SELECTING A STANDARD OF REVIEW: WHAT DOES THIS ENTAIL POST-*VAVILOV*?

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Considerable scholarly and judicial attention has been devoted to the selection of the standard of review in Canadian administrative law. Through generational analysis of the developments and challenges in administrative law, and a comparison of the different standards of review, the article examines the place of Canada (Minister of Citizenship and Immigration) v. Vavilov *in the jurisprudential landscape. The article suggests that* Vavilov *now serves as the new* Baker v. Canada (Minister of Citizenship and Immigration)*, providing practical guidance and a stable framework by simplifying the selection of the standard of review process but requires further refinement by attending to transparency and justification regarding the reweighing of factors and the use of* Charter *values. Ultimately, this article proposes that* Baker *and* Vavilov *together could inform the next generational shift in administrative law: the formal recognition of a general duty to provide reasons.*

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INTRODUCTION

In Canadian administrative law, *selecting* the standard of review used to be tricky business. This was partly because one had to select amongst three standards of review, a selection that was accompanied by a less than helpful "pragmatic and functional" analytic

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framework.[1] Burdened with "law office metaphysics,"[2] the entire exercise of judicial review sometimes seemed only to focus on selecting the standard, and then became mired in further disagreements about that particular selection, let alone getting to the arguments about the quality of the actual administrative decision at bar. Five years on from *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[3] a fundamental question animates this article: is *Vavilov* now the new *Baker v. Canada (Minister of Citizenship and Immigration)*[4] in terms of utility, longevity, and stability? A second, more controversial conclusory question follows: why do we continue to need to select a standard of review at all? To answer these questions, the article will consider and compare the standards of review and their accompanying analytic frameworks across Canadian public law.

Part I presents a generational snapshot of the standard of review: three generations, with *Vavilov* being a third-generation development. In Part II, I compare the current set of standards of review in public law, focusing on similarities and differences amongst them. In Part III, I turn to examine recurring issues in administrative law jurisprudence, such as weight and values, which the administrative law standard of reasonableness could better manage. I will suggest in Part IV if we continue to embrace justification as a unifying principle in administrative law, as well as the lynchpin of review for fairness and reasonableness, then one future remedial direction might be to revisit the duty to give reasons and make it a general duty which subsequently informs *all* standards of review. I will conclude by returning to the two framing questions posed above.

I. SELECTING THE STANDARD OF REVIEW: A GENERATIONAL SNAPSHOT

This section provides a snapshot of what I am calling the generations of the standard of review in administrative law, ranging from "ground zero" to the current third generation.[5] Ground zero existed before Canadian administrative law became *Canadian* in 1979, with the epochal *C.U.P.E. v. N.B. Liquor Corporation*[6] decision regarding the standard of review and the equally ground-breaking *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*[7] decision regarding procedural fairness. Beginning in 1979, then, the three generations that will be examined are: (1) the *CUPE* (or *PU(CE)* when anagrammed to emphasize the patent unreasonableness or PU standard of review[8]) generation; (2), the Fairness (or *Baker*) generation as the second; and, (3) the Justification generation as the third which includes both the *Doré v. Barreau du Québec*[9] and *Vavilov* decisions.

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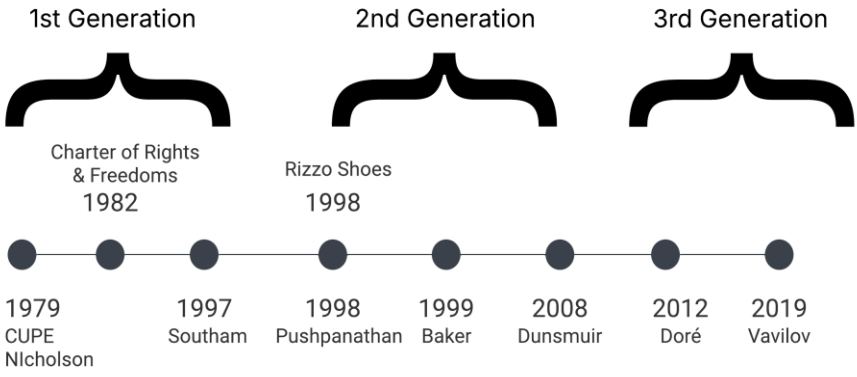
1 *UES, Local 298 v Bibeault*, 1988 CanLII 30 at para 122, Beetz J (SCC) [*Bibeault*].
2 *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 122, Binnie J [*Dunsmuir*].
3 2019 SCC 65 [*Vavilov*].
4 1999 CanLII 699 (SCC) [*Baker*].
5 For a deeper historical discussion, see Audrey Macklin, "A Short History of Standard of Review" in Colleen M Flood & Paul Daly, eds, *Administrative Law in Context*, 4th ed (Toronto: Emond Montgomery, 2022) ch 11 [Macklin, "Short History"].
6 1979 CanLII 23 (SCC) [*CUPE*].
7 1978 CanLII 24 (SCC) [*Nicholson*].
8 For law students, PU became the wry abbreviation for patent unreasonableness. Given the association between the meaning of the acronym and the "hold-your-nose" approach to applying the standard, it is perhaps not surprising that antipathy towards PU would be one factor leading to its demise.
9 2012 SCC 12 [*Doré*].

These generations are depicted in the following figure:

FIGURE 1:
THREE GENERATIONS OF STANDARD OF REVIEW IN ADMINISTRATIVE LAW



A. GROUND ZERO: THE JURASSIC PERIOD

The ground zero generation, or the pre-1979 Jurassic period of administrative law that Canada originally inherited from the United Kingdom, involved *no selection* of the standard of review. This period exhibited a binary on-off dynamic with reviewing courts either showing no deference under correctness review,[10] or providing little judicial review at all by deferentially abdicating the function due to separation of powers and justiciability concerns.[11] During this time, the principle of legality gave way to the principle of deference for perhaps the vast majority of government decisions, including procedural fairness,[12] and affected persons were left with few legal means to redress arbitrary decisions. Correctness controlled both process and substance, and it was "hands on." Statutes, however, could provide a remedy for this situation if they authorized judicial review through procedural fairness routes and if

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[10] See e.g. *Bell v Ontario Human Rights Commission*, 1971 CanLII 195 (SCC).

[11] See *Attorney General of Canada v Inuit Tapirisat et al*, 1980 CanLII 21 (SCC) [*Inuit Tapirisat*], which concerned an appeal to Cabinet and illustrates extreme judicial deference to Cabinet as a quasi-legislative body in both procedural and substantive matters. See also *Thorne's Hardware Ltd. v The Queen*, 1983 CanLII 20 (SCC) [*Thorne's Hardware*] for high judicial deference, and near non-justiciability, regarding an order-in-council made by Cabinet. On the unfortunate effects of the legislative exception in administrative law, see Geneviève Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?" (2003) 53:3 UTLJ 217.

[12] Unless counsel could frame the issue as a matter of natural justice, which sanctioned judicial review because the decision-maker had an adjudicative function and the substance affected common law rights. Decision-makers who were considered administrative, quasi-administrative, and/or had a legislative function would not be reviewed for process or substance in old-style administrative law. See footnote 11 above. For greater discussion of this history and the turn away from the restricted categorical approach, see David Mullan, "The Reach of Administrative Law" (ch 1) and "The Reach of Procedural Fairness" (ch 8) in *Administrative Law* (Toronto: Irwin Law, 2001). See also "Fairness: The Right to Be Heard" (ch 4) in Lorne Sossin and Emily Lawrence, *Administrative Law in Practice: Principles and Advocacy* (Toronto: Emond Montgomery, 2018).

they contained a reconsideration or an appeal process, thereby providing access to substantive review. Then came 1979, which proved to be a foundational year.[13]

B. *CUPE (PU(CE))*: THE FIRST GENERATION

In 1979, correctness remained the ostensible standard of review for procedural fairness. But, *Nicholson* set into motion a number of significant changes, not all of which were fully realized in the judgment itself. For example, the correctness standard in *Nicholson* became wedded to the idea of procedural fairness as an individual *right*, not a privilege or mere government courtesy.[14] Simultaneously, the modern discourse of fairness began to manifest itself in the case. Chief Justice Laskin discussed how the standard of fairness was emerging in the jurisprudence from the United Kingdom, and the Supreme Court of Canada then used this innovation to overcome the traditional on-off nature of review for procedure.[15] Chief Justice Laskin determined that Nicholson was owed *fairness*, which continued to include the older content of natural justice, in the making of this administrative decision.[16] While one might not get the greater contect that natural justice provided, one had greater access to justice through fairness review.

Nicholson also contained an emergent sensibility about the importance of reason-giving for judicial review, as Chief Justice Laskin rejected the "reason" given by the decision-maker; indeed, he did not count it as a reason at all. Nicholson was owed, as a matter of fairness, the right kind of reason to potentially justify his dismissal from employment.[17] Later down the

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[13] I would note that the test for bias, regarding which the relationship to the standard of review in procedural fairness is murky at best, can be located in this cloudy period and has, indeed, not left ground zero. This article will not examine the second principle of fairness, but see Paul Daly, "On Time and Space: Proximity in the Law of Bias" (15 April 2025), online (pdf): [perma.cc/87E9-F5DT].

[14] See e.g. how Martland J, dissenting (with Justices Pigeon, Beetz, and Pratte) characterized Nicholson's unfair dismissal from his employment as a probationary constable: "The very purpose of the probationary period was to enable the respondent to decide whether it wished to continue his services beyond the probationary period. The only interest involved was that of the Board itself. Its decision was purely administrative. This being so, it was under no duty to explain to the appellant why his services were no longer required, or to give him an opportunity to be heard. It could have taken that course as a matter of courtesy, but its failure to do so was not a breach of any legal duty to the appellant": *Nicholson*, *supra* note 7 at 335.

[15] Chief Justice Laskin did this by rejecting the old categorical approach to justiciability and emphasizing how the law of judicial review should function outside of a categorial approach, else the courts themselves be found to be acting arbitrarily (*ibid* at 324):

> In short, I am of the opinion that although the appellant clearly cannot claim the procedural protections afforded to a constable with more than eighteen months' service, he cannot be denied any protection. He should be treated 'fairly' not arbitrarily. I accept, therefore, for present purposes and as a common law principle what Megarry J. accepted in *Bates v. Lord Hailsham* … "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness."

[16] *Ibid* at 328:

> Once it had the appellant's response, it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith. Such a course provides fairness to the appellant, and it is fair as well to the Board's right, as a public authority to decide, once it had the appellant's response, whether a person in his position should be allowed to continue in office to the point where his right to procedural protection was enlarged. Status in office deserves this minimal protection, however brief the period for which the office is held.

[17] Chief Justice Laskin clearly considers reasons to restrain arbitrary power and instantiate fairness, even if minimal (*ibid* at 329–30):

line, *Baker*, by applying fairness as the modern standard of review for procedure and instantiating the duty to give reasons, develops the thread that began with *Nicholson* and confirmed the tight connection between the provision of reasons and fairness. This golden thread that begins with *Nicholson*, is traceable through the subsequent jurisprudence, and is what we now call the "ethos of justification"[18] and the "culture of justification"[19] in Canadian administrative law.

With the *CUPE* decision, also handed down in 1979, the Supreme Court first created the need to *select* a standard of review for substantive matters by creating two: the historically older intrusive (or non-deferential) correctness review and the newer deferential (or hands-off) patent unreasonableness review. With indicators like a privative clause or strong discretionary language, the principle of deference in *CUPE* became concretized in the patent unreasonableness standard. Patent unreasonableness was justified by a number of factors that required judicial restraint — clear legislative intent to recognize delegated authority through particular language, a strong privative clause limiting judicial review, the lack of a statutory appeal, specialized jurisdiction, and relative expertise (political, economic, policy) — and therefore supported the selection and application of patent unreasonableness over correctness review. In the application of the patent unreasonableness standard, the principle of deference informed judicial review both through legislative intent and the judicial interpretation of a new role for the courts: "[N]ot only would the Board not be required to be 'correct' in its interpretation, but one would think that the Board was entitled to err and any such error would be protected from review by the privative clause in s. 101."[20] Missing from *CUPE*, and perhaps acting as a harbinger for what was to become of the patent unreasonableness standard, was any discussion of the role of reason-giving and the quality of reasons.

C. FAIRNESS: THE SECOND GENERATION

Things remained relatively constant over the decade that followed the first generation. But then, in quick succession over a two-year period, administrative law radically changed. It began with the creation of the reasonableness standard of review in *Canada (Director of*

> If the making of the telephone call of which Burger disapproved, (and which he said was in disobedience of a direct order, Nicholson saying he was unaware of any relevant order) was the basis of the proposed dismissal, it would have been simple enough to say so. I can hardly credit that in itself it could be a reason for dismissing a constable who had served for fifteen months. If it was an allegedly culminating event this too could be easily stated, or if there was another ground Nicholson could have been told of it prior to dismissal. I do not regard it as giving a reason for dismissal to tell Nicholson that he had no future in the department. Moreover, there is nothing in the record to show that an inspector, the particular inspector, had the power to dismiss a constable with less than eighteen months' service.

18 *R v REM*, 2008 SCC 51 at para 11 [*REM*], citing Mary Liston, "'Alert, Alive and Sensitive': *Baker*, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law" in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 113.

19 *Vavilov*, *supra* note 3 at para 2: "We will also affirm the need to develop and strengthen a culture of justification in administrative decision making." See also Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998) 12 Can J Admin L & Prac 171; Paul Daly, "*Vavilov* and the Culture of Justification in Contemporary Administrative Law" (2021) 100 SCLR 279.

20 *CUPE*, *supra* note 6 at 236.

Investigation and Research) v. Southam Inc.,[21] bringing the total to three standards. But by the end of the decade, the jurisprudential path would take another turn, and we would revert back to two. Correctness remained a constant throughout. Before attending further to this development, this section will consider the enduring *Baker* decision, its standard of review, and the accompanying analytic framework for fairness.

One year after *Southam*, the Supreme Court in 1999 created the *Baker* analytic framework. While this framework did not provide any assistance with the *selection* of the standard of review for procedural fairness, it did comport with the expansion of access to procedural justice signalled earlier in *Nicholson*. That said, it became a stunning success in the *application* of the standard, no doubt because it built on *Nicholson*'s idea of procedural fairness as a right, not a privilege, thereby mandating judicial oversight and providing legitimacy to the overall exercise. We can see this explicitly in the third factor of the framework: the importance of the decision to the individual or individuals affected.[22] Three factors in the innovative *Baker* framework explicitly required attention to the statute and legislative intent in context: factor one, the nature of the decision and process followed; factor two, the nature of statutory scheme; and factor five, the agency's procedural choice.[23] In devising this framework, the Supreme Court may also have been helped by the previous year's newly articulated modern approach to statutory interpretation in *Rizzo & Rizzo Shoes Ltd. (Re)*,[24] a principle which guides the interpretive process undertaken in *Baker*. Procedural fairness under the *Baker* approach has since rolled along untouched despite Justice L'Heureux-Dubé's emphatic statement that "this list of factors is not exhaustive."[25] The potentially thorny issue of whether or not the standard should be correctness, or fairness *akin to* correctness, has now been resolved in favour of correctness.[26] Selection and application of the standard of review work as a united, efficient, and effective duo in the procedural fairness context.

As intimated in the first paragraph of this subsection, the same happy story cannot be said for the standard of review in substantive review. While the creation of the reasonableness standard of review was an excellent turn in the story, the larger tale proved dissatisfying. Reasonableness, in short, only further complicated the *selection* of the standard of review. Justice Iacobucci alerted us to this problem early on in *Southam* where guidance on what

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21 1997 CanLII 385 (SCC) [*Southam*].

22 *Baker*, *supra* note 4 at para 25.

23 *Ibid* at paras 23–28. Factor four, legitimate expectations, proves to be a wild card, partly dependent on context and partly dependent on the statutory scheme, but most of the time not providing any independent assistance to the analysis.

24 1998 CanLII 837 [*Rizzo Shoes*].

25 *Baker, supra* note 4 at para 28.

26 For more on fairness akin to correctness, see *Mission Institution v Khela*, 2014 SCC 24 at para 79, where Justice LeBel, for the Court, placed scare quotes around the traditional standard to emphasize its difference in the procedural fairness context: "[T]he standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be 'correctness.'" For the reaffirmation of the traditional correctness standard *simpliciter*, see, e.g., *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29. This author, however, still prefers to conceive of the standard of review for the first principle of fairness as *fairness akin to correctness* because it acknowledges the influence of the deference principle even in procedural matters.

distinguished reasonableness (*simpliciter*)[27] from patent unreasonableness seemed to amount to no more than the difference being in the eye of the beholder:

> Even as a matter of semantics, the closeness of the "clearly wrong" test to the standard of reasonableness *simpliciter* is obvious. It is true that many things are wrong that are not unreasonable; but when "clearly" is added to "wrong", the meaning is brought much nearer to that of '"unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not go so far as the standard of patent unreasonableness. *For if many things are wrong that are not unreasonable, then many things are clearly wrong that are not patently unreasonable (on the assumption that "clearly" and "patently" are close synonyms).* It follows, then, that the clearly wrong test, like the standard of reasonableness *simpliciter*, falls on the *continuum* between correctness and the standard of patent unreasonableness. Because the clearly wrong test is familiar to Canadian judges, it may serve as a guide to them in applying the standard of reasonableness *simpliciter*.[28]

The new standard therefore required further judicial guidance about how to go about selecting from amongst the three, a selection which could often seem distinguishable only by the breadth of a hair in some cases. Although an analytic framework came together in 1998 (which had been presaged earlier in the late 1980s), it both imperfectly guided the selection process and provided very little (if not zero) assistance in application. This was the pragmatic and functional analytic framework.[29] Unlike in procedural fairness, the modern approach cannot be said to have helped much in the pragmatic and functional analysis for the selection of the appropriate standard or in the resulting application. Things muddled along for a decade with the complexity of selecting the standard of review merely acting as an *amuse-bouche* for the difficulties that ensued in the actual application of the resulting standard.[30]

The elimination of the patent unreasonableness standard in the 2008 *Dunsmuir* decision (but not in British Columbia[31]) provided to be a capstone to this period. The drive to simplify the complicated selection process, however, was only partially achieved in the majority's

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[27] It remains an irony that reasonableness initially at that time required the unnecessary modifier of *simpliciter*. Of course, reasonableness no longer requires *simpliciter* under *Vavilov*, and rightly so.

[28] *Southam*, *supra* note 21 at para 60 [emphasis added].

[29] See e.g. *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [*Pushpanathan*], though the framework was initiated in the *Bibeault* decision a decade earlier: *Bibeault*, *supra* note 1.

[30] As Bastarache and LeBel JJ candidly disclosed in *Dunsmuir*, *supra* note 2 at para 41 [citations omitted]:
> [A] review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory … Indeed, even this Court divided when attempting to determine whether a particular decision was "patently unreasonable", although this should have been self-evident under the existing test (see [*CUPE*]). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision.

[31] The patent unreasonableness standard has been codified in sections 58 (standard of review with privative clause) and 59 (standard of review without privative clause) of British Columbia's *Administrative Tribunals Act*, SBC 2004, c 45.

decision. Justice Binnie, in his concurrence, ultimately set down the path that was later to unfold in the third generation:

> *The going-in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness ("contextually" applied)*. The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single "correct" outcome. It should also be presumed, in accordance with the ordinary rules of litigation, that the decision under review *is* reasonable until the applicant shows otherwise.
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> An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision under review rests on an error in the determination of a *legal* issue not confided (or which constitutionally *could* not be confided) to the administrative decision-maker to decide, whether in relation to jurisdiction or the general law. Labour arbitrators, as in this case, command deference on legal matters within their enabling statute or on legal matters intimately connected thereto.[32]

Much like Justice L'Heureux Dubé did in *Baker* with her explication of what the standard of fairness signifies and demands, Justice Binnie attempted (unsuccessfully, as his way of thinking has still not found favour in the jurisprudence) to explain what his conception of reasonableness, once it has been selected, *means* as a standard of review:

> When, then, should a decision be deemed "unreasonable"? My colleagues suggest a test of *irrationality* (para. 46), but the editors of de Smith point out that "many decisions which fall foul of [unreasonableness] have been coldly rational" (*de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at para. 13-003). A decision meeting this description by this Court is *C.U.P.E. v. Ontario (Minister of Labour),* [2003] 1 S.C.R. 539, 2003 SCC 29, where the Minister's appointment of retired judges with little experience in labour matters to chair "interest" arbitrations (as opposed to "grievance" arbitrations) between hospitals and hospital workers was "coldly rational" in terms of the Minister's own agenda, but was held by a majority of this Court to be patently unreasonable in terms of the history, object and purpose of the authorizing legislation. He had not used the appointment power for the purposes for which the legislature had conferred it.
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> *Reasonableness rather than rationality has been the traditional standard* and, properly interpreted, it works. That said, a single "reasonableness" standard will now necessarily incorporate *both* the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, and an assessment of the range of options reasonably open to the decision maker in the circumstances, *in light of the reasons given for the decision*. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the "reasonableness" standard.[33]

The point to notice here is the tight connection drawn between nomenclature/selection and content/application. For Justice L'Heureux-Dubé, the standard of review in procedural fairness would not exactly match the traditional correctness standard. Instead, it meant *fairness* and its content would be discerned through the application of an analytic framework, not judicial discretion. For Justice Binnie, the selection of a *reasonableness* standard also did

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[32] *Dunsmuir*, *supra* note 2 at paras 146–47 [emphasis added].
[33] *Ibid* at paras 148–49 [emphasis added; citations omitted].

not mean correctness, and would necessarily have to reflect contexts where the principle of deference was more demanding (that is, in contexts where patent unreasonableness would have fit). Reasonableness, unlike correctness, and like fairness, is intimately connected with reasons. And as Justice Binnie highlights, reasonableness as a standard is broader and more nuanced than review for rationality.[34] It is more like fairness in its attention to context, text and scheme, reasons, deference, and the components that comprise the practice of judicial review (various actors, submissions, evidence, and so on). Lastly, it can be both more deferential and more demanding of administrative decision makers depending on the context.

By reducing the standards from three to two, *Dunsmuir* assisted with the selection of the standard of review for substance. But, because it was not a unified judgment,[35] because the majority simply rebranded the pragmatic and functional analysis rather than renovating it, and because the court did not provide enough guidance on how the reasonableness standard would work contextually, *Dunsmuir* did not resolve the problems with application of the reasonableness standard of review.[36] It therefore seemed to raise as many problems as it solved. We would need the next generation for a fresh direction.

D. JUSTIFICATION: THE THIRD GENERATION

The selection of the standard of review remained constant for procedural fairness, subject to the clarification that fairness was not a different standard than correctness, only that deference informed the context under the *Baker* framework. Post-*Dunsmuir* judicial disagreements about both the selection and application of the two standards in substantive review continued and intensified. Two developments ensued in the third generation: one complicated matters, and one simplified things. The complicating innovation was the *Doré* decision regarding judicial review of discretionary decisions affecting a *Charter*[37] right or value. The confounding outcome for the *selection* of the standard of review following *Doré* was whether to endorse the *Doré* reasonableness standard and its accompanying analytic framework or to revert back to the older *R v. Oakes*[38] test. Once selected, however, the

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[34] If we had created a standard called rationality review, cases would be decided differently, Justice Binnie intimates (*ibid*). I would note that the understanding of rationality here may map onto American rational basis review where the bar is higher to invalidate a federal or state law (that is, stupid laws will survive rational basis review). Justice Binnie may very well have been thinking about this.

[35] The three judgments created confusion about application given judicial disagreement in the case about determining the standard through precedent, or a rebranded pragmatic and functional approach, or a rebuttable presumption, or by determining the nature of the question at bar, or by the presence or absence of a privative clause.

[36] As Audrey Macklin writes; "The criteria for justification, transparency, and intelligibility remained underdeveloped, and the relationship between assessment of reasoning and outcome was unclear. The application of reasonableness depended on "context," but contextual considerations were never specified, elaborated, or methodically applied." Macklin, "Short History", *supra* note 5. See also Sheila Wildeman's nuanced analysis, "Making Sense of Reasonableness," in Lorne Sossin & Colleen Flood, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery, 2018) ch 12.

[37] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. For the jurisprudential history behind why *Doré* was created in administrative law, see Mary Liston, "Administering the *Charter*, Proportioning Justice: Thirty-Five Years of Development in a Nutshell" (2017) 30:2 Can J Admin L & Prac 211.

[38] 1986 CanLII 46 (SCC) [*Oakes*]. For an example of disagreement, see e.g. *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 [*Loyola HS*], where the majority applied *Doré* whereas the concurring judges applied a modified *Oakes* test.

application of either *Doré* or *Oakes* became more or less straightforward due to their relatively uncomplicated analytic frameworks. It has only been in the last two years that this disagreement appears to have been resolved and *Doré* is back in play.[39] When a discretionary decision made by an executive actor is challenged, the standard that will be applied is reasonableness under the *Doré* analytic framework.[40] *Oakes*, using a correctness standard, can be used to challenge government action, but focuses on the identification of the correct *Charter* right and its scope in administrative law or specific statutory infringements.[41]

Simplification came from *Vavilov*, where the selection of the standard of review was made easy by following Justice Binnie's concurrence in *Dunsmuir* and making reasonableness a rebuttable presumptive standard in substantive review.[42] It is now rightly the workhorse of substantive review, just like fairness is the workhorse for procedural fairness.[43] In the third generation of administrative law, the Supreme Court has finally arranged jurisprudential matters in such a way that the selection of the standard of review is usually NOT at issue. Unless, of course, apex courts revisit their current reticence about adding more categorical exceptions.[44]

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[39] Query the implications of *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 [*York*]. In this case, all agreed that the determination of whether the *Charter* applied to school boards was a correctness question. But the Supreme Court split on how to review the arbitrator's decision that implicated section 8 privacy interests. Justice Rowe, for the majority, held that the decision disclosed the failure of the arbitrator to take into account section 8 entirely, and so proceeded on the correctness standard because of this scoping error (*ibid* at paras 94–95). The minority (agreeing on the outcome) applied *Vavilov*'s reasonableness standard, not *Doré*, even though the Supreme Court was reviewing the arbitrator's "balancing of interests" framework (*ibid* at para 128). While it seems clear that correctness is the appropriate standard to answer the question whether a *Charter* right or value has been affected by a decision-maker's discretionary decision (and this may include the scope of the right), it is not clear whether correctness applies to the identification of a *Charter value.* In addition, the Supreme Court may need to reconfirm that *Doré*'s reasonableness standard (including the proportionality principle) applies to the decision maker's balancing exercise.

[40] This was confirmed in *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 [*CSFTNO*].

[41] It appears that counsel can choose whether or not to "frame" the matter *overtly* as a discretionary decision thereby requiring *Doré — or* may choose to simply label it a "government decision," which can be reviewed under *Oakes* or *Doré*. The other complicating feature is whether what is at issue is a *Charter* right or value. See, e.g., *Canada (Attorney General) v PHS Community Services* Society, 2011 SCC 44 [*PHS*], a hybrid administrative-*Charter* case where the Minister of Health's discretionary decision not to renew an exemption allowing a safe injection site to continue to operate was reversed by the Supreme Court. Because this deeply discretionary decision violated section 7 of the *Charter*, no *Oakes* analysis was undertaken. See also the bifurcated decision in *Loyola HS*, *supra* note 38.

[42] *Vavilov*, *supra* note 3 at paras 8–10.

[43] See the empirical analyses of post-*Vavilov* trends in this issue: Paul Warchuk, "Simplification or Semantics: Evaluating *Vavilov*'s Impact on the Standard of Review" (2025) 63:1 Alta L Rev, and David Said & Greg Flynn, "Five Years Later: Did *Vavilov* Kill Deference? Findings from the Ontario Superior Court of Justice" (2025) 63:1 Alta L Rev.

[44] For an application of the correctness standard on the basis of the existence of a statutory right of appeal, see *Bell Canada v Canada (Attorney General)*, 2019 SCC 66 [*Bell*]. For an unsuccessful attempt to establish a new category of correctness review, see *Mason v Canada (Citizenship and Immigration*), 2023 SCC 21. A serious question of general importance in the immigration context will be reviewed on the reasonableness standard, not the correctness.

II. COMPARING PUBLIC LAW STANDARDS OF REVIEW

We can put our public law standards of review side by side to compare in the Table 1 below.

TABLE 1:
PUBLIC LAW STANDARDS OF REVIEW

	Procedural Fairness	**Correctness (Substantive)**	**Reasonableness (Substantive)**	**Discretion (Substantive)**	***Oakes* (Constitutional)**
Prior test before selecting standard?	Yes: **1.** *Harelkin*[45] test to avoid duplicate proceedings **2.** *Cardinal*[46] test to determine justiciability	No	No	No	Yes, to determine justiciability: **1.** Identified right **2.** Section 32 **3.** Prescribed by law test **4.** Specific rights tests, e.g. section 2(a) freedom of religion.
Author's Query	Query removal of legislative exception (IT) and build into prior test or use deference principle in *Baker*.	Query whether substantive review in administrative law could employ a justiciability test that replaces what *Thorne's Hardware* does internally or make explicit use of principle of deference.			
Selection mode	Automatic based on presence of PF issue for 1st principle of fairness	Based on open set of categories	Rebuttable presumption	Based on the presence of discretionary decision	Automatic based on identification of affected *Charter* right
Type of Standard	Correctness with contextual deference	Correctness with no deference	Reasonableness according to context (aka intensity)	Reasonableness according to context and *Charter* protection (aka intensity)	Correctness with contextual deference

[45] *Harelkin v University of Regina*, 1979 CanLII 18 (SCC) [*Harelkin*]. The "rule" from *Harelkin* holds that all administrative internal remedies must be exhausted before accessing judicial review.

[46] *Cardinal v Director of Kent Institution,* 1985 CanLII 23 (SCC) [*Cardinal*]. The *Cardinal* test requires: (1) a public authority; (2) making an administrative decision; (3) that is not legislative in nature; and, 4) the decision affects the right, privileges, interests of an individual? If the claimant can satisfy this test, then judicial review is available.

	Procedural Fairness	**Correctness (Substantive)**	**Reasonableness (Substantive)**	**Discretion (Substantive)**	***Oakes* (Constitutional)**
Overarching Question	Yes: Was the procedure that was used fair considering all of the circumstances?	No, *or*: Does the reviewing judge agree with this administrative decision?	Yes: Do the reasons demonstrate the decision and/or outcome is reasonable in context?	Yes: Do the reasons demonstrate the decision and/or outcome is reasonable in context?	Yes: Does this government action unjustifiably infringe a *Charter* right?
Analytic framework	Yes, *Baker*: An open list of 5 factors used to determine the appropriate content: **1.** Nature of the decision and the process followed **2.** Nature of the statutory scheme & terms under which operates (use modern approach) **3.** Importance of the decision to the individual(s) affected **4.** Legitimate expectations of the person(s) challenging the decision **5.** Respect for agency expertise in determining and following the agency's own procedures Provision of reasons also may be fairness requirement.	No, categories: **1.** Legislative intent **2.** Rule of law requires a singular, determinate and final answer **3.** New bases possible --- Presence of statutory appeal provision (*Housen v Nikolaisen* appellate standards);[47] law attracts correctness.	Yes, *Vavilov*: **1. Reasons:** Ask if the reasons are internally coherent, transparent, intelligible **2. Record:** If no reasons exist and also to consider the relevant legal and factual constraints, e.g.: **a.** governing statutory scheme (use modern approach) law **b.** Other relevant law **c.** Context **d.** Evidentiary record **e.** Parties' submissions **f.** consistency **g.** impact **3. Outcome:** Ask if the outcome is justified in light of the relevants facts and the law	Yes, *Doré*: **1.** Statutory interpretation: Determine the statutory mandate (use modern approach) **2. Reasons:** Consider whether the discretionary decision reflects a proportionate balance **a.** consider context **b.** consider if the reasons given can justify a limit or infringement of the *Charter* protection --- Query implications of *York*	Yes, *Oakes*: **1.** Pressing and substantial goal **2.** Proportionality analysis **3.** Rational connection **4.** Minimal impairment **5.** Final balancing
Proportionality Principle	Yes	No	Yes	Yes	Yes

[47] 2002 SCC 33 [*Housen v Nikolaisen*]. Note that findings of fact and mixed fact and law in *Housen v Nikolaisen* are reviewed in a manner akin to reasonableness. According to Justice Iacobucci in *Southam, supra* note 21 at para 59: "The standard of reasonableness simpliciter is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges." Justice Deschamps in *Dunsmuir* also constructed a midway point in an attempt to solidify affinities between administrative and appellate review.

From this comparison, the next section will highlight some key similarities and differences.

A. SIMILARITIES AMONGST THE STANDARDS OF REVIEW

As can be seen from Table 1, except for correctness review, all public law standards of review incorporate the modern approach. Even under *Oakes* in constitutional rights cases, a reviewing court may use the modern approach to interpret the statute and then the living tree approach to interpret the affected *Charter* right (though these choices are not always made explicit or followed in the particular case). Imperfect though it may be, the modern principle works well with analytic frameworks that require a reviewing court to actually pay attention to the text of a statute or regulation as well as the surrounding context.

Contextual matters are overtly incorporated and shared amongst four of the standards (but not correctness) and include the following factors in the analytic framework and methodology of application (see Analytic framework in Table 1):

- The governing statute and the principles of statutory interpretation;
- Other guiding law including other statutes, common law, and international law;
- Evidence and facts;
- Larger context including history, institutional considerations, other principles, and values; and
- Submissions of parties and interveners; and,
- Impact on the affected person(s).

Note that in both *Baker* and *Vavilov*, the existence of a privative clause and relative expertise — once independent factors under the pragmatic and functional approach — are now considered part of the statutory scheme or the context.[48] Analytic frameworks have therefore proved to very beneficial devices.[49] They serve to guide and constrain the power and interpretive choices that a reviewing court makes.

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[48] *Baker*, *supra* note 4 at para 62; *Vavilov*, *supra* note 3 at para 49. Recollect that the balance amongst the four pragmatic and functional factors (the presence or absence of a privative clause, the purpose of the statute and the provision in particular, the nature of the problem, and the relative expertise of the decision-maker) led Justice L'Heureux-Dubé to select reasonableness over patent unreasonableness in the *Baker* case.

[49] Analytic frameworks are designed to help deal with complexity and a large number of variables. They provide guidance and clear pointers to the issues, facts, and legal materials a reviewing court (and counsel) need to consider in order to structure their arguments and judgments. They help construct the resulting legal interpretation and the answer to the problem/outcome. Finally, they provide stability and constraints on judicial discretion. Second and third-generation standards of review make good use of these frameworks. See Mary Liston, "Transubstantiation in Canadian Public Law: Processing Substance and Instantiating Process" in John Bell et al, eds*, Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016) 213.

In four of the five standards, reasons play a key role. The correctness standard does not share this feature. And, except for correctness review, the principles of deference and proportionality inform four of the five public law standards. Proportionality appears in the balancing exercises that review courts undertake in both administrative and constitutional law. Justice Binnie in *Dunsmuir* captures the nature of the exercise well when considering reasonableness review:

> "[T]here is always a perspective", observed Rand J., "within which a statute is intended [by the legislature] to operate": *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140. How is that "perspective" to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. *In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced.* In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many "contextual" considerations as the court considers relevant and material.[50]

Administrative law standards of reasonableness, in tandem with the principle of proportionality, particularly emphasize the related principle of "*responsive justification*" or *responsive reasons*.[51] Consistency in decision-making in the administrative state remains a unique contextual factor in administrative law: when a departure from past practice occurs, reasonableness demands an adequate explanation from all good decision-makers (as similarly for judges when they depart from precedent).[52] That supports the pragmatic nature of the exercise where reasons also serve a system purpose.[53] And these standards of reasonableness demand that decision-makers actually respond to the person who is before them in their reasons — that is a matter of justice for both process and substance.

B. DIFFERENCES AMONGST THE STANDARDS OF REVIEW

The question of justiciability is treated inconsistently amongst the public law standards of review. Under some standards, an additional test must be satisfied before the selected

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50 *Dunsmuir*, *supra* note 2 at para 151 [emphasis added].

51 *Vavilov*, *supra* note 3 at para 133 [emphasis added].

52 Though as Justice L'Heureux-Dubé made clear in *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles),* [1993] 2 SCR 756, while administrative tribunals should strive for consistency, they are not courts and are therefore not bound by the doctrine of *stare decisis* (*ibid* at 784ff).

53 On the pragmatic and functional nature of reasons, and in addition to *Vavilov*, see *REM*, *supra* note 18 and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

standard can be applied (for instance, *Harelkin*,[54] *Cardinal*,[55] and the pre-*Oakes* tests[56]). These sorts of tests clearly aim to restrain judicial review and respect the separation of powers. On the other hand, in others, justiciability concerns are tied to the deference principle within the analysis so that restraint emerges through the application of the standard (for instance, in the application of patent unreasonableness in *Thorne's Hardware*, the legislative exception in *Inuit Tapirisat*, or within reasonableness review itself).[57] One could imagine that the fourth generation might attempt to create consistency amongst the standards where it seems necessary to address justiciability concerns. The *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*[58] decision, for example, has attempted to resolve one justiciability problem by drawing a bright line between public and private power for the purposes of accessing judicial review in administrative law.

Table 1 also reveals several interesting features about the correctness standard. First, the correctness standard of review has resisted change for decades. It remains both a Jurassic and a first-generation phenomenon. It is simplistic — correctness *simpliciter* — and provides no constraints on the exercise of judicial discretion. Unlike the other standards, where selection has been streamlined so that selection is nearly automatic, the current correctness standard has now become complexified. This is a significant recent change. Correctness review is now an open set of categories, and unlike *Baker*, this open set could still potentially expand. All of the other standards are guided by an explicit overarching question which frames and structures the arguments that legal actors must meet. Correctness, however, is motivated by no overarching question unless it is this one: "Do I, the reviewing judge, agree with this administrative decision?" Nor does correctness make use of an analytic framework to guide judicial discretion. Finally, and not surprisingly, the principle of proportionality makes no appearance in correctness review.

The correctness standard now hovers in tension with the principles of legality and the separation of powers. The four other standards have attempted to better guide and constrain judicial power while respecting the necessity and legitimacy of judicial review. Correctness review's categorical approach to the selection of the standard[59] — an old-style common law provisional approach for dealing with complexity — should be abandoned and, instead, it should reflect a principles-based approach.[60] Rethinking the correctness standard — in terms

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54 *Harelkin*, *supra* note 45.

55 *Cardinal v Director of Kent Institution*, 1985 CanLII 23 (SCC).

56 See *Oakes*, *supra* note 38 at paras 33–61.

57 *Thorne's Hardware*, *supra* note 11 at 111 (using the term "egregious"); *Inuit Tapirisat*, *supra* note 11.

58 2018 SCC 26 [*Wall*].

59 For examples of the various categories, see: *Bell*, *supra* note 44 (statutory right of appeal); *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association,* 2022 SCC 30 (administrative body and courts share concurrent first instance jurisdiction over questions of law); *Mason*, *supra* note 44 (rejecting the invitation to make serious questions of general importance that are certified by Federal Court for appeal a new category of correctness). Carving out correctness categories raises concerns about ad hockery and arbitrariness in the jurisprudence.

60 An analogous area is evidence law which moved from the categorial to the principled approach in the 2000s. See Lisa Dufraimont, "Realizing the Potential of the Principled Approach to Evidence" (2013) 39:1 Queen's LJ 11; Daniella Murynka, "Give Me One Good Reason: The 'Principled Approach' in the Canadian Judicial Opinion" (2015) 40:2 Queen's LJ 609.

of why and how it is selected as well as providing better guidance about its application — should be a key fourth generation project.[61]

III. RECURRING ISSUES: WEIGHT AND VALUES

Two longstanding recurring issues require attention in the fourth generation of the standard of review: weight and values. This section will first consider the prohibition on reweighing factors at judicial review before turning to the controversial role of values in administrative decisions and judicial review of those decisions where *Charter* values are implicated.

A. WEIGHT AND THE JUDICIAL DIET

The 2002 *Suresh v. Canada (Minister of Citizenship and Immigration)*[62] decision laid down a strong prohibition on judges reweighing factors that the original decision-maker had weighted:

> The *first question is what standard* should be adopted with respect to the Minister's decision that a refugee constitutes a danger to the security of Canada. We agree with Robertson J.A. that the reviewing court should adopt a deferential approach to this question and should set aside the Minister's *discretionary decision if it is patently unreasonable* in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. *The court should not reweigh the factors or interfere merely because it would have come to a different conclusion.*[63]

These strong words were a direct response to the reweighing that Justice L'Heureux-Dubé undertook in that part of *Baker* involving reasonableness review of the Minister's discretionary decision:

> I believe that the failure to give *serious weight* and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer.
>
> …
>
> The certified question asks whether the best interests of children must be *a* primary consideration when assessing an applicant under s. 114(2) and the Regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with

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[61] I am sympathetic to Richard Stacey's query about the continued utility of the correctness standard altogether in the wake of robust reasonableness review under *Doré* and *Vavilov*: see Richard Stacey, "A Unified Model of Public Law: Charter Values and Reasonableness Review in Canada" (2021) 71:3 UTLJ 338.

[62] 2002 SCC 1 [*Suresh*].

[63] *Ibid* at para 29 [emphasis added].

> Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.[64]

Later, in *Dunsmuir*, Justice Binnie adverted readers to the risks of the reasonableness standard which had now been merged with patent unreasonableness:

> The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision *as if it were the judge's view of "reasonableness" that counts.* At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.[65]

Were I a judge in *Dunsmuir*, I would have signed on to Justice Binnie's prescient concurrence — but for the above passage. *Suresh, Baker*, and *Dunsmuir* now need to be reread through *Doré* and *Vavilov* and the intertwined effects of the principles of deference, proportionality, reasonableness, and the culture of justification. If we were to place *Suresh* on the timeline presented in Part II above, *Suresh* would chronologically be a second-generation case (since it was handed down in 2002). It is, however, a throwback to the first generation (or even before to the Jurassic period) due to anxieties about judicial interference in national security matters post 9-11. Following the changes brought by *Dunsmuir* and *Doré*, the discretionary decision at issue in *Suresh* would now be reviewed under *Doré*'s reasonableness standard.[66] Patent unreasonableness could not be selected now, and it is arguable that reasonableness should have been selected in 2002 in order to square *Suresh* with *Baker* given that reasonableness was the standard selected and applied for the highly discretionary decision reviewed in *Baker*. With this rereading, judicial reweighing could now be explicitly dealt with through the proportionality principle that is embedded in each of standards of reasonableness found in *Doré* and *Vavilov*. The affected right/value combined with the severity of the outcome for the affected person would be key considerations in the balancing exercise that proportionality demands.[67] Constraints in the judicial exercise of power would be optimized through mandated requirements to consider the decision-maker's reasons, the statutory scheme and text, and the relevant contextual factors — in other words, through analytic frameworks and a principled approach to the resulting analysis. As administrative

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64 *Baker*, *supra* note 4 at paras 65, 75 [emphasis added].

65 *Supra* note 2 at para 141 [emphasis added].

66 See Audrey Macklin on *Suresh*, where she writes of the rejection of reweighing factors: "The Court coyly declines to explain when or why deporting a person to face torture might be a reasonable and/or constitutional exercise of discretion. Yet, the plausibility of such a scenario is crucial to legitimating the Court's choice to reject an absolute prohibition on deportation to torture": Audrey Macklin, "Charter Right or Charter-Lite?: Administrative Discretion and the Charter" (2014) 67 SCLR (2d) 561 at 566 [Macklin, "Charter Right"].

67 As it was in *PHS, supra* note 41, a case pre-dating *Doré* but suggestive in its fusion of administrative and constitutional law to examine the Minister of Health's discretionary decision to deny the renewal of a license to operate for a safe injection site, closure of which would result in an increase in the mortality rate amongst drug users in Vancouver. The Minister's decision was held to be "grossly disproportionate" in its effects because by denying the services of Insite to the population it serves, the result would be a correlative increase in the risk of death and disease that was contrary to the statutory objectives of health and public safety. The benefit that Canada might derive from presenting a uniform stance on the possession of narcotics therefore received less weight in the balancing test.

decision-makers must explain their balancing through their reasons, so too must reviewing judges, especially when they have determined that the discretionary decision is neither justified nor justifiable. But then they must also explain why their weighing when it differs from that of the original decision-maker.

In the fourth generation, perhaps the fig leaf could be removed, the noble lie rejected, and we could acknowledge that judges have *always* reweighed. What hasn't been provided is a justification for when and why judges should reweigh, particularly when statutory or common law restraints must be enforced on administrative decision-makers.[68] Has the time come where we no longer need to rely on the language of (ir)relevant considerations and improper purposes? Third-generation jurisprudence counsels that if judges reweigh (if, because they don't have to), they should do so transparently, respectfully, abiding by overt constraints, and themselves being required to participate in the reciprocal culture of justification by explaining why and how they have reweighed factors. A reviewing court can therefore quash the decision not "*merely because* it would have come to a different conclusion" (as was expressed in *Suresh*),[69] but because the totality of the factors, along with the court's own reasoning, potentially justifies quashing an unreasonable decision. As the Supreme Court wrote in *Vavilov*: "The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood."[70] Quashing a decision *merely because* a reviewing court would come to a different conclusion is, of course, the hallmark of correctness review. By further refining the contextualized application of the framework for the reasonableness standard, this area of administrative law could further emulate *Baker*'s success.[71]

B. REVALUING CHARTER VALUES

The second recurring issue, that of *Charter* values, also originates (for the purposes of this article) from the reasonableness analysis conducted by Justice L'Heureux-Dubé in *Baker*. In her judgment, Justice L'Heureux-Dubé wrote about values and explicitly connected them to the issues of weight and judicial reweighing:

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[68] For an argument which assists in forcing this justification to the surface, see Megan Pfiffer's article "The (A)Symmetry of the Law of Judicial Review" (2025) 63:1 Alta L Rev, which promotes a rights-based approach to substantive review. See also Colin Feasby who writes in "Just Words? Judicial Reasons as Remedy in Administrative Law" (2025) 63:1 Alta L Rev at 14:

> Judicial reasons not only explain the judge's reasoning and the outcome of the decision to the parties, where a case is returned to the administrative decision-maker, the reasons should provide guidance and sometimes limits on the scope of the administrative decision-maker's jurisdiction.… [T]his requires a shift of mindset from approaching reasons as explanatory to understanding reasons as also having a remedial function.

[69] *Supra* note 62 at para 29 [emphasis added].

[70] *Supra* note 3 at para 133.

[71] Here I am in agreement with Paul Daly who argues that "because the *Vavilov* framework contains principles – thin ones for selecting the standard of review; thick ones for applying the reasonableness standard – it carries within it the analytical tools required for the purposes of critique" and therefore further reform. See Paul Daly, "The Scope and Meaning of Reasonableness Review after *Vavilov*" (2025) 63:1 Alta L Rev.

> Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the "proper purposes" or "relevant considerations" involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that *discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the* Charter.
>
> …
>
> The reasons of the immigration officer show that his decision was inconsistent with the *values underlying the grant of discretion*. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.
>
> …
>
> Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally: see *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at paras. 20-23. In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.[72]

Much anxiety exists about public law values generally and *Charter* values in particular.[73] This anxiety shares similarities with the concerns about how courts may and may not use unwritten constitutional principles. Should we worry so much? Private law seems to be managing with the horizontal effect of the *Charter*.[74] *Charter* review under *Oakes* can be both rigorous and properly deferential even when fundamental values and unwritten principles are in play.[75] Procedural fairness has not been destabilized by the infusion of fairness or statutory values in particular cases. Moreover, as Paul Daly argues, don't we want our government decision-makers to pay attention to legally significant values:

> For my part I again find it unarguable that a law society should put its mind to freedom of religion and equality when determining a Christian university's application for accreditation (*Law Society of British*

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[72] *Baker*, *supra* note 4 at paras 56, 65, 67 [emphasis added].

[73] See e.g. Macklin, "Charter Right", *supra* note 66. See also this more recent commentary: Paul Daly, "The *Charter* in Administrative Decision-Making: Defending the Duty to Take Charter Values (or Purposes) Into Account" (24 October 2024), online: [perma.cc/5ZSU-9KN7]; Mark Mancini, "Charter Values and the Allure of the Unwritten" (29 October 2024), online (video): [perma.cc/FQB4-E78M]; Mark Mancini, "The Metastasis of *Charter* Vibes…Again" (11 December 2023) online (blog): [perma.cc/CWE5-2KU6]; Leonid Sirota, "Unholy Trinity: The Failure of Administrative Constitutionalism in Canada" (2020) 2 Journal of Commonwealth L 1.

[74] See e.g. *Hill v Church of Scientology of Toronto*, 1995 CanLII 59 (SCC).

[75] For an example of constraint in the wake of waves of anxiety concerning unwritten principles, see *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34.

> *Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293); that a municipality should consider freedom of speech when making decisions that impact residents' ability to express themselves (*Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154; *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43); and that a school board should have careful regard to freedom of conscience when setting policies on the wearing of religious symbols in the classroom (*Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256).[76]

It may be that recent focus on the importance of text and context in relation to unwritten principles in constitutional law can provide guidance on how to approach *Charter* values in administrative law so that judicial discretion, and interpretation, does not remain untethered.[77] It should be remembered that, with respect to administrative law values, the *Baker* decision took statutory text very seriously. It also looked to context, evidence, and the submissions of the parties for guidance. Indeed, when one looks to the materials that Justice L'Heureux-Dubé drew upon in *Baker,* we can find ample sources and guidance for the consideration of *Charter* values — also termed principles — in both administrative and judicial decisions: the importance to and impact on the affected person as argued at bar, the statutory text, the departmental guidelines, constitutional principles, administrative law principles, other relevant law, and Canadian values about the dignity and worth of children in our society. Taking this guidance and applying it to the denial of Mavis Baker's humanitarian and compassionate grounds application, we can see how Justice L'Heureux-Dubé did indeed reweigh the factors in the balance to find that this unreasonable decision "was inconsistent with the values underlying the grant of discretion."[78]

Finally, unlike in constitutional law, the risks are lower in administrative law. After *Baker* was handed down, institutional disagreement was still possible since the other branches could directly respond to the judgment. With a simple computer keystroke, a responsive government could have reversed the decision's effect and legacy by rewording the statutory text to demand "inhumane and inconsiderate" decisions, rather than humanitarian and compassionate ones.

IV. THE DUTY TO GIVE REASONS: FROM A PENULTIMATE TO AN ULTIMATE REQUIREMENT

The *Baker* decision remains vital because of its instantiation of *a* duty to give reasons:

> In my opinion, it is now appropriate to recognize that, *in certain circumstances*, the duty of procedural fairness will require the provision of a written explanation for a decision.… [I]n cases such as this *where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required....* The profound importance of an H & C decision to those affected … militates in favour of a requirement that reasons be provided. It would be *unfair* for a person subject to a decision such as this one which is so critical to their future not to be told *why* the result was reached.[79]

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[76] Paul Daly, "The Doctrinal Roots of Charter Values" (11 December 2023), online (blog): [perma.cc/7LMG-DHV6].

[77] See *CSFTNO*, *supra* note 40.

[78] *Baker*, *supra* note 4 at para 65.

[79] *Ibid* at para 43 [emphasis added].

In this excerpt, note how closely connected reasons are with fairness: it would be *unfair* not to be told *why* the result was reached, and the only way one knows why the result was reached is through the provision of reasons. *Baker* emphasizes how knowing why and receiving responsive reasons is part of the general sense of justice that all humans possess.[80]

Vavilov also closely ties together reasons and the reasonableness standard of review:

> In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.
>
> …
>
> [W]here the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion.[81]

The Supreme Court avowed in *Vavilov* that: "We will also affirm the need to develop and strengthen a culture of justification in administrative decision making."[82] Building on the salutary developments from the previous two generations, the articulation of a culture of justification and a principle of responsive reasons are the hallmarks of third-generation Canadian administrative law's reasonableness standard of review.

The fourth generation could solidify these developments further by requiring a *general* duty of fairness. The aftermath of *Baker* has shown that this duty need not be onerous on governments. Certainly, it appears that AI will only make letter-writing and reason-giving cheaper and more efficient. This possibility does not make a general duty otiose, but it does complicate matters for judicial review, as other commentators have discussed.[83] Going all the

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[80] The Supreme Court in *Vavilov*, *supra* note 3 at para 127 confirms this:
> The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties [emphasis in original].

[81] *Ibid* at paras 15, 84 [emphasis added].

[82] *Ibid* at para 2.

[83] Robert Diab, "*Vavilov* and Generative AI" (2025) 63:1 Alta L Rev; Wei William Tao, *Fair Process: An Examination of the Use of Automated Decision-Making Systems in Canadian Administrative Law through the Case Study of Canadian Immigration* (LLM Thesis, University of British Columbia, 2025), online: [perma.cc/YGG2-EW45]. See also Jennifer Raso, "Responsible AI: Binaries that Bind" (2024) 69:4 McGill LJ 417; Paul Daly, "Artificial Intelligence and Administrative Tribunals" in Yee-Fui Ng & Matthew Groves, eds, *Automation in Governance: Theory, Practice and Problems* (Oxford: Hart [forthcoming November 2025]), online: [perma.cc/33UX-B3ZF].

way back to *Nicholson*, we can see in Nicholson's own words, as related by Chief Justice Laskin, how reason-giving is a fundamental component of the human sense of justice:

> The cross-examination also revealed that the inspector invited or offered to let Nicholson resign. Nicholson denied that he was told by the inspector that "subject to the confirmation of the Board, [he was] no longer a policeman", these words being put to him by counsel for the Board on his cross-examination. When asked what he thought his position was when he left the inspector's office, Nicholson said this:
>
> I thought that if they felt I was dispensed with, I thought it was illegal. There were no charges, there was no lawful suspension, there was no lawful firing and I was in a quandary. I knew that I was off probation, so I decided to go and see a lawyer, and retain a lawyer.[84]

A *general* duty would underscore the fundamental importance of values like accountability, fairness, legality, reasonableness, transparency, and access to justice that lay at the heart of administrative law's standards of review.[85] The correlative would be a right to reasons for all persons who are subjects of an administrative decision, but especially for those who are arbitrarily treated. Lastly, reasons should inform administrative law, no matter what standard of review is selected — and that includes correctness review.

V. CONCLUSION: IS *VAVILOV* THE NEW *BAKER*?

In short, yes. I am reasonably confident to conclude that, with some tweaks, *Vavilov* could indeed be the new *Baker* in terms of utility, stability, and satisfying the values and requirements of reasonableness. When it comes to *selecting* the standard of review, *Vavilov* makes it as easy, efficient, and uncontroversial as *Baker* does. In my view, *Vavilov* and *Baker* are close siblings in the administrative law family — sororal twins, as it were. They share many of the same virtues, and what problems remain turn out to be problems that inform administrative law generally, and not these standards in particular. The next generation of change offers the opportunity to iron out some of the wrinkles I have identified in Parts IV and V of this article.

To return to my *other* query: why do we continue to *select* a standard of review at all? In this fourth generation, imagine a more radical change. Can we even conceive of administrative law *without* the correctness standard at all?[86] What if administrative law were to operate with only two contextual standards, each working with the principles of deference and modern statutory interpretation, and guided by the demands of responsive justification: fairness for procedure and reasonableness (*non-simpliciter*) for substance? What if we went

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[84] *Supra* note 7 at 329. See also the excerpts from the case in notes 16 and 17.

[85] An emerging literature exists on the core values at the heart of administrative law: see e.g. Dawn Oliver who identifies five overarching systemic values: autonomy, dignity, respect, status and security. Dawn Oliver, "The Underlying Values of Public and Private Law" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997). See also Paul Daly, who identifies the four "core" values of individual self-realisation, good administration, electoral legitimacy, and decisional autonomy: Paul Daly, "A Values-Based Approach" in *Understanding Administrative Law in the Common Law World* (Oxford: Oxford University Press, 2021) ch 1.

[86] See Stacey, *supra* note 61. See also David Dyzenhaus, who proposed that patent unreasonableness better recognized the principle of deference as respect than the correctness standard: David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997) 279.

even further and merged them so that we had only one? At the end of the day, to be fair is to be reasonable, and to be reasonable is to be fair. Then we would no longer have any need to select a standard of review in administrative law at all.