at para. 103.

<sup>89</sup> *Vavilov*, at para. 104.

*illustrate* a general point — the absence of logic and reason — and not as a set of categories into which dubious administrative decisions can be pigeonholed by reviewing courts (though, I am sure, this will be a tempting course of action for lower courts, urged upon them by clever counsel).<sup>90</sup>

Second, a decision must be “justified in relation to the constellation of law and facts that are relevant to the decision”.<sup>91</sup> The majority emphasizes that it is impossible to “catalogue” all the considerations which will be relevant to the constellation of particular individual cases but sets out a set which will “generally be relevant”:

...the governing statutory scheme; other relevant statutory or common law [including international law]; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies.<sup>92</sup>

That these “elements” are not intended as “a checklist for conducting reasonableness review”,<sup>93</sup> clearly emerges from the ensuing discussion where the formulation “may be unreasonable” is repeatedly employed. And, of course, they must be read against the clear guidance set out by the majority (and accepted by the concurring judges) on the inherently deferential methodology of reasonableness review.

(iii) *Tensions to be Resolved*

Despite the scholarly analysis in the majority’s reasons and notwithstanding the large area of common ground between the majority and their concurring colleagues, there are tensions in the majority reasons which will have to be worked out in future cases.

Consider, *first*, this passage: “Before a decision can be set aside [for unreasonableness], the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency”.<sup>94</sup> What is the operative test here? Are “justification, intelligibility and transparency” to be taken as the (high) bar administrative decision-makers are expected to scale (consistent with the emphasis on the principle of responsive justification)? Or are reviewing

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<sup>90</sup> I suspect that government lawyers will regularly cite paras. 82-98 and their opponents paras. 99-138.

<sup>91</sup> *Vavilov*, at para. 105.

<sup>92</sup> *Vavilov*, at para. 106.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Vavilov*, at para. 100.

courts to look only for the presence of “sufficiently serious shortcomings” rather than the absence of “justification, intelligibility and transparency”? The latter answer seems to me more consistent with the tenor of the majority reasons and the methodology of reasonableness review articulated in *Vavilov*. But lower courts and future Supreme Court coalitions could conceivably prefer the former. Indeed, whereas in *Dunsmuir* one of the issues for a reviewing court was whether a decision “falls” the range of possible acceptable outcomes in view of the facts and the law, in *Vavilov* the issue is whether the decision is “justified in relation to the relevant factual and legal constraints that bear on the decision”.<sup>95</sup> It seems to me that this is not merely a difference of emphasis: requiring *justification* of a decision rather than merely *falling within* a range can be read as a more demanding standard.<sup>96</sup>

Consider, *second*, the discussion of the relevance of the “governing statutory scheme” to the constellation of law and fact in which the justifiability of an administrative decision is to be assessed.<sup>97</sup> Whereas in respect of the other contextual considerations considered by the majority the permissive term “may” is almost invariably used, it is replaced by the imperative “must”.<sup>98</sup> For example, “[a]lthough a decision maker’s interpretation of its statutory grant of authority is generally entitled to deference, the decision maker *must* nonetheless properly justify that interpretation”.<sup>99</sup> Must, not may.<sup>100</sup>

Furthermore, the two closing sentences of the section are almost irreconcilable:

What matters is whether, in the eyes of the reviewing court, the decision maker has *properly justified* its interpretation of the statute in light of the surrounding context. It will, of course, be *impossible* for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.<sup>101</sup>

The first sentence posits a test of justification, the second sentence posits clear limits enforceable by a reviewing court. What to make of this? Have jurisdictional questions been killed off as far as selecting the standard of review goes only to re-emerge, vital as ever, in the

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<sup>95</sup> *Vavilov*, at para. 99.

<sup>96</sup> I think this must have impact on decisions whether to grant leave to seek judicial review of an administrative decision. On its own, and despite the inherently deferential methodology of reasonableness review set out in *Vavilov*, this shift in language should exercise the mind of any judge attempting to determine whether an applicant can make out an arguable case for judicial review.

<sup>97</sup> *Vavilov*, at para. 108-110.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Vavilov*, at para. 109, emphasis added.

<sup>100</sup> There are other examples of slippage from the permissive to the imperative: compare para. 111 with para. 112; and see paras. 126 and 133. But none seems as portentous as the slippage in paras. 108-110.

<sup>101</sup> *Vavilov*, at para. 110, emphasis added.

application of the reasonableness standard? On balance, I think the first sentence must prevail. After all, the majority insists that, in general, a reviewing court “*may*” rely on the contextual considerations to support a finding of unreasonableness;<sup>102</sup> and references to “*must*” sit uneasily with the inherently deferential methodology for reasonableness review set out in *Vavilov*. But courts minded to police what they perceive to be jurisdictional boundaries can certainly fasten on the language in the “governing statutory scheme” section of *Vavilov* to engage in intrusive reasonableness review.

**Third**, the role of the nominate grounds for abuse of discretion remains murky. In most other Commonwealth jurisdictions, the exercise of discretionary powers is reviewable on a variety of bases, such as improper purposes, irrelevant considerations, fettering of discretion, sub-delegation and bad faith. Although the Supreme Court held in the early 2000s that such grounds of review are “still useful as familiar landmarks”, it emphasized that they “no longer dictate the journey” to a conclusion of unreasonableness:<sup>103</sup> it is insufficient “merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor”.<sup>104</sup> Since then, however, many judges have considered that the establishment of at least some of the nominate grounds of review renders an administrative decision *per se* unreasonable.<sup>105</sup>

In *Vavilov*, one of the areas in which the majority preferred the imperative “*must*” to the permissive “*may*” was in its discussion of the constraints imposed by the “governing statutory scheme”:<sup>106</sup> a decision “*must* ultimately comply ‘with the rationale and purview of the statutory scheme under which it is adopted’”; “any exercise of discretion *must* accord with the purposes for which it was given”; “a decision *must* comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion”; and “where a decision maker is given wide discretion, it *would* be unreasonable for it to fetter that discretion”.<sup>107</sup> To me, conceiving of the nominate grounds of review for abuse of discretion as a checklist of bases for automatic curial

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<sup>102</sup> *Vavilov*, at para. 107.

<sup>103</sup> *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 24.

<sup>104</sup> *Ibid.*, at para. 22.

<sup>105</sup> See e.g. *Kane v. Canada (Attorney General)*, 2011 FCA 19; *Canadian Association of Refugee Lawyers v. Canada (Citizenship and Immigration)*, 2019 FC 1126, at para. 57. Compare *Alberta (Director of Assured Income for the Severely Handicapped) v. Januario*, 2013 ABQB 677, at paras. 35-37; *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, at para. 73.

<sup>106</sup> *Vavilov*, at paras. 108-110.

<sup>107</sup> *Vavilov*, at para 108, emphases added.

intervention on judicial review is at odds with the directive to begin with the administrative decision-maker's reasons, not with the relevant statutory provisions, but I can neither deny nor downplay the significance of the use of "must" rather than "may". Digging more deeply, however, it is apparent that in respect of some of the nominate grounds of review, a holistic reasonableness analysis will be appropriate and even unavoidable. Take, for example, fettering of discretion, where the question for a reviewing court will not be "was discretion fettered?" but rather "was it reasonable, given the context, to issue a detailed directive to front-line decision-makers?"<sup>108</sup> Sometimes, discretion might indeed be fettered, at least to some extent, but the question for the reviewing court will be whether this was justifiable, given the decision-making context.<sup>109</sup>

Consider, *fourth*, the discussion of the principles of statutory interpretation. Whilst it is pellucidly clear (and most welcome) that a reviewing court is not to conduct its own statutory interpretation exercise to establish a benchmark or yardstick against which to measure an administrative decision-maker's interpretation of law,<sup>110</sup> the finer details are murky. On the one hand, the reader is told: "Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case".<sup>111</sup> On the other hand, a few paragraphs later, the administrative decision-maker's task is said to be to "interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue".<sup>112</sup> That looks awfully like a "formalistic statutory interpretation exercise", one which judges suspicious of an administrative decision-maker's ability to issue interpretations of law might well require. I hope such judges take particular note of the majority's insistence that sometimes an administrative decision-maker need "touch upon only the most salient aspects of the text, context or purpose".<sup>113</sup> But there is a risk that many anti-deference judges will fasten upon the emphasis on text, context and

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<sup>108</sup> As Professor McHarg observes, there is no "general presumption either for or against the legitimacy of administrative rule-making", but the no-fettering principle operates instead "as a means of judicial control over the *degree of structuring* of discretion that is appropriate in particular contexts". Aileen McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 *Current Legal Problems* 267, at p. 273. See further Daly, "Waiting for Godot", *supra* note 64, at pp. 49-50.

<sup>109</sup> See generally *British Oxygen Co. Ltd v. Minister of Technology* [1971] A.C. 610 and *Thamotharem v. Canada (Minister of Citizenship and Immigration)* [2008] 1 F.C.R. 385 and see, for examples of permissible fettering, *Wetzel v. District Court of New South Wales* (1998) 43 N.S.W.L.R. 687; *R v. Nottingham City Council, ex parte Howitt* [1999] C.O.D. 530; *R v. Chief Constable of South Yorkshire Police ex parte LS* [2004] 1 W.L.R. 2196, at paras. 58-60; *R (Nicholds) v. Security Industry Authority* [2007] 1 W.L.R. 2067; and *My Noodle Ltd v. Queenstown Lakes District Council* [2010] N.Z.A.R. 152.

<sup>110</sup> *Vavilov*, at para. 124.

<sup>111</sup> *Vavilov*, at para. 119.

<sup>112</sup> *Vavilov*, at para. 121.

<sup>113</sup> *Vavilov*, at para. 122.

purpose to constrain administrative interpretations of law. Here, I would wholeheartedly endorse the approach set out by Abella and Karakatsanis JJ.<sup>114</sup>

**Fifth**, *Vavilov* was a case where reasons were “available and required”.<sup>115</sup> Not very fulsome reasons, but reasons nonetheless. In such cases, the direction to begin with the administrative decision-maker’s reasons is easy to follow. But in other cases, where reasons are sparse or non-existent, deferential review will be harder to conduct. The majority is quite open about this: “it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker’s reasoning process”.<sup>116</sup> In general, most administrative decision-makers now provide reasons as a matter of course. But this will not always be the case. Going forward, the absence of reasons, or presence of sparse reasons, may function as an invitation to reviewing courts to conduct an outcome-focused assessment of the decision, in which substitution of judgment is an ever-present risk. Abella and Karakatsanis JJ admonish that, in such scenarios, “a reviewing court should remain focussed on whether the decision has been shown to be unreasonable”,<sup>117</sup> but the majority seems to have little patience with non-existent and sparse reasons, consistent with its emphasis on the primacy of reasoned decision-making.

**Sixth**, the majority rejects the suggestion of the *amici* that reviewing courts should engage in correctness review whenever there is “persistent discord” on an issue within an administrative decision-making body.<sup>118</sup> The majority accepts that situations in which the outcome of the administrative process depends on the identity of the administrative decision-maker an individual happens to encounter are not tolerable. Mindful, though, of the “practical difficulties” of identifying exactly when and where disagreement within an administrative decision-making body has risen to the level of “persistent discord”, the majority’s view is that recognizing a correctness category would be inappropriate.<sup>119</sup> Rather, “the more robust reasonableness review” enunciated in *Vavilov* would be an adequate safeguard against the risk of intolerable arbitrariness, “guarding against threats to the rule of law” created by inconsistent outputs from the administrative process.<sup>120</sup> That said, citizens “are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity

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<sup>114</sup> *Vavilov*, at paras 306-311.

<sup>115</sup> *Vavilov*, at para. 78.

<sup>116</sup> *Vavilov*, at para. 138.

<sup>117</sup> *Vavilov*, at para. 312.

<sup>118</sup> *Vavilov*, at para. 71. See generally *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, [2015] 4 F.C.R. 467, reversed 2016 SCC 29, [2016] 1 S.C.R. 770.

<sup>119</sup> *Vavilov*, at para. 72.

<sup>120</sup> *Vavilov*, at para. 72.

of the individual decision maker”.<sup>121</sup> Accordingly, “[w]here a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons”.<sup>122</sup> In my view, the majority reasons respond adequately – impeccably, indeed – to the risk of administrative inconsistency. Recognizing a category of correctness review would have been too radical a step. Rather, the majority confirmed, in clear terms, what many of us had supposed to be the case, namely that departures from previous administrative decisions have to be justified.<sup>123</sup> Quite how this will work out in areas of mass adjudication, such as immigration law, remains to be seen, however. There is the ever-present possibility that clever counsel will band together to create databases of decisions which can subsequently be brandished as evidence of administrative inconsistency requiring justification on the part of the decision-maker concerned. And the reference to the “legitimate expectations of the parties” in connection with administrative consistency will no doubt be repeated with great force in lower courts throughout the land.<sup>124</sup>

### C. Summary

In terms of reasonableness review, the changes wrought by *Vavilov* are less significant than the changes to the selection of the standard of review, though they may be consequential. In *Vavilov* the Supreme Court came down quite firmly on the side of hands-on reasonableness review (as exemplified by *Delta Air Lines*) rather than hands-off reasonableness review (as exemplified by *Newfoundland Nurses*), especially in its insistence that deference is to be founded in reasoned decisions and demonstrable expertise. In one sense, this is not a significant change: I would argue that, read properly, *Newfoundland Nurses* was not a blank cheque for administrative decision-makers and that the line of cases permitting ex post rationalizations of defective reasons was to be treated with caution. In another sense, Supreme Court confirmation that exercises of state power must be justified pursuant to a “robust” reasonableness standard, accompanied by equivocal guidance on jurisdictional error and statutory interpretation, may lead reviewing courts to more intensive scrutiny of administrative decisions. The clear requirement to start with the reasons for decision and work from there to a conclusion of

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<sup>121</sup> *Vavilov*, at para. 129.

<sup>122</sup> *Vavilov*, at para. 131, emphasis original.

<sup>123</sup> Paul Daly, “The Principle of Stare Decisis in Canadian Administrative Law” (2015) 49 RJTUM 757.

<sup>124</sup> *Vavilov*, at para. 131. My view has long been that although the Supreme Court has purported to rule out the enforceability of substantive legitimate expectations (*Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281), reasonableness review performs similar functions to a doctrine of legitimate expectation. See Paul Daly, “A Pluralist Account of Deference and Legitimate Expectations” in Matthew Groves and Greg Weeks eds., *Legitimate Expectations in the Common Law World* (Hart Publishing, Oxford, 2017).

unreasonableness should stand in the way of overly aggressive review. *Vavilovian* reasonableness review seems to be inherently deferential, as I have argued. But only time will tell whether, with the benefit of hindsight, *Vavilov* is indeed “a eulogy for deference”, as Abella and Karakatsanis JJ. charge.<sup>125</sup>

The tensions evident in the majority’s reasons in *Vavilov* will have to be worked out in future cases. Judicial review hawks might resolve them in different ways to judicial review doves. Again, the consensus may not hold; the *Vavilov* coalition may fracture, with different members emphasizing different aspects of *Vavilov*. What lower courts do with these tensions will be fascinating and may soon portend just how effectively the *Vavilov* framework will achieve the majority’s goals of increased clarity and predictability.

### III. Precedent

The *Vavilov* framework is intended to be a clear break with the past: “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”.<sup>126</sup> Given the reformulations effected in *Vavilov*, some precedents will now carry less force: decisions on jurisdictional questions or statutory appeal mechanisms, for instance, will be henceforth of little relevance.<sup>127</sup> Prior decisions on overlapping jurisdiction, by contrast, will continue to be relevant.<sup>128</sup> The majority suggests, or perhaps expresses the hope, that the Supreme Court’s jurisprudence on questions of central importance to the legal system will “continue to apply essentially without modification”.<sup>129</sup> We will see about that.

More ominously, the majority acknowledges that retrofitting precedents to the *Vavilov* framework “may” require reviewing courts to “resolve subsidiary questions” about the compatibility of prior decisions with the new framework.<sup>130</sup> There is, again, a suggestion/expression of hope that the Supreme Court’s precedents will “continue to provide helpful guidance”.<sup>131</sup> But the majority — to its credit — appreciates that matters will not always be so simple: “Where a reviewing court is not certain how these reasons relate to the case before

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<sup>125</sup> *Vavilov*, at para. 201.

<sup>126</sup> *Vavilov*, at para. 143.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

it, it may find it prudent to request submissions from the parties on both the appropriate standard and the application of that standard”.<sup>132</sup>

I can already think of several Supreme Court precedents whose status will soon have to be clarified. **First**, the Supreme Court insisted in *Canada (Citizenship and Immigration) v. Khosa*,<sup>133</sup> that even though the *Federal Courts Act* sets out detailed *grounds* of review of review of federal administrative decision-makers, these grounds must be read in light of the common law *standards* of review. So, where the *Federal Courts Act* states in section 18.1(4)(c) that a remedy can be granted where an administrative decision-maker “erred in law in making a decision or an order”,<sup>134</sup> it states a *ground* of review, but the *standard* of review is the common law standard of reasonableness. The reasoning in *Khosa* was compelling and remains so.<sup>135</sup> Indeed, the majority in *Vavilov* cites to *Khosa*<sup>136</sup> and implicitly relies on the grounds/standard distinction in setting out its test for legislative displacement of the common law: “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”.<sup>137</sup> Although I am sure that the status quo ought to prevail, I am also sure that the compatibility of *Khosa* with the *Vavilov* framework will soon be called into question.<sup>138</sup>

**Second**, in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*,<sup>139</sup> the Supreme Court recognized an exception to the presumption of reasonableness review in respect of judicial review of the Copyright Board. Because copyright questions may equally be raised in judicial review proceedings (where reasonableness would presumptively be the standard) or at first-instance (where questions of law would be answered

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<sup>132</sup> *Vavilov*, at para. 144.

<sup>133</sup> 2009 SCC 12, [2009] 1 S.C.R. 339 [*Khosa*].

<sup>134</sup> R.S.C. 1985, c. F-7.

<sup>135</sup> Paul Daly, “Canada’s Bipolar Administrative Law: Time for Fusion” (2014) 40 Queen’s L.J. 213.

<sup>136</sup> *Vavilov*, at para. 34.

<sup>137</sup> *Vavilov*, at para. 35, emphasis added.

<sup>138</sup> See also *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41. At issue here was the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s 365, s. 34, which expressly restricts the application of the grounds of review set out in the *Federal Courts Act* to decisions of the Federal Public Sector Labour Relations and Employment Board. Only jurisdictional error, procedural unfairness and bad faith are grounds of review. Error of law, for instance, is not a ground of review. Here, the Board argued as an intervener that s. 34 eliminated *any* review for error of law, on the reasonableness or correctness standard. Gleason J.A. rejected the Board’s arguments (at paras. 23-33). They were also “roundly rejected” (at para. 16) by the parties to the matter before the Board. It is therefore unlikely that the issue will be relitigated. Nonetheless, it could legitimately be revisited in light of the stern injunction in *Vavilov* to respect “institutional design” choices which manifest themselves in a legislated standard of review framework.

<sup>139</sup> 2012 SCC 35, [2012] 2 S.C.R. 283 [*Rogers*].

*de novo* by the trial judge), Rothstein J. reasoned that decisions of the Board on issues of copyright law must be subject to correctness review in all circumstances to ensure coherence.

Under the *Vavilov* framework the standard of review of decisions of the Board would presumptively be reasonableness, as there is no right of appeal from decisions of the Board. Copyright questions would perhaps now fall within the category of questions of central importance to the legal system, being ones which “require a single determinate answer”.<sup>140</sup> But this was not the basis on which Rothstein J. proceeded in *Rogers*, underscoring that the reformulated central questions category is broader than the previous one. It might also be possible to invoke the rule of law to justify the creation of a new categorical exception to the presumption of reasonableness review, though it is doubtful that the Canadian legal system would be rent asunder by the mere possibility of conflict between a judicial review of the Board and a first-instance decision on an issue of copyright law. There is no doubt, however, that this point will be litigated, probably sooner rather than later.

**Third**, in *Tervita Corp. v. Canada (Commissioner of Competition)*, Rothstein J. struck again, holding that the standard of review was correctness because of a provision in the *Competition Tribunal Act* stating that a decision of the Tribunal is appealable as if “it were a judgment of the Federal Court”.<sup>141</sup>

Under the *Vavilov* framework, the holding in *Tervita* would be the same, because there is an *appeal* from the Tribunal to the Federal Court of Appeal, which would owe the Tribunal no deference on extricable questions of law. Where the status of *Tervita* is likely to be litigated is in cases which provide platforms for the argument that similar clauses provide for “appeals”. As the majority acknowledges, “[s]ome provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context”.<sup>142</sup> Arguably, the clause in *Tervita* was just that sort of clause. Nonetheless, it was enough to justify correctness review. *Tervita* thus will be a platform for inventive arguments that procedural legislative provisions create “appeals” for the purposes of the *Vavilov* framework. That said, the clause in the *Competition Tribunal Act* has no equivalent elsewhere on the statute book and perhaps *Tervita* will meet the same fate as *Alberta Teachers*, confined forevermore to its special facts.

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<sup>140</sup> *Vavilov*, at para. 62.

<sup>141</sup> 2015 SCC 3, at para. 38, [2015] 1 S.C.R. 161 [*Tervita*]

<sup>142</sup> *Vavilov*, at para. 51.

**Fourth**, consider the certified question regime in immigration law. Immigration decisions are subject to judicial review in the Federal Court. Under *Vavilov*, reasonableness will presumptively be the standard of review. From the Federal Court there is an appeal to the Federal Court of Appeal, but only on a certified question of law. What role should the Federal Court of Appeal play in immigration law post-*Vavilov*? Should it apply the appellate standard of review (presumably leaving questions of fact off the table as outside the “scope” of the appeal)?<sup>143</sup> Or should it also consider factual matters addressed by the Federal Court, as has been the case under Supreme Court authority such as *Baker v. Canada (Minister of Citizenship and Immigration)*<sup>144</sup> and *Kanthasamy v. Canada (Citizenship and Immigration)*?<sup>145</sup>

**Fifthly**, there are Supreme Court precedents which license the “segmentation” of administrative decisions, parsing them into discrete pieces and applying different standards of review. In *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*,<sup>146</sup> Rothstein J. (again!) identified five distinct questions calling for five distinct standards of review.<sup>147</sup> Segmentation also occurred, albeit unacknowledged,<sup>148</sup> in *Mouvement laïque québécois v. Saguenay (City)*.<sup>149</sup> These precedents will support arguments that, on statutory appeals, questions of law can and should be extricated from the morass of factual issues, mixed questions of law and fact and discretionary and policy choices which ought to attract the palpable and overriding error standard.<sup>150</sup> As Abella and Karakatsanis JJ rightly comment, “the application of appellate law principles will inevitably create confusion by encouraging segmentation in judicial review”.<sup>151</sup> Given that *SODRAC* and *Saguenay* were judicial review cases, the argument will be — *a fortiori* — that their tolerance of segmentation should be applied in the appellate context.

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<sup>143</sup> *Vavilov*, at para. 37.

<sup>144</sup> [1999] 2 S.C.R. 817.

<sup>145</sup> 2015 SCC 61, [2015] 3 S.C.R. 909.

<sup>146</sup> 2015 SCC 57, [2015] 3 S.C.R. 615 [*SODRAC*].

<sup>147</sup> Paul Daly, “Curiouser and Curiouser: *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57” (26 November 2015), online (blog): *Administrative Law Matters* <[www.administrativelawmatters.com/blog/2015/11/26/curiouser-and-curiouser-canadian-broadcasting-corp-v-sodrac-2003-inc-2015-scc-57/](http://www.administrativelawmatters.com/blog/2015/11/26/curiouser-and-curiouser-canadian-broadcasting-corp-v-sodrac-2003-inc-2015-scc-57/)>.

<sup>148</sup> Paul Daly, “I Don’t Know: *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16” (16 April 2015), online (blog): *Administrative Law Matters* <[www.administrativelawmatters.com/blog/2015/04/16/i-dont-know-mouvement-laïque-quebécois-v-saguenay-city-2015-scc-16/](http://www.administrativelawmatters.com/blog/2015/04/16/i-dont-know-mouvement-laïque-quebécois-v-saguenay-city-2015-scc-16/)>.

<sup>149</sup> 2015 SCC 16, [2015] 2 S.C.R. 3 [*Saguenay*].

<sup>150</sup> Whither, also *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, applying aspects of the judicial review framework to arbitration appeals? Given that its authority has already been chipped away at (*Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23) the law in this area may soon return to the status quo ante.

<sup>151</sup> *Vavilov*, at para. 252.

Finally, there may be particular precedents which administrative decision-makers or courts may wish to revisit. From an administrative decision-maker's perspective, it is permitted to depart from a prior judicial decision if it is "able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context".<sup>152</sup> Some displeased with previous judicial interference in their regulatory domains may wish to take up this clear invitation. From the courts' perspective, there are no doubt many sector-specific decisions on the meaning of reasonableness review in particular regulatory settings which judges will be called upon to reconsider at the behest of counsel who are displeased (for one reason or another) with past decisions. This is necessarily vague but those who practice in particular areas will have their own particular bugbears and will surely use the rolling out of the *Vavilov* framework as an opportunity to eliminate or modify them.

#### IV. Remedial Discretion

Despite occasional suggestions to the contrary, remedial discretion is a key feature of contemporary administrative law.<sup>153</sup> In *Vavilov*, the majority discussed the issue at surprising length — surprising because although remedial discretion is by now a well-developed phenomenon, it is rarely the subject of detailed discussion.

The majority set out a variety of factors which are influential in the exercise of remedial discretion:

Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources...<sup>154</sup>

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<sup>152</sup> *Vavilov*, at para. 112.

<sup>153</sup> See e.g. Christopher Forsyth, "The Rock and the Sand: Jurisdiction and Remedial Discretion" [2013] J.R. 360 but see *Harelkin v. University of Regina* [1979] 2 S.C.R. 561, at p. 576; *State (Cussen) v. Brennan* [1981] I.R. 181, at p. 195; *Seal v. Chief Constable of the South Wales Police* [2007] 1 W.L.R. 1910, at para. 33; *Walton v. Scottish Ministers* [2013] Env. L.R. 16, at paras. 81 (Lord Reed), 103 and 112 (Lord Carnwath) and 155-156 (Lord Hope); and *R (New London College) v. Secretary of State for the Home Department* [2013] 1 W.L.R. 2358, at paras. 45-46.

<sup>154</sup> *Vavilov*, at para. 142.

The particular aspect discussed in *Vavilov* is the discretion of reviewing court which has quashed an administrative decision to “remit the matter to the decision maker for reconsideration with the benefit of the court’s reasons”.<sup>155</sup>

Remitting the matter will “most often”<sup>156</sup> be the appropriate course of action, as “the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide”.<sup>157</sup> Considerations of efficient and effective administration will also be relevant<sup>158</sup> and although these will typically also militate in favour of remitting a matter for fresh consideration by a specialized, expert decision-maker, there are “limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters”.<sup>159</sup> It may, for instance, not be appropriate to remit where “it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose”.<sup>160</sup>

There is nothing particularly objectionable about any of this. Indeed, it is salutary to have remedial discretion out in the open, as a subject of discussion, rather than exercised (as is often the case) in a conclusory fashion without much analysis.

That said, the discussion in *Vavilov* falls short in two respects. The *first* is that the framework for exercising remedial discretion does not really follow from any set of guiding principles. The majority says “the choice of remedy must be guided by the rationale for applying that standard to begin with”.<sup>161</sup> But given that the selection of the standard of review is now based on a context- and nuance-free assessment of whether the legislature created a right of appeal or not, it is difficult to identify a “rationale” which can offer much assistance to a judge struggling to decide whether to remit a matter or not. There is a much richer, principle- and value-laden analysis in *D’Errico v. Canada (Attorney General)*,<sup>162</sup> a case to which the majority cites, and which emphasizes the important additional factor — glossed over by the majority — of the rights of the individual who has been deprived of a benefit s/he is entitled to. Perhaps in the future *D’Errico* will get more attention.

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<sup>155</sup> *Vavilov*, at para. 139.

<sup>156</sup> *Vavilov*, at para. 140.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> *Vavilov*, at para. 142.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Vavilov*, at para. 140.

<sup>162</sup> 2014 FCA 95 [*D’Errico*].

The *second* is the failure to appreciate that exercises of judicial discretion can have systemic consequences. If judicial willingness to quash decisions for unreasonableness is combined with judicial unwillingness to remit matters to the administrative decision-makers whose responsibility it is to address them, the result will be to transfer decisional authority from administrative decision-makers to the courts. Over time there is even a risk that administrative decision-makers will come to take their responsibilities less seriously, in the knowledge that if any problems arise the courts will sort them out in due course. By contrast, if matters are routinely remitted, the effect will be very quickly to make clear to administrative decision-makers that they really have to get it right first time. Otherwise, the matters will keep returning to their desks, embossed with a judicial stamp to the effect of “not good enough”. Where the discussion in *Vavilov* is lacking is in its failure to appreciate the systemic consequences of exercises of judicial discretion. Ordinarily, the application of robust reasonableness review should lead to decisions regularly being remitted, given the majority’s warning about ex post facto supplementation of sparse administrative decisions, as it will rarely be possible for a reviewing court to refuse to remit a sparse decision without engaging in extensive supplementation.<sup>163</sup> Of course, the law here will have to be built from the ground up<sup>164</sup> and lower courts may pay more attention to the systemic consequences of exercises of judicial discretion than the majority did in *Vavilov*. But again, only time will tell.

## Conclusion

On the merits, *Vavilov* and *Bell Canada/NFL* were successful. *Vavilov* convinced the Supreme Court that the Registrar of Citizenship’s decision was unreasonable. Having regard to the text, purpose and context of para. 3 of the Citizenship Act, as well as Canada’s international law obligations, it was unreasonable to conclude that the Canadian-born “children of individuals who have not been granted diplomatic privileges and immunities” are excluded from Canadian citizenship. There being no question that *Vavilov*’s undercover-agent parents benefitted from diplomatic privileges and immunities, there was no basis for the Registrar to revoke his citizenship. *Abella* and *Karakatsanis JJ.* agreed with this conclusion, for substantially similar reasons.

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<sup>163</sup> Cf. the comment in *Vavilov*, at para. 138 “it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker’s reasoning process”. But this comment is directed to a scenario in which reasons have not been provided at all (sometimes understandably so: para. 137) and would not warrant supplementation and/or refusal to remit in a case where reasons (however sparse) had been provided.

<sup>164</sup> Thanks to Brendan van Niejenhuis for making this point.

The discussion of the remedy in *Vavilov* itself is somewhat curious. Recall that Vavilov's citizenship certificate was revoked. In the Federal Court of Appeal, the Registrar of Citizenship's decision was quashed. The effect was to restore the status quo ante, with Vavilov's citizenship certificate unrevoked. There was therefore no need at all for the Supreme Court to consider whether to remit the matter. There was simply nothing left to remit. Indeed, the Supreme Court's disposition of the appeal left the Federal Court of Appeal's order intact. Any talk of remitting a decision was entirely unnecessary. Of course, Vavilov might run into the Registrar of Citizenship again at some point, and the Registrar will have to carefully read the decision in *Vavilov*. But there was nothing to "remit".<sup>165</sup>

Under the *Vavilov* framework, matters in *Bell Canada/NFL* were more straightforward. Section 31 of the Broadcasting Act provides for an appeal, with leave, on questions of law or jurisdiction, from orders of the CRTC, to the Federal Court of Appeal.<sup>166</sup> As the question of whether the CRTC had the authority to target a specific programme in its order "plainly" fell "within the scope of the statutory appeal mechanism",<sup>167</sup> the standard of review was correctness. The same majority from *Vavilov* concluded that the authority under the statutory provision the CRTC invoked "is limited to issuing orders that require television service providers to carry specific channels as part of their service offerings, and attaching [general] terms and conditions..."<sup>168</sup> In dissent, Abella and Karakatsanis JJ. refused to follow the *Vavilov* framework. Applying reasonableness review to what they described as "an archetype of an expert administrative body",<sup>169</sup> they found nothing to exclude the possibility that CRTC orders "could relate to a single program in this context".<sup>170</sup>

The most concrete outcome of the Trilogy, therefore, is that Vavilov's Canadian citizenship is secure and that the 2020 Super Bowl will feature Canadian advertisements during the Half Time Show. As to whether activity will cease on the never-ending construction site of Canadian administrative law, only time will tell.

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<sup>165</sup> This may seem like a technical point but it is in fact fundamental. Moreover, it underscores the absence of guiding principles in the majority's discussion of remedial discretion. Two principles or values are at play: Vavilov's autonomy and the Registrar's freedom to manage the area of regulation assigned to her by Parliament. A "remit" compromises Vavilov's autonomy. For ordinarily it is up to him to decide whether to make any request of the Registrar or any other official. Equally, a "remit" infringes upon the Registrar's use of her resources, adding another task to her in-tray.

<sup>166</sup> See further *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573, at paras. 20-28.

<sup>167</sup> *Bell Canada*, at para. 35.

<sup>168</sup> *Bell Canada*, at para. 44.

<sup>169</sup> *Bell Canada*, at para. 83.

<sup>170</sup> *Bell Canada*, at para. 93.

*Vavilov* represents a commendable effort to comprehensively address two issues, namely the selection of the standard of review and the application of the reasonableness standard, which have plagued Canadian administrative law for decades. There is much to like in *Vavilov*, great chunks of which resemble the scholarly and judicial advice provided to the Supreme Court over the last decade. Significantly, judges with divergent views on the rule of reviewing courts in administrative law cases formed a coalition coalescing around a new framework.

Read holistically, the majority reasons setting out the *Vavilov* framework have something for everyone. When the reformulation of reasonableness review is placed alongside the rearticulation of the framework for selecting the standard of review, some fascinating antimonies emerge. Although contextual factors have been swept away from the selection of the standard of review, they are central to the approach to reasonableness review articulated by the majority. Whereas the brute fact of a legislative choice to create an administrative decision-maker is sufficient to create an almost irrebuttable presumption of reasonableness review, in its articulation of reasonableness review, the majority emphasizes the need for reasons to be “responsive”<sup>171</sup> and stresses “the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it”<sup>172</sup> with legitimacy flowing ultimately from the reasoned exercise of authority granted by legislation, not the mere fact of its existence. The thin conception of the rule of law underpinning the selection of the standard of review strikes a contrast with the conception (albeit implicit) of the same concept which animates robust and responsive reasonableness review. And expertise is irrelevant to selecting the standard of review but the “*demonstrated* experience and expertise” of an administrative decision-maker will help to support the conclusion that a given decision was reasonable.<sup>173</sup>

But the *Vavilov* framework leads occasionally to unusual consequences. Some tribunals previously considered to be expert will be due less deference than decision-makers whose claim to expertise is much less compelling. The trilogy provides an example: the Registrar of Citizenship is entitled to more deference than the CRTC on questions of law. By any standard, that is an unusual consequence. Even the Competition Tribunal, with its cohort of judges, would get less deference in the *Vavilov* framework than the Registrar, or for that matter, a part-time adjudicator hearing appeals from roadside policing decisions in British Columbia.

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<sup>171</sup> *Vavilov*, at para. 127, 133.

<sup>172</sup> *Vavilov*, at para. 95.

<sup>173</sup> *Vavilov*, at para. 93, emphasis added.

In *Vavilov*, comprehensive though it was, some important issues were left unaddressed. Confusion continues to reign in respect of judicial review of delegated legislation. Whilst correctness remains the standard on constitutional questions, I expect that there will be some pressure for *Doré v. Barreau du Québec*<sup>174</sup> to be partly or wholly assimilated to the category of questions of central importance and/or the constitutional questions category but *Doré* is safe for now.<sup>175</sup> As for procedural fairness, the *Baker* factors should continue to govern.<sup>176</sup> Lastly, there was no attempt to change the appellate standard of review set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*.<sup>177</sup> I expect there will be some pressure for change here. If palpable and overriding error is the standard for appellate intervention on regulatory determinations of fact and exercises of discretion, there will be pressure for similar light-touch appellate review to be exercised in appeals of first-instance judicial review decisions.<sup>178</sup>

These unusual consequences and unaddressed issues suggest that the *Vavilov* framework is one based on pragmatism, not principle, developed by a group understandably interested more in consensus than coherence. Indeed, I would argue that pragmatism was the name of the majority's game in *Vavilov*. Whereas in *Dunsmuir* the standard of review was seen as a crucible in which the clash between the principles of the rule of law and democracy forged detailed

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<sup>174</sup> 2012 SCC 12, [2012] 1 S.C.R. 395 [*Doré*].

<sup>175</sup> *Vavilov* was prayed in aid of an application of correctness review by the Ontario Court of Appeal in *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025, at para. 37, per Sharpe J.A.:

The issue before the decision maker was whether the *Dagenais/Mentuck* test had a bearing on the discretionary decision he had to make. That is not the same as the issue presented in *Doré*...of how the s. 2(b) *Charter* right impacted or affected the discretionary decision he had to make. The decision maker did not reach the point of factoring the *Dagenais/Mentuck* test into his discretionary decision because he decided that it did not apply. A reasonableness standard assumes a range of possible outcomes all of which are defensible in law: see *Vavilov*, at para. 83. That standard is inappropriate here. The *Dagenais/Mentuck* test either applied or it did not

But 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*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 67, and on the scope of a *Charter* right, s. 2(a), *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at paras. 68-75. 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 *Charter* rights (or values). 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. Accordingly, and although I have long been critical of this aspect of *Doré*, I expect it will be longer before the compatibility of exercises of discretion with *Charter* rights is subsumed into the correctness categories.

<sup>176</sup> *Vavilov*, at para. 23.

<sup>177</sup> 2013 SCC 36, [2013] 2 S.C.R. 559.

<sup>178</sup> Again, this assumes that palpable and overriding error is indeed a more deferential standard than *Vavilovian* reasonableness review, which ultimately is an empirical question.

doctrinal rules, in *Vavilov* principle is almost entirely absent. The *Dunsmuir* principles are retained<sup>179</sup> but they exercise little discernible influence over the *Vavilov* framework. In terms of selecting the standard of review, institutional design is invoked as a master principle. But if it is a principle, it is a very thin one. Principle is largely absent from the majority's articulation of a methodology for reasonableness review. Some principles are mentioned, admittedly.<sup>180</sup> It is not obvious, however, how the core propositions set out by the majority and accepted by the concurring judges flow from these or any other principles. They read, rather, like a pragmatic attempt at shaping Supreme Court precedent into a workable approach to reasonableness review. As for the contextual factors enunciated as guides to the application of the reasonableness standard, it is again far from obvious how they relate to or can be said to follow from general principles. As for remedial discretion, here some principles appear. But they are not the *Dunsmuir* principles, they are not the principles invoked in the majority's articulation of reasonableness review and they bear no resemblance to the institutional design principle around which the selection of the standard of review is said to revolve.

*Vavilov* might be said, then, to represent the triumph of pragmatism over principle. And this may be no bad thing. Nothing succeeds like success, after all. But will the majority reasons in *Vavilov* prove robust enough to provide a stable framework for Canadian administrative law? In my analysis of the *Vavilov* framework I identified some tensions and technical details which will have to be resolved or clarified in future cases, either by the Supreme Court or by lower courts. Here are my top ten:

- Will the correctness categories, especially the 'general questions of central importance to the legal system' category, be narrowly construed?
- Will correctness review be embraced where an appeal has been provided for, or will judges continue to defer to expert agencies, either by giving significant weight to administrative interpretations of law or by classifying them as questions of mixed law and fact calling for deferential review?
- Will courts welcome the possibility, especially on appeals, of segmenting administrative decisions into questions calling for correctness review and other questions calling for deferential review?

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<sup>179</sup> *Vavilov*, at para. 2.

<sup>180</sup> *Vavilov*, at paras 74, 95, 127, 133.

- Will the bar for judicial intervention on the reasonableness standard be the absence of “justification, transparency and intelligibility” or the presence of “serious shortcomings” in the administrative decision?
- Will reviewing courts refuse to supplement sparse administrative decisions?
- Will the “elements” of reasonableness review be treated as a box-ticking exercise or a guide to a holistic assessment of the reasonableness of a decision?
- Will the majority’s contextual considerations be treated as a laundry list of factors permitting immediate judicial intervention or (again) a guide to a holistic assessment of reasonableness?
- Will questions of statutory interpretation and questions which are arguably jurisdictional attract something akin to correctness review?
- Will courts tend towards substitution of judgement and/or refusal to remit in cases where reasons for an administrative decision are sparse or non-existent?
- Will the retrofitting of precedents to the *Vavilov* framework lead to more or less intrusive review?

Some of these are essentially technical issues which will lend themselves to pragmatic resolution. Most, however, are more ideologically charged issues on which a judge will be influenced by his or her own view of the legitimacy of administrative decision-making and which might therefore cause the *Vavilov* majority coalition to fracture and lower courts to diverge in their uses of the *Vavilov* framework. In that respect, principled guidance from the Supreme Court might have been helpful.

Of course, *all* of these issues, tensions and sources of pressure *might* be addressed, resolved and removed in a pragmatic fashion. The consensus memorialized in the *Vavilov* framework might be welcomed to such an extent that judges put their principled disagreements about Canadian administrative law to one side. This is certainly a possibility, especially if the pragmatic message from 301 Wellington Street is enthusiastically received elsewhere in Canada. In truth, it is impossible to be certain about what will happen next. The *Vavilov* framework represents a consensus (for the most part) on the Supreme Court and, probably, a consensus in Canada’s legal community. The important question is whether the consensus will survive.