

CASE COMMENT ON  
*CANADA (MINISTER OF CITIZENSHIP  
AND IMMIGRATION) V. VAVILOV*

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I. INTRODUCTION

Leading up to the release of the Supreme Court of Canada's roughly decennial overhaul of administrative law's standards of review, one could be forgiven for thinking *Canada (Minister of Citizenship and Immigration) v. Vavilov* would be the latest marker in the inexorable march towards the death of correctness review and the establishment of reasonableness as the only standard of review for all administrative decisions.<sup>1</sup> Instead, *Vavilov* delivered a smorgasbord of tweaks, clarifications, and statements of principle, and likely sent law students and lawyers alike running to their dictionaries to look up the definition of "encomium."<sup>2</sup> *Vavilov*, a decision unanimous in the result but with two sets of reasons on how to get there, presents a clear and spirited debate over the foundations of administrative law, focusing most strongly on the standard of review analysis, while also providing much-needed clarity in conducting reasonableness review.

At the end of it all, however, *Vavilov* is more pragmatic than principled, though, as will be discussed, certainly not *unprincipled*. Both sets of opinions address the need for clarity in administrative law and decision-making, which, as the majority notes, is "one of the principal manifestations of state power in the lives of Canadians."<sup>3</sup> In the selection of standard of review, the majority opinion represents a largely effective effort at bringing clarity, coherence, and predictability to administrative law. The majority reaffirms a blanket presumption of deference, subject to exceptions where legislative intent or the rule of law require a standard of correctness, including statutory rights of appeal and questions of central importance to the legal system. Where the concurring justices differ from the majority, it is because their desire for pragmatism runs into the boundaries of their principles. This is evident in two disagreements over the standard of review analysis. The majority eliminates *all* case-by-case examination of expertise at this stage and also creates a presumption that statutory rights of appeal lead to appellate standards of review. These rules are clear, coherent, and predictable. But they are also too much for the concurring justices, who are unwilling to sacrifice deference to determinations of questions of law within an administrative decision-maker's expertise and unwilling to inflexibly apply *Housen v. Nikolaisen*<sup>4</sup> whenever the word "appeal" pops up in a statute, merely for the sake of consistency. The concurring justices would, like the majority, eliminate the contextual factors analysis and the correctness category of "true questions of jurisdiction," but they would only allow for correctness in the three remaining categories from *Dunsmuir v. New*

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

<sup>2</sup> See *ibid* at para 201. Per *Merriam-Webster*, an encomium is an expression of "glowing and warmly enthusiastic praise": see *Mirriam-Webster*, online: <merriam-webster.com/dictionary/encomium> sub verbo "encomium."

<sup>3</sup> *Vavilov*, *ibid* at para 4.

<sup>4</sup> 2002 SCC 33.

*Brunswick*: (1) constitutional questions; (2) questions of law of central importance to the legal system that are outside the decision-maker's specialized area of expertise; and (3) questions about jurisdictional lines between tribunals.<sup>5</sup>

The majority's approach to reasonableness review is also eminently pragmatic; it sets out a two-part framework for assessing reasons, along with a list of legal and factual constraints which a decision must generally respect. The majority instructs reviewing courts to first read the decision-maker's reasons with respectful attention, then decide whether the decision is holistically reasonable, taking into account whether the reasons are internally coherent and justified in light of the factual and legal background. This framework is easy to understand and easily reproducible. However, the concurrence disagrees with the form — though not the substantive *idea* of holistic review — insisting that holistic review of administrative decisions precludes recourse to any sort of list, such as the majority's list of common legal and factual restraints (presumably for fear of summoning the evil spirit of *Anisminic v. Foreign Compensation Commission*<sup>6</sup> and the legion of jurisdictional errors). The concurrence would merely continue to preach deference in three forms: as an attitude of the court towards administrative actors, as a way of framing the question to be answered when conducting judicial review, and as placing the onus on the applicant seeking judicial review to demonstrate that the decision is unreasonable.<sup>7</sup>

However, after a decade of navigating the tension between *Dunsmuir*'s joint principles of legislative supremacy and the rule of law, *Vavilov*'s majority ought to be commended — if for nothing else, then at least for their responsiveness to numerous requests for clarity and simplicity. For all the issues to be addressed, it cannot be said that the field of administrative law is less clear than before. The majority's approaches to accounting for expertise, interpreting statutory rights of appeal, and conducting reasonableness review itself represent principled and pragmatic changes and clarifications in the field of administrative law.

## II. BACKGROUND

The facts of *Vavilov* are (quite literally) the stuff of television.<sup>8</sup> Alexander Vavilov, born in Toronto in 1994, was the son of Russian spies posing as Canadians. In 2010, his parents were arrested in the United States and charged with espionage. After their arrest, Vavilov obtained a certificate of Canadian citizenship in 2013. In 2014, the Canadian Registrar of Citizenship cancelled this certificate based on her interpretation of section 3(2)(a) of the *Citizenship Act*, which prevents persons born in Canada from obtaining citizenship if his or her parents are “a diplomatic or consular officer or other representative or employee in

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<sup>5</sup> *Vavilov*, *supra* note 1 at para 282; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 58, 60–61 [*Dunsmuir*]. For readers unfamiliar with this area of law, *Dunsmuir* was the last instalment in the Supreme Court's roughly decennial review of this area of administrative law.

<sup>6</sup> Again, for the reader unfamiliar with the history of this area, *Anisminic v Foreign Compensation Commission*, [1969] 2 AC 147 (HL (Eng)) [*Anisminic*], was a landmark case decided in the House of Lords and adopted shortly thereafter by the Supreme Court in *Metropolitan Life Insurance Company v International Union of Operating Engineers, Local 796*, [1970] SCR 425, which begat the concept of “jurisdictional error” — an error, including simply misinterpreting an enabling statute or failing to take a single factor into account, that leads to the administrative decision maker completely losing jurisdiction to make the decision.

<sup>7</sup> *Anisminic*, *ibid* at paras 287–91.

<sup>8</sup> US television network FX aired a six-season show, *The Americans*, inspired in part by the facts of this case.

Canada of a foreign government.”<sup>9</sup> The Registrar concluded that because Vavilov’s parents were working for the Russian foreign intelligence service, this section must therefore apply.

Vavilov applied for judicial review of this decision in the Federal Court, which dismissed his application.<sup>10</sup> His appeal to the Federal Court of Appeal was successful.<sup>11</sup> The Minister of Citizenship and Immigration appealed to the Supreme Court. The Supreme Court granted leave to appeal with reasons indicating that it wished to review its previous ruling in *Dunsmuir*, and inviting the parties to provide submissions on this issue.<sup>12</sup>

### III. MAJORITY OPINION

The majority started by setting out the new framework for selecting the standard of review. The framework consists of a blanket presumption of reasonableness review which can be rebutted in two ways:

- (1) Legislative intent that a different standard applies demonstrated through either
  - (a) a statutorily prescribed standard of review; or
  - (b) a statutory appeal mechanism;
- (2) A standard of correctness required by the rule of law for certain categories of questions:
  - (a) constitutional questions;
  - (b) general questions of law of central importance to the legal system as a whole; and
  - (c) questions related to jurisdictional boundaries between two or more administrative bodies.

This framework finally removed the need for a “contextual inquiry” to determine the standard of review by creating a universal presumption, rebutted only by recourse to certain distinct categories.<sup>13</sup> The majority also confirmed that jurisdictional questions were no longer a distinct category of questions requiring correctness review.<sup>14</sup>

The majority then set out some guidance for how to perform reasonableness review:

- (1) A reviewing court should first examine the reasons with respectful attention.<sup>15</sup>

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<sup>9</sup> RSC 1985, c C-29, s 3(2)(a).

<sup>10</sup> *Vavilov v Canada (Citizenship and Immigration)*, 2015 FC 960.

<sup>11</sup> *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132.

<sup>12</sup> *Ibid*, leave to appeal to SCC granted, 37748 (10 May 2018).

<sup>13</sup> *Vavilov*, *supra* note 1 at para 17.

<sup>14</sup> *Ibid* at para 65.

<sup>15</sup> *Ibid* at para 84.

- (2) The reviewing court must then determine whether the decision is reasonable; this determination must take into account the reasoning process as well as the outcome. The majority identified two types of issues which may make a decision unreasonable:
- (a) The decision is not based on internally coherent reasoning.<sup>16</sup>
  - (b) The decision is not justified in light of the relevant legal and factual constraints.<sup>17</sup> Typical constraints that will be relevant to a decision include:
    - (i) the governing statutory scheme;
    - (ii) other statutory or common law;
    - (iii) principles of statutory interpretation;
    - (iv) the evidence before the decision-maker;
    - (v) the submissions of the parties;
    - (vi) past practices and decisions of the decision-maker; and
    - (vii) the impact of the decision on the affected individual.
- (3) If the decision is unreasonable, the reviewing court must decide whether to remit the decision for reconsideration. This will usually be appropriate, but may not be when a particular outcome is inevitable and remitting would serve no purpose or when other concerns apply, such as delay, fairness to the parties, and so on.

In applying the standard of review analysis to the facts, the majority determined that reasonableness review was appropriate. Upon review of the Registrar's decision, the majority determined that the decision was unreasonable, as the phrase "other representative or employee in Canada of a foreign government" only applies to individuals who have been granted diplomatic privileges and immunities in Canada as a result of their position.<sup>18</sup> Because Vavilov's parents did not have these privileges and immunities, section 3(2)(a) of the *Citizenship Act* did not apply to him. The majority held that the Registrar failed to justify her interpretation of the *Citizenship Act* in light of several constraints, including:

- the entire text of section 3 of the *Citizenship Act*;
- other legislation and international treaties that inform section 3's purpose;

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<sup>16</sup> *Ibid* at para 102.

<sup>17</sup> *Ibid* at para 105.

<sup>18</sup> *Ibid* at para 173.

- jurisprudence interpreting section 3(2)(a); and
- the potential consequences of her interpretation.<sup>19</sup>

The majority also determined that no purpose would be served by remitting the decision back to the Registrar and therefore declared Vavilov to be a Canadian citizen.<sup>20</sup>

#### IV. CONCURRING OPINION

Justices Abella and Karakatsanis, concurring, identified several areas of agreement with the majority: eliminating the contextual factors analysis, abolishing questions of true jurisdiction, and quashing the Registrar's decision for want of reasonable statutory interpretation. However, after starting with a paean for deference, the concurrence's tone quickly turned scathing, essentially chastising the majority for dismantling 40 years of hard work spent clarifying and operationalizing deference. After tracing the story of Canadian administrative law from A.V. Dicey to the present, the bulk of the legal analysis is in a section with the heading "The Majority's Reasons."<sup>21</sup> The concurrence argued that the majority gave insufficient weight to expertise,<sup>22</sup> returned to a court-centric conception of the rule of law,<sup>23</sup> misunderstood legislative intent,<sup>24</sup> and disregarded precedent and the principle of horizontal stare decisis.<sup>25</sup> The concurrence particularly decried the expansion of the "questions of central importance" category to include points of law within an adjudicator's expertise,<sup>26</sup> as well as the application of correctness review where a statutory right of appeal exists.<sup>27</sup>

Ultimately, however, the concurrence reached the same result as the majority: the Registrar's decision was unreasonable. The concurrence used identical reasoning to reach this conclusion, with the sole exception of omitting the consequences of the Registrar's decision.

#### V. ANALYSIS

Given the Supreme Court's history of regularly revisiting standard of review in administrative law, there is little reason to believe *Vavilov* marks a departure from the pattern of regular guidance coming from the Supreme Court. The majority decision does, however, provide *workable* frameworks for determining the standard of review and for conducting reasonableness review. While one might take issue with the principles underlying the majority's changes, it is more likely than not that if *Vavilov* is revisited in the future, it will not be because reviewing courts cannot consistently and easily apply it.

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<sup>19</sup> *Ibid* at para 172.

<sup>20</sup> *Ibid* at para 196.

<sup>21</sup> *Ibid* at para 230.

<sup>22</sup> *Ibid* at para 236.

<sup>23</sup> *Ibid* at para 241.

<sup>24</sup> *Ibid* at para 245.

<sup>25</sup> *Ibid* at para 254.

<sup>26</sup> *Ibid* at para 244.

<sup>27</sup> *Ibid* at para 245.

That being said, on each significant point of conflict with the concurrence, the majority also provided principled reasons for its changes. The removal of an adjudicator's expertise from determining questions of central importance puts the focus firmly on the rule of law and whether a court's generalist expertise is required to bring clarity and uniformity. The majority's treatment of statutory rights of appeal gives effect to clear statutory language and creates a bright-line rule with clear guidance for legislatures. And the majority's suggested framework for reasonableness review maintains an emphasis on holistic review of reasoning while creating an easily reproducible framework for reviewing courts.

This case comment aims to demonstrate, through examining three points of conflict between the majority and concurring opinions, that far from being unprincipled, the majority provides a simplified, justifiable approach to administrative law. This approach is based on principles that, rather than being jumbled together in a free-range contextual analysis and formless approach to reasonableness review, are each given due attention in specific places. Expertise finds due recognition in a presumption of reasonableness review and in the respectful attention paid to institutional context in reasonableness review itself. Legislative intent is respected in the explicit bright-line rule on which legislatures may now base their drafting.

#### A. THE ROLE OF EXPERTISE IN DETERMINING THE STANDARD OF REVIEW

The first point of conflict is the role of expertise in the standard of review analysis. Whereas a decision-maker's expertise relative to a reviewing court was once a factor in contextual analysis, the majority deemed this analysis no longer necessary.<sup>28</sup> The concurrence joins on this point.<sup>29</sup> For both sets of reasons, the focus of the standard of review framework is on legislative intent — namely, in a broad sense, whether the legislature intended for courts to defer to the administrative decision-maker.<sup>30</sup> The divergence occurs when determining *how* relative expertise relates to legislative intent. For the concurrence, the mere existence of specialized expertise indicates legislative intent towards deferential review — *even where there is explicit statutory language providing for appellate review*.<sup>31</sup> For the majority, it is the opposite — the mere fact of delegation *creates* inherent expertise in administrative bodies.<sup>32</sup> The default presumption of reasonableness review is premised only on legislative intent, but the majority recognizes a host of reasons — other than expertise — why a legislature might have chosen to delegate authority, including “the decision maker’s proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly and efficiently, and ability to provide simplified and streamlined proceedings intended to promote access to justice.”<sup>33</sup> However, perhaps most importantly, the majority maintains that expertise is not irrelevant, but rather forms part of the conceptual basis for a presumption of deference, along with other factors a legislature may consider.

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<sup>28</sup> *Ibid* at para 27.

<sup>29</sup> *Ibid* at para 200.

<sup>30</sup> *Ibid* at paras 23, 199.

<sup>31</sup> See *ibid* at para 216, citing *United Brotherhood of Carpenters and Joiners of America, Local 579 v Bradco Construction Ltd.*, [1993] 2 SCR 316 at 335 and *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 1722 at 1745–46.

<sup>32</sup> *Vavilov*, *ibid* at para 28.

<sup>33</sup> *Ibid* at para 29.

For this reason, the concurrence's accusation that "the majority reads out the foundations of the modern understanding of legislative intent in administrative law" reads as somewhat unfair.<sup>34</sup> The majority does, as the concurrence alleges, render *explicit* consideration of the above reasons for delegating authority unnecessary for reviewing courts. However, the majority's reason for doing so is to obviate the need for the contextual analysis — a goal with which the concurrence ostensibly agrees.

Given that the concurrence agrees with the majority's presumption of reasonableness review, it is not clear at first why the concurring justices take issue with the majority's treatment of expertise, other than that it "opens the gates to expanded correctness review."<sup>35</sup> The critique is largely theoretical. The only practical application the concurrence's insistence on considering expertise might have is to counter the majority's reformulation of the "questions of central importance" category. And, somewhat perplexingly, the concurrence uses only a single paragraph to address what seems to be the real issue it has with the majority's treatment of expertise.<sup>36</sup>

Whereas courts were previously only permitted to substitute their opinions on questions "of central importance to the legal system *and* outside the specialized expertise of the decision maker,"<sup>37</sup> the majority now allows correctness review on legal questions *within* a decision-maker's area of expertise.<sup>38</sup> The rationale is that "certain general questions of law 'require uniform and consistent answers' as a result of 'their impact on the administration of justice as a whole.'"<sup>39</sup>

The concurrence decries this choice as replacing "rule of law" with "rule of courts" and imposing "judicial hegemony over administrative decision-makers."<sup>40</sup> However, the concurrence falls short of addressing the majority's emphasis on uniformity, consistency, and legal certainty. An approach that balances legal consistency with administrative agility might have been more persuasive. Instead, the concurrence aims at dismantling judicial hegemony and flattening administrative and court-based justice systems with little attention to countervailing factors. These countervailing factors include, ironically, the same reasons the concurrence gives for upholding the principle of horizontal stare decisis in the Supreme Court's own decisions: "providing certainty as to what the law is, consistency that allows those subject to the law to order their affairs accordingly, and continuity that protects reliance on those legal consequences."<sup>41</sup> These types of reasons seemingly lie behind the majority's decision to impose correctness on certain general questions of law. Given the importance of certainty, consistency, and continuity to the rule of law in both the majority and concurring opinion, it is also clear that there is no disagreement over what the rule of law is, only what it *requires*.

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<sup>34</sup> *Ibid* at para 230.

<sup>35</sup> *Ibid* at para 239.

<sup>36</sup> See *ibid* at para 244.

<sup>37</sup> *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 28.

<sup>38</sup> *Vavilov*, *supra* note 1 at para 58.

<sup>39</sup> *Ibid* at para 59, citing *Dunsmuir*, *supra* note 5 at para 60.

<sup>40</sup> *Vavilov*, *ibid* at paras 241, 243.

<sup>41</sup> *Ibid* at para 281.

There is, perhaps, another way of thinking about expertise under the new framework. Although this is not a part of the majority's reasoning, the majority's framework can be seen as collapsing into one the separate requirements of central importance to the legal system and being outside the decision-maker's area of expertise. Where the concurrence accuses the new framework of "authorizing more incursions into the administrative system by generalist judges," this may be a feature, not a bug.<sup>42</sup> The types of questions the majority contemplates as falling under this category could be seen as requiring the expertise of a generalist — someone trained in thinking about the legal system as a whole. Questions that are truly of central importance to the legal system are *necessarily* outside the specialized expertise of an adjudicator, as they require some detachment from the particular context of a single administrative regime. In other words, the concept of expertise is not entirely removed from the standard of review analysis — the focus merely shifts from the relative specialized expertise of administrative decision-makers to the relative generalized expertise of judges.

Rather than "pervert[ing] the purpose of establishing a parallel system of administrative justice,"<sup>43</sup> as the concurrence suggests, having courts pronounce on certain sufficiently important legal questions reinforces the parallel (but not identical!) roles of courts and administrative decision-makers. Administrative decision-makers decide questions of law within their specialized areas and courts decide questions of law that span across those areas and affect the legal system as a whole. The fact that certain larger questions of law may arise from judicial review of administrative decisions does not make their determination unnecessarily expensive or complex.

## B. THE ROLE OF STATUTORY RIGHTS OF APPEAL IN DETERMINING THE STANDARD OF REVIEW

The second major point of conflict is the role of statutory rights of appeal, formerly a factor in a contextual analysis now jettisoned. The Supreme Court was left with two options: ignore them as it has done with privative clauses or treat them as determinative. The majority decision chose to interpret statutory rights of appeal as indicating legislative intent to apply appellate standards of review. The concurring decision claimed that statutory rights of appeal were well on their way to joining privative clauses in ineffectuality, and ought to have continued to fade into oblivion.

The main issue here seems to be that either of these options requires an exercise in statutory interpretation in the abstract. The majority focused on the respectable supposition that the mere inclusion of a statutory appeal clause must mean *something* — as opposed to nothing (legislatures do not speak in vain!).<sup>44</sup> On the other hand, the concurrence claims that legislatures have known for 25 years that they *do* speak in vain in certain aspects of administrative law.<sup>45</sup> On this point, the concurrence notes the comfort with which courts have previously ignored privative clauses. And yet, contrary to the concurrence, it may go too far to state that there is "no principled reason" to give effect to statutory appeal rights and not

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<sup>42</sup> *Ibid* at para 283.

<sup>43</sup> *Ibid* at para 243.

<sup>44</sup> *Ibid* at para 45.

<sup>45</sup> *Ibid* at para 249.



to privative clauses.<sup>46</sup> First, it is possible to plainly read and incorporate a statutory appeal right into the standard of review analysis, namely by doing as the majority suggests. It is *not* possible to plainly read a privative clause purporting to oust the courts' jurisdiction and incorporate it into a framework which already starts with a presumption of reasonableness review. Second, as the majority notes, "legislative choice" is not deference by another name — a legislature *can* signal an intention to give a reviewing court an appellate role, and it can do so in different ways.<sup>47</sup> There is no principled reason why statutorily prescribed standards of review should be the only meaningful indicator of legislative intent past the fact of delegation.

Assuming that statutory appeal clauses must mean something, the options are fairly limited. Whether or not, as the majority claims, a legislature presumes the word "appeal" to mean the same thing in an administrative law context as in a criminal context may be more of a stretch. It is also beside the point. In the realm of administrative law, legislative intent is far more often a convenient fiction than the result of applying the modern principle of statutory interpretation. It is, after all, difficult to conduct a satisfactory statutory interpretation exercise in the absence of a statute at the level of a policy-making court. The Supreme Court's attempt to do so here predictably ended up as a battle of competing presumptions — the presumption of consistent expression against the presumption of compliance with existing common law rules. That said, *Vavilov* is better seen not as interpreting existing statutes, but as providing guidance to legislators in the future. For this reason, it matters little that the legislative intent the majority discovers is a fiction — it is more of a sign to legislatures of how their "intent" will be determined. This ought to assuage the concurrence's concerns that the majority's treatment of statutory appeal rights will undermine legislative intent to "entrust certain legal and policy questions to non-judicial actors."<sup>48</sup> The Supreme Court has indicated how courts ought to determine legislative intent from now on; it has drawn a bright line. Legislatures that wish to insulate administrative determinations of legal questions continue to have the option of specifying a deferential standard of review. They do, after all, have the last word — at least within the confines of the Constitution.

### C. CONDUCTING REASONABLENESS REVIEW

The third point of conflict is the guidance the majority offers for conducting reasonableness — guidance which both the majority and the concurrence noted was needed. The most apt descriptor (and the most admirable quality) of the majority's approach is that it is *reproducible* — it sets out a discernible process and list of factors that reviewing courts can take and adapt to future cases. This framework is couched by myriad qualifiers warning against its use as a binding checklist:

- The majority found it conceptually useful only in this case to consider two types of fundamental flaws;<sup>49</sup>

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<sup>46</sup> *Ibid* at para 248.

<sup>47</sup> *Ibid* at para 39.

<sup>48</sup> *Ibid* at para 251.

<sup>49</sup> *Ibid* at para 101.

- reviewing courts do not need to categorize failures of reasonableness as belonging to one type or another;<sup>50</sup>
- the majority’s descriptions are only a convenient way to discuss types of issues that lead to unreasonableness;<sup>51</sup> and
- the listed elements are not a checklist for conducting reasonableness review, may vary in significance depending on the context, and are offered merely to highlight some elements of the surrounding context.<sup>52</sup>

Perhaps unsatisfied that it was heard, the Supreme Court re-emphasized these points in *Canada Post Corp. v. Canadian Union of Postal Workers*,<sup>53</sup> a decision released the day after *Vavilov*. The majority in that case used an analysis that focused first on the internal coherence of the reasons, and then on whether the decision was justified in light of the relevant facts and law. The majority stated that “as *Vavilov* emphasizes, courts need not structure their analysis through these two lenses or in this order,” and that “[a]s *Vavilov* states, at para 106, the framework is not intended as an invariable ‘checklist for conducting reasonableness review,’” but that the structure was “convenient and useful in the circumstances of this case.”<sup>54</sup>

*Vavilov*’s concurrence seems unconvinced by these assurances. Among the concurrence’s criticisms are that the majority’s approach:

- is “an encomium for correctness and a eulogy for deference”;<sup>55</sup>
- “will encourage reviewing courts to dissect administrative reasons in a ‘line-by-line treasure hunt for error’”;<sup>56</sup>
- “may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision”;<sup>57</sup>
- “imposes on administrative decision-makers a higher standard of justification than that applied to trial judges”;<sup>58</sup>
- “undercuts deference and revives a long-abandoned posture of suspicion towards administrative decision making”;<sup>59</sup> and

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid* at para 106.

<sup>53</sup> 2019 SCC 67 [*Canada Post*].

<sup>54</sup> *Ibid* at para 34.

<sup>55</sup> *Vavilov*, *supra* note 1 at para 201.

<sup>56</sup> *Ibid* at para 284

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid* at para 285.

<sup>59</sup> *Ibid.*

- “risks reintroducing the tortured concept of ‘jurisdictional error’ by another name.”<sup>60</sup>

To these criticisms, the concurrence adds in numerous references to A.V. Dicey and *Anisminic* that can only be interpreted as insinuating that the majority justices are on the wrong side of legal history, or at least unfaithful to the “deferential path” the Supreme Court has supposedly been travelling since *C.U.P.E., Local 963 v. New Brunswick Liquor Corporation*.<sup>61</sup>

On this point, the concurrence reads as uncharitable toward the majority’s reasoning and distrustful of reviewing courts to maintain the respectful approach to deference that both sets of reasons exhort. And it should be noted that in substance, the majority and concurrence’s approaches to reasonableness review are substantially the same: reviewing courts should examine the reasons provided with respectful attention,<sup>62</sup> refrain from asking how they would resolve an issue,<sup>63</sup> and assess a decision holistically without resorting to a checklist of potential errors.<sup>64</sup> Even when applying reasonableness review to the facts in *Vavilov*, both sets of reasons cover the same points: carefully reading and explaining the reasons for the decision under review, assessing the submissions *Vavilov* made before the Registrar, and identifying significant errors that, on the whole, rendered the decision unreasonable. Both sets of reasons impugn the decision as improperly focusing on the text of the provision at issue to the exclusion of surrounding statutory context, relevant legislation and international treaties, and relevant Federal Court jurisprudence. The only salient difference is that the majority’s approach utilized more headings and considered the Registrar’s failures in reasoning each in turn. At no point did the majority engage in a “line-by-line treasure hunt for error” as the concurrence feared it could.<sup>65</sup>

However, the power behind the concurrence’s fear mongering is that there is no easy way to disprove it. Overzealous reviewing courts have been engaging in disguised correctness review since the Supreme Court first mandated curial deference in *C.U.P.E.* Some judges will no doubt continue in this line, substituting *Vavilov* for *Dunsmuir* in their footnotes, and drawing the ire of judges and academics. But when this happens, it will not be because the majority in *Vavilov* has provided them with a convenient checklist — it will be because they ignore the pains to which the majority has gone to point out the respectful attention they owe to an administrative decision-maker’s reasons. Indeed, with the majority’s increased focus on the reasons as the starting point of reasonableness review, it should be harder to get away with disguised correctness review. *Vavilov* is a clear signal that starting with judicial interpretation of a statute and using it as a yardstick to measure the decision-maker’s interpretation — as, ironically, Justice Abella did the next day in *Canada Post* — should not be allowed.

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<sup>60</sup> *Ibid.*

<sup>61</sup> [1979] 2 SCR 227 [CUPE].

<sup>62</sup> *Vavilov*, *supra* note 1 at paras 84, 288.

<sup>63</sup> *Ibid* at paras 75, 289.

<sup>64</sup> *Ibid* at paras 97, 106, 292.

<sup>65</sup> *Ibid* at para 284.

## VI. CONCLUSION

Like any Supreme Court case that significantly alters the current state of affairs, *Vavilov* leaves several questions unanswered and leaves more room for interpretation and application than some would be comfortable with. Among the issues to be decided are the scope reviewing courts will give to the “questions of central importance” category, how legislatures will respond to the majority’s guidance on statutory rights of appeal, and how strictly reviewing courts will use the majority’s guidance on conducting reasonableness review. *Vavilov* also hints at some matters to be decided another day, such as the framework set out in *Doré v. Barreau du Québec*, which was premised on an idea of adjudicative expertise and specialization that may now be in question.<sup>66</sup> For now, though, the majority in *Vavilov* has accomplished what it set out to do — namely, give a clarified and simplified framework for determining the standard of review and conducting reasonableness review.

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<sup>66</sup> 2012 SCC 12.