THE SCOPE AND MEANING OF REASONABLENESS REVIEW AFTER *VAVILOV*

PAUL DALY*

This article examines the scope and meaning of reasonableness review in Canadian administrative law, revisiting themes first discussed in the author's 2015 article. It highlights the narrow scope of correctness review, the rejection of contextual analysis, and the adoption of "thin" conceptions of the rule of law and institutional design. The article examines the structure of reasonableness review, focusing on coherent reasoning and the central role of "constraint" in managing tensions within the framework. The framework from Canada (Minister of Citizenship and Immigration) v Vavilov *has achieved sociological and normative legitimacy by balancing competing values in Canadian administrative law. Five years on, Vavilov has proven to be a pragmatic, consensus-building framework — valued more for its practical success than theoretical perfection.*

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INTRODUCTION

In 2015, I wrote an article in the *Alberta Law Review* entitled "The Scope and Meaning of Reasonableness Review." On the opening page, I asked, "To what does the standard of reasonableness apply and, when it does, what does it mean?" and lamented: "Unfortunately, we have had little concrete guidance from the Supreme Court of Canada in recent years." [1] There was uncertainty about the scope and meaning of reasonableness review, which I attributed to the fact that the Supreme Court was "not at present given to broad theorizing about the general principles of judicial review."[2] With what seems like prescience in hindsight, I warned that the current period might represent the "calm before the storm."[3]

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1 Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52:4 Alta L Rev 799 at 800 [Daly, "Reasonableness Review"].

2 *Ibid* at 827.

3 *Ibid*.

Sure enough, a storm soon arrived in the form of *Canada (Minister of Citizenship and Immigration) v Vavilov*.[4] It was not, though, a violent storm that razed everything in its path to the ground. Rather, it was like the mild thunderstorms familiar to those who live in Ottawa: increasingly oppressive heat followed by a short, sharp blast of wind, rain, lightning, and thunder before a relieving, cool, damp period.

A decade on — and five years after the Supreme Court thundered into the arena to clarify and simplify the law of judicial review — is an appropriate point at which to ask the question anew and to assess the concrete guidance the judges have provided.

As in my 2015 article, I will discuss the scope and meaning of reasonableness review. First, I tackle the scope of reasonableness review, highlighting the narrow scope of the correctness categories and the contested — though now resolved — role of context in selecting the standard of review. I then make an overall assessment of how the exceptions to reasonableness review, based respectively on institutional design and the rule of law, have functioned. In general, my discussion is quite upbeat: although there are some incoherences in the *Vavilov* framework on the scope of reasonableness review, the framework is functioning satisfactorily.

Second, I address the meaning of reasonableness review. To begin with, I describe the general structure of reasonableness review in *Vavilov*: its general principles; the requirement to provide coherent reasons; the requirement to respect legal and factual constraints; and the tensions within reasonableness review. I then turn to the concept of "constraint," which is central to *Vavilovian* reasonableness review, and assess the extent to which it successfully mediates the tensions within the framework. In particular, I am interested in whether, as Justices Abella and Karakatsanis charged in their concurrence in *Vavilov*, the majority reasons represent "a eulogy for deference."[5] Again, I am quite upbeat, finding that *Vavilov*, at the very least, provides an appropriate structure within which to debate the proper application of the reasonableness standard, as it clearly delineates the respective roles of administrative decision-makers and reviewing courts, responding effectively to the concerns of the concurring judges.

Interestingly, if my diagnosis in 2015 was accurate, my prescription — more theory! — was not. In fact, it was the "retreat from theory"[6] in *Vavilov* that has ushered in a period of stability in Canadian administrative law. My sense is that *Vavilov* has broad acceptance in the legal community, much more so than its predecessor frameworks ever had. At the risk of putting too fine a point on it, *Vavilov* has "sociological legitimacy." In other work, I have observed that *Vavilov* straddles three fault lines in Canadian administrative law: form versus substance; judicial supremacy versus administrative supremacy; and authority versus reason:

> By form, I mean the development of conceptual categories, into which decisions must be placed without regard to whether the achievement of the substantive ends intended by the development of the categories is actually furthered by placing a particular decision in a category. By substance, I mean paying attention to the eccentricities of the individual decision and the statutory provisions pursuant to which it was made.
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4 2019 SCC 65 [*Vavilov*].

5 *Ibid* at para 201.

6 Megan Pfiffer, "What's the Problem with Substantive Review?" (2024) 69:3 McGill LJ 325 at 352.

> [By judicial supremacy versus administrative supremacy, I mean that some] judges are hostile to administrative discretion, and others are much more open to it. Some seek to cut discretion down to the bare minimum, while others are comfortable with deferring to the views of administrative decision makers, especially those who can plausibly claim to be expert in their field of regulation.
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> The last fault line is between reason and authority. Professor David Dyzenhaus has described this as the distinction between "deference as submission" and "deference as respect."[7] Some judges accord deference and apply deferential standards because there is some *authoritative* basis to do so. Others, though, require a *reasoned basis* to defer in the first place, and to uphold a decision.[8]

By favouring form and substance, judicial supremacy and administrative supremacy, and authority and reason in different parts of the judgment, the majority in *Vavilov* succeeded in giving something to everyone. Hence its acceptability in the legal community. Below, I will add the observation that the *Vavilov* framework contains within it the resources with which to critique applications of the framework and thereby further safeguards its sociological legitimacy. There is no need to step outside the *Vavilov* framework and appeal to external principles or values because all of the tools of critique are already available within the framework.

Furthermore, when the *Vavilov* framework is observed from an external perspective, it has "normative legitimacy" as well. The creation of normatively acceptable administrative law doctrine involves balancing the values of individual self-realization, good administration, electoral legitimacy, and decisional autonomy.[9] I do not intend to belabor the point here, but *Vavilov* certainly strikes a balance between those values: reasonableness review puts the individual at the centre of the justification exercise; good administration is promoted by insisting on demonstrated expertise in exchange for deference; electoral legitimacy is furthered by insistence on the importance of legislative intent in identifying the standard of review and applying the reasonableness standard; and decisional autonomy is achieved by clear lines of delineation between the roles of courts and administrative decision-makers. With these characteristics, *Vavilov*'s normative legitimacy is secured — at the very least, it is difficult to say that the *Vavilov* framework is illegitimate. Therefore, its normative legitimacy reinforces its sociological legitimacy, helping to explain why the framework has proved more durable to date than its predecessors.

I. SCOPE

As is well known, *Vavilov* establishes that the presumptive standard of review for any administrative decision is reasonableness,[10] subject to two sets of exceptions: one based on the rule of law, and the other based on institutional design.

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7 David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 303.

8 Paul Daly, "Why is Administrative Law So Complicated?", *A Culture of Justification: Vavilov and the Future of Administrative Law* (Vancouver: UBC Press, 2023) 16 at 37–39 [emphasis added, footnotes omitted].

9 Paul Daly, *Understanding Administrative Law in the Common Law World* (Oxford: Oxford University Press, 2021) at ch 1.

10 *Vavilov*, *supra* note 4 at para 25.

A. THE NARROW SCOPE OF THE CORRECTNESS CATEGORIES

Both the "rule of law" and "institutional design" are potentially capacious concepts. Much has been written about "thick" conceptions of the rule of law, for example. However, under *Vavilov*, the conceptions of the rule of law and institutional design are "wafer thin."[11] The rule of law exception to the presumption of reasonableness review requires the application of the correctness standard in a limited set of situations where the superior courts must provide a uniform answer to ensure coherence and the integrity of the legal system. Each has a "need for uniform application of a legal principle."[12]

- Questions about the constitutional validity of statutes are the classic example: a statute cannot be constitutionally valid on a Monday but invalid on a Tuesday, depending on the identity of the decision-maker opining on the question of validity.[13] The same is true of the meaning of a *Charter* right.[14]

- Jurisdictional overlaps are another example: the identity of the decision-maker who will resolve a particular dispute must be authoritatively determined by a superior court where there is a risk of overlap.[15]

- General questions of law with a constitutional dimension are also subject to correctness review — for example, matters of privilege (parliamentary[16] and professional[17]), and, perhaps, the interpretation of quasi-constitutional statutes.[18]

- Situations where an administrative decision-maker and a court share concurrent jurisdiction over the interpretation of a legal term in a statute.[19]

More on that last one in a moment. In general, these categories have given rise to relatively little debate in individual cases. I struggle to think of many controversial invocations of correctness review post-*Vavilov*.

As far as institutional design is concerned, the position is similarly simple. Where the legislature has provided for an "appeal," the appellate standards of review apply: correctness for extricable questions of law, but palpable and overriding error for all other questions

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11 Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) 33:2 Can J Admin L & Prac 111 at 119.

12 Daly, "Reasonableness Review", *supra* note 1 at 814.

13 *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at paras 92–97.

14 *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at para 63.

15 *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 at paras 7–9.

16 *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39.

17 *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53. But see *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at para 16 [*Information Commissioner*], equivocating on the point, albeit in a context where the parties had agreed that reasonableness was the applicable standard in a case involving judicial review of a decision ordering the release of cabinet-level documents. See further Paul Daly, "Case Comment: *Ontario (AG) v. Ontario (IPC)*" (2024) 37 Can J Admin L & Prac 167.

18 *United Nurses of Alberta v Alberta Health Services*, 2021 ABCA 194 at paras 51–60.

19 *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 [*Entertainment Software Association*].

(namely, questions of mixed fact and law and questions of fact). There has been some debate about what constitutes a "right of appeal,"[20] but none of which has risen to the level of appellate courts — still less to meaningful appellate disagreement. A lingering question about whether the appellate standards from *Vavilov* apply in the context of arbitration appeals remains unresolved,[21] and the extent to which substantive considerations about expertise influence the classification of a question on appeal as one of "law" continues to fascinate;[22] but otherwise, this is not a particularly complex or controversial area of law. Beyond "appeals," the legislature may otherwise specify a standard of review; but outside of British Columbia, and some one-off provisions in statutes from Alberta and Ontario, none have taken up the invitation.[23] "Institutional design," therefore, does not generally give rise to regular debates or disputes — a function, no doubt, of its thinness as a concept.

B. THE ROLE OF CONTEXT IN SELECTING THE STANDARD OF REVIEW

The one significant post-*Vavilov* debate about the scope of reasonableness review concerns the role of context in determining whether new correctness categories should be recognized. In *Vavilov* itself, the majority deprecated contextual analysis, describing it as "unwieldy,"[24] and vaunted the "elimination" of context from the selection of the standard of review.[25] However, the majority did not foreclose the possibility that additional correctness categories could be recognized where doing so would be consistent with the *Vavilov* framework and overarching principles.[26] This could be taken as an invitation to have recourse to contextual analysis in justifying the creation of a new correctness category.

Sure enough, in *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, the Supreme Court adopted a contextual approach.[27] The underlying issue was whether the Copyright Board had erred in determining that there is a separate "making available right" in Canadian copyright law. The Board had found that a right to payment exists where a recording is "made available" for access in an online repository (think iTunes). On judicial review, the Federal Court of Appeal found that the Board's decision was unreasonable. On appeal, the Supreme Court agreed, the majority (per Justice Rowe) concluding that the Board was incorrect, the minority (per Justice Karakatsanis) applying the reasonableness standard and finding the Board's decision unreasonable.[28]

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20 See e.g. *O'Shea/Oceanmount Community Association v Town of Gibsons*, 2020 BCSC 698 at para 52.

21 *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at paras 117–22; James Plotkin & Mark Mancini, "Inspired by *Vavilov*, Made for Arbitration: Why the Appellate Standard of Review Framework Should Apply to Appeals from Arbitral Awards" (2021) 2:1 Can J Commercial Arbitration 1.

22 Paul Daly, "Big Bang Theory: Vavilov's New Framework for Substantive Review" in Colleen M Flood & Paul Daly, eds, *Administrative Law in Context*, 4th ed (Toronto: Emond, 2022) 327.

23 Paul Daly, "Patent Unreasonableness After *Vavilov*" (2021) 34:2 Can J Admin L & Prac 167.

24 *Vavilov*, *supra* note 4 at para 28.

25 *Ibid* at para 47.

26 *Ibid* at para 70.

27 *Supra* note 19.

28 *Ibid* at paras 114, 161.

This matter involved the interpretation by the Board of its home statute, the *Copyright Act*.[29] The question of whether the *Act* protects a "making available right" did not fall into any of the correctness categories in *Vavilov*, either on the "institutional design" branch or "rule of law" branch.[30]As this was a judicial review, not an appeal, the appellate standards of review could not apply on the basis of "institutional design." And as the question involved the interpretation of the Board's home statute the "rule of law" was not engaged.

But Justice Rowe held that this was a "rare and exceptional [case] where it [was] appropriate to recognize a new category of correctness review," namely "when courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute."[31] Questions concerning the interpretation of copyright law can arise on judicial review of decisions of the Board (at the Federal Court of Appeal), but also in the context of actions to enforce copyright heard in the Federal Court with a right of appeal to the Federal Court of Appeal. This concurrent jurisdiction was enough, Justice Rowe held, to require the application of the appellate standards of review to decisions of the Board. In this way, questions of copyright law will invariably be subject to correctness review by the Federal Court of Appeal, regardless of whether they are posed in a Board proceeding or an action in Federal Court at first instance.

Justice Rowe provided several reasons why applying the correctness standard in such circumstances "accords with legislative intent and promotes the rule of law."[32] In terms of legislative intent, Justice Rowe commented that *Vavilov*'s presumption of reasonableness review "no longer applies"[33] in situations where "the legislature expressly involves the court in the administrative scheme," because where interpretive decisions can be made either by courts or administrative decision-makers, "it should be inferred that the legislature wanted to subject those decisions to appellate standards of review."[34]

I have criticized this reasoning elsewhere.[35] Suffice it to say for present purposes that Justice Rowe took a much "thicker" approach here to legislative intent. In *Vavilov*, remember, institutional design meant "appeals attract" appellate standards or "legislatures may" specify the standard of review.[36] Here, the magic word "appeal" did not appear, nor was there any legislative specification of the standard of review. Justice Rowe took a much more holistic — which is to say, contextual — view of legislative intent.

As far as the rule of law is concerned, Justice Rowe was concerned that deferential review of the Board's interpretations of law in *Entertainment Software Association* could create legal inconsistencies which would be "antithetical to the rule of law":[37] it would potentially subject the same issue to a different standard of review depending on the forum deciding it at first

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29 RSC 1985, c C-42.

30 In a previous era of Canadian administrative law, the Supreme Court held that correctness applies to the review of interpretations of law by the Board: Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35.

31 *Entertainment Software Association*, *supra* note 19 at para 28.

32 *Ibid*.

33 *Ibid* at para 30.

34 *Ibid* at para 31.

35 Paul Daly, "Future Directions in Standard of Review in Canadian Administrative Law: Substantive Review and Procedural Fairness" (2023) 36:1 Can J Admin L & Prac 69 [Daly, "Future Directions"].

36 *Vavilov*, supra note 4 at para 37.

37 *Vavilov*, *supra* note 4 at para 72.

instance, which could lead to "conflicting statutory interpretations."[38] For example, reasonableness in the Federal Court of Appeal on an interpretive issue arising from the Board, but correctness in the same court on a legal issue first decided by the Federal Court.

Moreover, Justice Rowe held that this scenario is different, in rule of law terms, from discord within an administrative agency. In *Vavilov*, the majority refused to recognize "persistent discord" as justifying correctness review.[39] But for Justice Rowe, the rationales offered for this reticence in *Vavilov* lose their gravitational force where the "discord" is between different decision-makers. Most significantly, he suggested that reasonableness review cannot safeguard the rule of law. The majority in "*Vavilov* offered guidance as to how to manage persistent discord *within* administrative bodies," but *Vavilov* gave "little guidance on managing differing decisions between courts and tribunals."[40] However, whereas the rule of law categories in *Vavilov* are concerned with inconsistencies that would undermine the integrity of the legal system, *Entertainment Software Association* is concerned with the *potential* for such inconsistency. There is no *actual* inconsistency — or any example of which I am aware — between the courts and the Board on the interpretation of copyright law. If *potential* inconsistency and the resultant *risk* of discord is the trigger for rule of law concerns and, thus, the application of the correctness standard, then the door to correctness review is more open than *Vavilov* envisioned. Context allowed Justice Rowe to crack it open that little bit wider, destabilizing the balance between form and substance.

But this openness to context and correctness did not last long. A year later, in *Mason v. Canada (Citizenship and Immigration)*,[41] the Court firmly shut the door on contextual analysis in selecting the standard of review. The issue here involved the implications of the mechanism in the *Immigration and Refugee Protection Act*[42] that permits the Federal Court, having heard a judicial review application, to certify a question of general importance for resolution by the Federal Court of Appeal.[43] With colleagues, I appeared for the intervener, Canadian Association of Refugee Lawyers, before the Court in *Mason*. We argued that, under the *Vavilov* framework, the correctness standard should apply to questions of law arising in the immigration context. We leaned heavily on the apparent return to contextual analysis in

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38 *Entertainment Software Association*, *supra* note 19 at paras 33–35.

39 *Vavilov*, *supra* note 4 at paras 71–72.

40 *Entertainment Software Association*, *supra* note 19 at para 38 [emphasis in original].

41 2023 SCC 21 [*Mason*].

42 SC 2001, c 27, s 74(d) [*IRPA*].

43 As the Supreme Court explained in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 at para 43 (SCC):

> The key to the legislative intention as to the standard of review is the use of the words "a serious question of *general* importance" (emphasis added). The general importance of the question, that is, its applicability to numerous future cases, warrants the review by a court of justice. Would that review serve any purpose if the Court of Appeal were obliged to defer to incorrect decisions of the Board? Is it possible that the legislator would have provided for an exceptional appeal to the Court of Appeal on questions of "general importance", but then required that despite the "general importance" of the question, the court accept decisions of the Board which are wrong in law, even clearly wrong in law, but not patently unreasonable? The only way in which s. 83(1) can be given its explicitly articulated scope is if the Court of Appeal — and inferentially, the Federal Court, Trial Division — is permitted to substitute its own opinion for that of the Board in respect of questions of general importance.

In 2015, the Supreme Court abruptly changed course, applying the reasonableness standard to a question of interpretation in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61.

Entertainment Software Association, making legislative intent and rule of law arguments consistent with that approach. The "institutional design" of the certified question regime envisioned authoritative resolution of legal questions by the Federal Court of Appeal. This furthered the "rule of law" by ensuring consistent application of the law in the tens of thousands of adjudications conducted annually under the *IRPA* by the Immigration and Refugee Board, as well as the still more voluminous decisions made under the *IRPA* by civil servants in the Department of Immigration, Refugees and Citizenship Canada and their counterparts in the Canada Border Services Agency (an autonomous agency within the civil service).

Suffice it to say that having put our fingers through a door opened by *Entertainment Software Association*, the door was slammed shut by Justice Jamal in *Mason*:

> [R]ecognizing a new correctness category here would conflict with *Vavilov*'s goal of simplifying and making more predictable the standard of review framework by providing only limited exceptions to reasonableness review (para. 47). Treating s. 74(d) as justifying correctness review would effectively reintroduce a "contextual" approach to the standard of review — with the certification of a serious question of general importance being a "contextual" factor suggesting correctness — and thus would revive the approach that *Vavilov* eliminated because it created "uncertainty" and was "unwieldy" (para. 7; see also P. Daly, "Unresolved Issues after *Vavilov*" (2022), 85 *Sask. L. Rev.* 89, at pp. 91-92 (*Vavilov* is "an exercise in simplification and clarification" that "excised" the "'vexing contextual factors' . . . from the standard of review selection exercise.")).[44]

Although I let out a yelp of pain for my injured fingers and the definitive demise of correctness review on certified questions under the *IRPA*, I am not displeased with the overall outcome (as the citation to my work correctly suggests). *Vavilov* did simplify and clarify the law; rejecting context in the selection of the standard of review was an important part of the simplification and clarification exercise. Our argument for correctness review in *Mason* was narrowly tailored, but a firm rejection of contextual analysis will strongly dissuade lower courts from expanding the correctness categories. Indeed, Justice Jamal did not give an inch on the scope of the existing categories. Certified questions are not, he held, general questions of law of central importance to the legal system, as "the issues raised are particular to the interpretation of the conditions for inadmissibility under [the *IRPA*]."[45] This is commendably clear. I am happy to lose the battle over the *IRPA* if it means simplicity and clarity prevail in the wars that have raged for decades in Canadian administrative law.

C. OVERALL ASSESSMENT

Experience talking to lawyers and judges across Canada over the past half-decade teaches me that the *Vavilov* framework has wide support in the legal community. In my view, it enjoys such support because it responds effectively to many of the difficulties that plagued this area of law a decade ago. Then, the presumption of reasonableness review was effectively irrefutable. This was true even of statutory appeals, even though it made little sense, as a matter of principle, to give no weight to the legislative choice to provide for a right of appeal

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[44] *Mason*, *supra* note 41 at para 53.
[45] *Ibid* at para 47.

— especially when the nature of the question at issue was legal.[46] Unsurprisingly, this became a major flash point.[47] By making an exception in *Vavilov* to the presumption of reasonableness review for statutory appeals, the majority of the Supreme Court neutered these critiques: it gave up quite a bit of administrative supremacy, leaning instead into the authority of legislative intent. Moreover, by preferring "thin" conceptions of inherently contested concepts,[48] the majority judges used simple, formal rules and thereby managed to put in place a framework that is durable in practice — whatever its theoretical frailties. As we will see, the emphasis on form over substance, judicial supremacy over administrative supremacy, and authority over reason for the purposes of selecting the standard of review was reversed when it came to setting out the reasonableness standard.

It is appropriate, however, to comment on some of the incoherence that has resulted from *Vavilov*'s "retreat from theory."

1. INSTITUTIONAL DESIGN

Take institutional design first — particularly the application of the appellate standards of review to "appeals." A resulting incoherence is that many economic regulators, who by any definition are highly expert and specialized,[49] are subject to appeal clauses and hence *de novo* review on questions of law, whereas front-line decision-makers with no comparable expertise benefit from the presumption of reasonableness review. The precise reasons why legislatures considered rights of appeal appropriate have been lost in the mists of time. However, the upshot of a presumption of reasonableness review with an exception for statutory rights of appeal is that the reasonableness standard applies to officials with little or no legal training, who operate in pressurized environments, and who have little time, interest, or experience in addressing legal issues; meanwhile, correctness applies to many decision-makers who have deep expertise and knowledge. This makes little sense. That said, this quibble relates to matters of theory rather than to practice.

A more serious incoherence, which may ultimately have structural implications for the law of judicial review, is that the provision of a right of appeal now leads to *less* judicial oversight of mixed questions of law and fact, and questions of fact than does judicial review. The approach preferred by the majority was to apply the appellate standards of review in any case where a statute affords a right of appeal from a decision-maker to a reviewing court. As a result, the standard of correctness applies only to extricable questions of law, with palpable and overriding error applying to everything else.

The difficulty with the wholesale application of appellate standards of review is that in two respects, the standard of review is *less* demanding on a statutory appeal than on judicial review. First, the test on a statutory appeal for the adequacy of reasons is a much less

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46 *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at paras 78–79, per Côté and Brown JJ, dissenting.

47 See especially *Atlantic Mining NS Corp (DDV Gold Limited) v Oakley*, 2019 NSCA 14 at para 13.

48 See generally Pfiffer, *supra* note 6 at 331–38.

49 *Pezim v British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC); *Canada (Director of Investigation and Research) v Southam Inc*, 1997 CanLII 385 (SCC).

demanding standard than the standard of reasonableness.[50] On the appellate standard of review, the question is whether the reasons are so deficient that "an appellate court may consider itself unable to exercise appellate review in a meaningful way."[51] By contrast, on reasonableness review, not only must the decision-maker's reasons achieve this basic level of coherence, but they must also justify the result in view of the relevant legal and factual constraints. Second, the palpable and overriding error standard, which requires errors that jump off the page and go right to the root of the decision, strongly discourages judicial intervention on questions of fact or mixed fact and law.[52] However, under reasonableness review, a decision must be justified given "the evidentiary record and the general factual matrix,"[53] must explain how the decision-maker grappled with key arguments,[54] must justify any departure from past practice,[55] and must take adequate account of any harsh consequences imposed on individuals.[56]

One would expect the provision of a statutory right of appeal to *increase* judicial oversight, not to *decrease* it. Yet that is the result of the choice made by the majority in *Vavilov* to apply the appellate standards of review wholesale on statutory appeals from administrative decision-makers. My personal preference would be for *Vavilovian* reasonableness review to supplant palpable and overriding error and the adequacy-of-reasons standard. But unless and until the Supreme Court holds otherwise, we will have to live with this incoherence.

2. THE RULE OF LAW

As for the exceptions based on the rule of law, these are also well-established and generally do not provoke serious debate or discussion among the bench, the bar, and the academy.

One reason for the relative calm is the elimination of the notion of true questions of jurisdiction.[57] No doubt, the notion of jurisdiction remains fundamental. A decision-maker may exercise only the authority granted by statute and must remain within the four corners of the statute. For example:

> The Patented Medicine Prices Review Board regulates the pricing of medicines under the market power given by a patent—namely, patented medicines. The Board does not regulate the pricing of unpatented medicines. After all, it's right in the Board's name: the Board is the "Patented Medicine Prices Review

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50 See *Vavilov*, *supra* note 4 at para 285, per Abella and Karakatsanis JJ, concurring: "Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than that applied to trial judges." But see *Halton (Regional Municipality) v Canada (Transportation Agency)*, 2024 FCA 122 at para 22; *Best Buy Canada Ltd v Canada (Border Services Agency)*, 2025 FCA 45 at para 11. For discussion, see Paul Daly, "Unappealing Applications for Judicial Review: Best Buy Canada Ltd. v. Canada (Border Services Agency), 2025 FCA 45", (6 March 2025), online (blog): [perma.cc/D5GH-HJQ8].

51 *R v Sheppard*, 2002 SCC 26 at para 28.

52 *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46; *JG c Nadeau*, 2016 QCCA 167 at para 77.

53 *Vavilov*, *supra* note 4 at para 126.

54 *Ibid* at para 128.

55 *Ibid* at para 131.

56 *Ibid* at para 135.

57 *Ibid* at paras 65–68.

> Board," not the "Patented and Unpatented Medicine Prices Review Board" or the "All Medicine Prices Review Board."[58]

Jurisdiction, however, was a slippery concept.[59] The Supreme Court did everyone a favour by removing it from the judicial review framework. Again, the result was to enhance certainty.

Speaking of slippery concepts, *Vavilov* makes a categorical distinction between review of the merits of administrative decisions (subject to the *Vavilov* framework) and review of procedural aspects of administrative decisions.[60] It has justly been observed that by placing reasons at the heart of the judicial review exercise, the approach in *Vavilov* suggests that deference may be appropriate on procedural issues.[61] Where reasons have been given on a procedural issue, it can be said that any judicial review is of the merits of (that is, reasons for) the administrative decision.[62] This approach has found favour in Quebec since *Vavilov*,[63] but not elsewhere.[64] Courts have insisted either that the standard is correctness, or that there is no standard of review at all, and the court must ask whether the procedure was fair in all the circumstances. On statutory appeals, procedural fairness is considered on a correctness basis.[65] So far, the merits-or-procedure distinction has held as a matter of practice — unsatisfactory as it may be as a matter of theory.

Lastly, I must acknowledge that there is some debate about whether the correctness standard should apply to administrative decisions that infringe *Charter* rights.[66] The correctness standard here is something of a misnomer, because the real question is whether such a decision should be required to satisfy the *Oakes* test. But let us leave that terminological question aside. In terms of *Vavilov*, the issue is whether an individual *Charter*-infringing administrative decision comes within the "constitutional question" category because of its implications for the integrity of the legal system. I have my doubts about that: there is a significant rule-of-law difference between differing decisions by administrative decision-makers about the constitutional validity of a statute (or the scope of a *Charter* right), and the validity of a one-off administrative decision.[67] The Supreme Court has not cast any

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58 *Galderma Canada Inc v Canada (Attorney General)*, 2024 FCA 208 at para 4 [*Galderma*].

59 See generally Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012), chapter 6, and the many sources relied on therein.

60 *Vavilov*, *supra* note 4 at para 23.

61 Kevin Bouchard & Monica Popescu, "La substance et la procédure : l'effritement d'une distinction classique et ses conséquences pour le contrôle judiciaire" (2024) 65:4 C de D 789.

62 Paul Daly, "Unresolved Issues after *Vavilov*" (2022) 85:1 Sask L Rev 89 [Daly, "Unresolved Issues"].

63 Bouchard & Popescu, *supra* note 61.

64 See especially *Abiodun v Canada (Citizenship and Immigration)*, 2021 FC 642 at para 10.

65 *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at paras 26–30. The implications of this decision have not, in my view, been fully teased out: Daly, "Future Directions", *supra* note 35.

66 On this, compare Daly, "Unresolved Issues", *supra* note 62 with Mark Mancini, "The Conceptual Gap Between Doré and Vavilov" (2020) 43:2 Dal LJ 793.

67 To my mind, this point holds even though mixed questions of fact and law arising in the correctness categories attract correctness review as in the challenge to the validity of a statutory exclusion in *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13. For correctness to apply to a mixed question, the decision at issue must first fall within a correctness category; in *Société des casinos*, the constitutional validity of the statutory provision fulfilled this criterion). As far as individualized *Charter*-infringing decisions are concerned, it is necessary to demonstrate that they should actually be within a correctness category to begin with. It is not enough

doubt on the line of cases setting the *Oakes* test aside, and indeed reaffirmed them at the first available opportunity.[68] Furthermore, there is now little to no practical difference between *Vavilovian* reasonableness review and the *Oakes* test.[69]

All in all, the framework has been a significant success in setting the scope of reasonableness review. The presumption is simple, as are the rules relating to its exceptions. Concerns about coherence notwithstanding, operational clarity has been obtained, which is a significant achievement. Not only that but conceptual disagreement is now very rare, which speaks to the sociological legitimacy that *Vavilov* has achieved.

II. MEANING

As is well-known, the Supreme Court's guidance on reasonableness review prior to *Vavilov* was extremely limited — a shortcoming that was emphatically addressed in the majority reasons.

A. THE GENERAL STRUCTURE OF REASONABLENESS REVIEW

There are three general points to make about reasonableness review under this framework.

1. GENERAL PRINCIPLES

First, in terms of methodology, the general principles are clearly laid out. As I have observed elsewhere, *Vavilov* functions almost as a "Civil Code" of judicial review, with principles appearing first and detailed specifications of the principles set out in subsequent paragraphs.[70] In respect of reasonableness review, the majority judges identified the following general principles:

- The burden is on the applicant to show that a challenged decision is unreasonable;[71]
- Reasonableness review is "a robust form of review;"[72]
- Judicial review requires a reasons-first analysis where reasons are required to be given;[73]

to justify correctness review simply that an individualized decision may involve considerations of mixed fact and law. For thoughtful discussion, see Anthony Sangiuliano & Mark Friedman, "What is the Standard of Review for (Mixed) Constitutional Questions?", UBC L Rev [forthcoming in 2025].

68 *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at paras 60–75 [*CSFTNO*].

69 See especially *Lauzon v Ontario (Justices of the Peace Review Council)*, 2023 ONCA 425 at para 151.

70 Paul Daly, "Le droit civil et le droit administratif canadien" (Cycle "Le code civil : un incontournable?", delivered at University of Montreal, 2 February 2024) in Élise Charpentier, ed, *Le code civil – un incontournable?* (Montreal: Éditions Thémis, 2025).

71 *Vavilov*, *supra* note 4 at para 100. See also the concurring reasons, at para 312.

72 *Ibid* at para 13. See also the concurring reasons at para 294.

73 *Ibid* at para 81. See also the concurring reasons at paras 291, 296.

- A reviewing court does not conduct a *de novo* analysis to identify what the decision ought to have been;[74]
- Reasonableness depends on sensitivity to legal and factual constraints;[75]
- Reasonableness requires an appreciation for institutional context and background;[76] and
- "'Administrative justice' will not always look like 'judicial justice.'"[77]

I do not propose to go through these principles in great detail here. The point, for present purposes, is that these principles can be called into action where the application of the reasonableness standard gives rise to debate.

Consider, for instance, the decision of the Supreme Court in *Mason*. One interesting feature of that case is the majority's disagreement with the lower court about the approach to take to reasonableness review. The disagreement concerned the notion that a judge should conduct a preliminary review of a statutory scheme before looking at the reasons for decision. The Supreme Court criticized the lower court for departing from the guidance in *Vavilov*.[78] However, in conducting its own reasonableness analysis, commentators noted that the Supreme Court had itself engaged in such an exercise by assessing international law constraints that had not been argued before the decision-maker or addressed by the court below.[79]

My point here is not to arbitrate between the two courts, but simply to highlight that both courts and commentators were able to rely on the general principles in *Vavilov* to support their arguments. They could do so because the framework is a coherent whole — almost like a civil code for judicial review of administrative action. This is a significant advance on where the law was a decade ago, when the available principles were far too general to be of any assistance in responding to operational difficulties. Indeed, those general principles could sometimes aggravate or contribute to operational difficulties.[80]

2. THE REQUIREMENT TO PROVIDE COHERENT REASONS

Second, the Supreme Court provided guidance on the basic content requirements for reasons. These must be coherent — describing how the decision-maker reasoned from its premises to its conclusion[81] — and must avoid a short list of basic fallacies, "such as circular

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74 *Ibid* at paras 83–84. See also the concurring reasons at paras 306, 313.
75 *Ibid* at para 90. See also the concurring reasons at paras 292–93.
76 *Ibid* at para 93. See also the concurring reasons at para 297.
77 *Ibid* at para 92. See also the concurring reasons at para 299.
78 *Mason*, *supra* note 41 at para 79.
79 Paul Daly, "2023 Developments in Administrative Law Relevant to Energy Law and Regulation" (2024) 12:1 Energy Regulation Q 7; Mark Mancini, "Sunday Evening Administrative Review, Issue #108: A Big SCC Case on Reasonableness, Dore and Psilocybin Mushrooms" (1 October 2023), online (podcast): [perma.cc/R55T-V6NR].
80 See the discussion of the statutory appeals "flash point" in Part I.C, above.
81 *Vavilov*, *supra* note 4 at para 103.

reasoning, false dilemmas, unfounded generalizations or an absurd premise."[82] Building on this, courts have subsequently observed that administrative boilerplate reasons that are not responsive to the evidence or arguments before the decision-maker will be insufficient to meet the basic required content demanded by *Vavilov*.[83] That is, reasons that lack "any real analysis" because they are conclusory are, as far as *Vavilov* is concerned, no reasons at all.[84]

3. THE REQUIREMENT TO RESPECT LEGAL AND FACTUAL CONSTRAINTS

Third, and most importantly, there is a general list of legal and factual constraints that are likely to be relevant to determining reasonableness. Even though the majority judges were careful to observe that their exegesis of reasonableness was not intended to be exhaustive but rather illustrative of the sorts of circumstances in which a decision would be afflicted by a sufficiently serious shortcoming to render it unreasonable,[85] this has been treated as a category of unreasonableness in and of itself. Indeed, it is the dominant category — unless there is a patent (dare I say patently unreasonable) shortcoming in the reasons, the relevant question for the reviewing court will be whether the decision is reasonable given the relevant statutory constraints.

4. THE TENSIONS WITHIN *VAVILOVIAN* REASONABLENESS REVIEW

If nothing else, then, *Vavilov* provides meaningful guidance where before none had been present. Of course, it is entirely proper to point out that *Vavilovian* reasonableness review contains internal tensions that have, indeed, been propagated by post-*Vavilov* decisions.

For example, on the one hand, responsive justification is a central principle in *Vavilov* and requires that administrative decision-makers demonstrate through their reasons that they have listened to the parties, indicating a citizen-led approach to administrative law. On the other hand, *Vavilov* insists that decisions must be consistent with the relevant legal constraints. Hence, in *Mason*, the Supreme Court found an administrative interpretation of law to be unreasonable because it violated a relevant legal constraint — the international law prohibition on *refoulement* — even though the international law argument had not been made to the administrative decision-maker.[86]

Another example is the tension between the *Vavilovian* proposition that administrative decision-makers are not required to interpret statutes as judges would and the accompanying proposition that interpretations of law must comply with the principles of statutory interpretation developed by judges. Hence, in *Information Commissioner*, an interpretation of access-to-information law was found to be unreasonable because of a failure to consider

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82 *Ibid* at para 104.

83 See e.g. *Safarian v Canada (Citizenship and Immigration)*, 2023 FC 775 at para 3; *Khosravi v Canada (Citizenship and Immigration)*, 2023 FC 805 at para 7; *Kashefi v Canada (Citizenship and Immigration)*, 2024 FC 856 at para 8. See generally *Nesarzadeh v Canada (Citizenship and Immigration)*, 2023 FC 568 at paras 5–9.

84 *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at paras 58–60 [*Galindo Camayo*].

85 *Vavilov*, *supra* note 4 at para 101.

86 *Mason*, *supra* note 41 at para 117.

statutory purpose despite a well-reasoned and thorough decision that considered the problem from a multiplicity of angles well known in the world of access-to-information law.[87]

Does this doom us to "still more confusion and instability in the law?"[88] Here, I would plead in favour of *Vavilov*, that its emphasis on principles means that disagreement about the application of the framework in individual cases can be addressed by reference to those principles. In other words, the resources for a critique of *Mason* or *Information Commissioner* are found in *Vavilov* itself. There is no need to resort to higher-level principles relating to administrative law, Canada's constitutional structure, or the requirements of liberal democracy. A critique *can* be based on such principles, but it *need not* be. The problem prior to *Vavilov* was that the principles underpinning substantive review in administrative law were either unclear or pitched at such a high level of abstraction as to practically invite disagreement.[89] The advantage of *Vavilov* is that it provides the tools for immanent critique: disagreement can never be eliminated from the law, but it can be structured — and, if nothing else, *Vavilov* does that. To anticipate a point I will seek to bludgeon home below, this goes to the sociological legitimacy of the framework. Pulling back to take a broader view of the landscape of legitimacy, it is notable that the meaning given to reasonableness review in *Vavilov* is much "thicker" than the meaning giving to the rule of law and institutional design: substance is favoured over form; administrative supremacy is favoured over judicial supremacy; and reason is favoured over authority. Sauce for the goose — and just as much for the gander.

B. THE CONCEPT OF CONSTRAINT

And so to the heart of this article: What is the nature of the legal and factual constraints that are central to the application of the reasonableness standard?

The question is prompted by the charge of the concurring judges in *Vavilov* that the majority's approach upends Canadian administrative law by "dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis."[90] There is no doubt that this charge is amply made out with respect to the change made in *Vavilov* to the treatment of statutory rights of appeal. As noted above, this change stripped deference on questions of law from expert regulators.[91] But for present purposes, I am more interested in whether the charge has been made out with respect to reasonableness review. Here, the concurring judges feared that *Vavilovian* reasonableness review would invite reviewing courts to "dissect administrative reasons" by providing "a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision."[92]

Assessing whether this fear has been realized requires careful consideration of the majority reasons in *Vavilov* and post-*Vavilov* case law. I will cover four points: first,

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87 *Supra* note 17.
88 Pfiffer, *supra* note 6 at 356.
89 *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 27 (referring to the rule of law and legislative intent). Again, in *Vavilov*, the majority wisely chose thinner versions of those potentially capacious concepts.
90 *Vavilov*, *supra* note 4 at para 201.
91 See also *ibid* at para 251.
92 *Ibid* at para 284.

explaining how the constraints are objective in nature and thus subject to judicial determination; second, explaining that a failure to provide reasons on a relevant constraint will render an administrative decision unreasonable; third, explaining that, in some situations, the relevant constraints will require the provision of more extensive reasons; and fourth, using a series of cases involving the treatment of precedent in the reasonableness analysis to assess reasonableness review under the new framework.

1. THE RELEVANT LEGAL AND FACTUAL CONSTRAINTS ARE OBJECTIVE IN NATURE

A reasonable decision "must be justified in relation to the constellation of law and facts that are relevant to the decision."[93] In this constellation of law and facts will be legal and factual "[e]lements" that "operate as constraints on the decision maker."[94] In general, these are:

> [T]he governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies.[95]

Each of these constraints is objective in nature. Either there is a governing statutory scheme bearing on a decision or there is not;[96] either there are relevant statutory or common law principles or there are not;[97] either there are harsh consequences or there are not;[98] and so on. These are binary questions and, ultimately, it can only fall to the reviewing court to determine whether a particular constraint is relevant.

Consider the *Information Commissioner* case.[99] Here, the Commissioner had ordered that mandate letters issued by the Premier of Ontario to his cabinet ministers should be released under the *Freedom of Information and Protection of Privacy Act*.[100] The government of the province had resisted disclosure on the basis of section 12(1) of the *Act*, which creates an exemption "where the disclosure would reveal the substance of deliberations" of the cabinet for a range of documents "including" (but not limited to) agendas, minutes, or lists of policy options presented to cabinet.[101] The basic premise of the Commissioner's detailed reasons was that mandate letters, which memorialize decisions already taken, would not reveal the substance of deliberations.

Applying reasonableness review, Justice Karakatsanis concluded that the Commissioner's decision was unreasonable. The key error was that the Commissioner had

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93 *Ibid* at para 105.
94 *Ibid*.
95 *Ibid* at para 106.
96 Generally, there will be — though see *MacKinnon v Canada (Attorney General)*, 2025 FC 422 (prorogation of Parliament).
97 See e.g. *Conifex Timber Inc v British Columbia (Lieutenant Governor in Council)*, 2025 BCCA 62 at para 122 (suggesting that principles of utilities law are not relevant constraints where a provincial cabinet makes a decision in a utilities matter).
98 *Sticky Nuggz Inc v Alcohol and Gaming Commission of Ontario*, 2020 ONSC 5916 at para 68.
99 *Information Commissioner*, *supra* note 17.
100 RSO 1990, c F.31.
101 *Ibid*, s 12(1).

failed to give adequate regard to the constitutional context: "Because s. 12(1) was designed to preserve the secrecy of Cabinet's deliberative process, the constitutional dimension of Cabinet secrecy was crucial context in interpreting s. 12(1)."[102] This caused a loss of confidence in the outcome.[103] The Commissioner erred in two ways.

First, he gave too narrow a scope to section 12(1). The Commissioner focused on only two rationales for cabinet confidentiality — promoting ministerial candour and preserving collective solidarity — to the exclusion of a third: efficient government. Failing to take this rationale into account caused him to ascribe too narrow a purpose to section 12(1) and to fail to respond to one of the government's submissions.[104] As a result, the Commissioner also "did not acknowledge Cabinet Office's submission that determining '*when* and *how*' to communicate policy priorities to the public and opposition parties is itself an important part of Cabinet's deliberative process."[105] In particular, the Commissioner "concluded that 'outcomes' of the deliberative process are not encompassed by the opening words of s. 12(1), full stop, without acknowledging that an important part of Cabinet confidentiality is government's prerogative to decide how and when to announce policy priorities (see para. 104)."[106] Second, the Commissioner failed to have regard to constitutional conventions and traditions relating to the nature of cabinet decision-making and the premier's role in the process.[107]

Both of these failures related to constraints that bore on the decision-maker. The Supreme Court necessarily had to form the view that these constraints were relevant.

Something similar can be said about the Supreme Court's decision in *Mason*. Relevant here was section 34(1)(e) of the *IRPA*, which makes inadmissible anyone "engaging in acts of violence that would or might endanger the lives or safety of persons in Canada." In concrete terms, a finding of inadmissibility will typically lead to deportation from Canada. The applicant, M, had been charged with attempted murder after discharging a firearm and injuring two people at a concert at the Canadian Legion in British Columbia. The charges were stayed, however, and M was thus not convicted. The Minister argued — and the Immigration Appeal Division agreed — that the applicant's conduct came within section 34(1)(e). M argued on judicial review that it was unreasonable to interpret section 34(1)(e) as encompassing "acts of violence" which do not occur in the context of terrorism, war crimes, or organized criminality, these being the concerns underpinning the inadmissibility provisions of the *IRPA*. There must be, M argued, a national security nexus to section 34(1)(e).[108]

Justice Jamal held that the tribunal's decision was unreasonable.[109]

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[102] *Information Commissioner*, *supra* note 17 at para 27.
[103] *Ibid* at para 23.
[104] *Ibid* at paras 34–35.
[105] *Ibid* at para 37 [emphasis in original].
[106] *Ibid* at para 39.
[107] *Ibid* at paras 53–55.
[108] *Mason*, supra note 41 at paras 13–18.
[109] *Ibid* at para 123.

First, the tribunal had failed to grapple with M's argument that section 34(1)(e) requires a security nexus, because the availability of discretionary relief (from the responsible minister) was narrower for section 34(1)(e) than the relief available for serious criminality and criminality offences, which may lead to inadmissibility under section 36. The logic of M's argument is that the context of the statute indicates that national security crimes are to be treated more seriously than other crimes; but, on the opposing interpretation, less serious crimes (indeed, here, one for which there was not even a conviction) would carry the most serious possible consequences.[110] The tribunal had also failed to grapple with a related argument about the impact of a finding under section 34(1)(e) on the pre-removal risk assessment to be conducted by the responsible minister before deporting M or a similarly situated person. Again, M's argument was that the statutory scheme would only make sense if the most serious consequences attached to the most serious ground of inadmissibility — namely, national security.[111]

Second, the tribunal failed to grapple with M's argument that not requiring a national security nexus would lead to absurd consequences that Parliament could not possibly have intended — rendering people inadmissible to Canada for everything from domestic altercations to bar fights and schoolyard fights, including young people who would otherwise be protected from the harsh consequences of the law by the youth offender system.[112] According to Justice Jamal, the tribunal should have considered this point, which was not a "minor aspect" of the interpretive context.[113]

Third, the tribunal had failed to consider Canada's international law obligations. Justice Jamal's analysis is lengthy, but the key point was that the tribunal's interpretation would allow "a foreign national found inadmissible under s. 34(1)(e) to be subject to *refoulement* contrary to Article 33(1) of the *Refugee Convention*" — that is, to deportation to a country where they would face a risk of persecution.[114]

For Justice Jamal to conclude that these shortcomings in the tribunal's decision contributed to a finding of unreasonableness, he first had to conclude that each was a relevant constraint. For the first two shortcomings, Justice Jamal had to form the view that they were key arguments advanced before the tribunal. Once it was established that they were key arguments, the tribunal was then under an obligation to grapple with them, which it had evidently failed to do. For the third shortcoming, Justice Jamal again had to determine whether the obligations operated as a constraint on the tribunal; having analyzed the statute, he concluded that they did.[115] Given that the tribunal had not provided reasons on any of these constraints, the decision was necessarily unreasonable. For now, my point is that the constraints were authoritatively and definitively identified by the reviewing court.

The decision in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*[116] is similar in character. This case involved the review of ministerial discretion. Section 23 of the *Canadian Charter of*

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110 *Ibid* at para 91.
111 *Ibid* at paras 94–95.
112 *Ibid* at paras 99, 102.
113 *Ibid* at para 103.
114 *Ibid* at para 109.
115 *Ibid* at para 117.
116 *CSFTNO*, *supra* note 68. I appeared for the intervener the Yukon Francophone School Board.

Rights and Freedoms creates categories of "rights holders" who, because of their personal circumstances as speakers or learners of a minority language, "have the right to have their children receive primary and secondary school instruction in that language in that province."[117] Here, the Minister had adopted a policy that expanded the section 23 categories and made a wider group of children eligible to attend school in French. However, the children at issue in this case did not fall within the scope of the policy. The children were either French-language speakers, otherwise embedded in the French-language community in the Northwest Territories, or would contribute to the vitality of the community by attending school in French. In each case, the provincial Francophone school board recommended that they be permitted to attend a French-language school. But the children did not fall within the scope of the policy. Essentially on that basis, the Minister refused to permit them to attend a French-language school.

The children successfully invoked the values underlying section 23 of the *Charter*. According to the Supreme Court, the underlying values of section 23 were engaged on the facts, as there was a "clear link" between section 23 and the exercises of discretion, "because the decisions were likely to have an impact on a minority language educational environment."[118] Preserving and developing the minority-language community (which admission of the children would have contributed to) are section 23 values,[119] which the Minister was required to consider.[120] The Minister failed to justify her decisions given the evidence of this link: her reasons did not demonstrate that she "meaningfully addressed the values of preservation and development of the Francophone community of the Northwest Territories so as to reflect the significant impact that the decisions might have on it."[121] Here again, the relevance of a constraint — *Charter* values — was determined by the Supreme Court.

2. THE ABSENCE OF REASONS ON A RELEVANT CONSTRAINT IS UNREASONABLE

In *Information Commissioner*, *Mason*, and *CSFTNO*, the Supreme Court determined whether or not a constraint was relevant. Having determined, in each instance, that a constraint was relevant, the Supreme Court went on to consider whether the decision-maker had provided reasons in relation to the constraint. In the absence of reasons explicitly responsive to the constraints, the decisions were found to be unreasonable. (Had there been reasons that were conclusory or mere boilerplate, the same result would, of course, have been reached.)

The point is best appreciated *a contrario*: Where reasons are provided in respect of a constraint, the decision will most likely be held to be reasonable. Consider one of the companion cases to *Vavilov*: The decision in *Canada Post Corp. v. Canadian Union of Postal*

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117 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 23.
118 *Ibid* at para 78.
119 *Ibid* at paras 80–82.
120 *Ibid* at para 83.
121 *Ibid* at para 102.

Workers,[122] released the following day. At issue here was the scope of section 125(1)(z.12) of the *Canada Labour Code*, pursuant to which an employer shall,

> in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,
>
> …
>
> (z.12) ensure that the work place committee or the health and safety representative inspects each month all or part of the work place, so that every part of the work place is inspected at least once each year.[123]

A complaint was filed about Canada Post's compliance with this duty in relation to employees in Burlington, Ontario. Canada Post took the view that the duty under the *Code* extended only to its local depot, not to all of the carrier routes its employees traipse along to reach letterboxes throughout Burlington. The Union favoured a more liberal interpretation, which would encompass the routes and the letterboxes. The stakes here were high, as a determination in favour of the Union would, in principle, have nationwide repercussions. A Health and Safety Officer agreed with the Union, but an Appeals Officer took Canada Post's side at the Occupational Health and Safety Tribunal Canada.[124]

By majority, the Supreme Court upheld the Appeals Officer's decision. Here, Justice Rowe noted that the Appeals Officer had provided detailed reasons that "contended with the submissions of the parties throughout his analysis."[125] Crucially, these reasons "amply demonstrate[d] that [the Appeals Officer] considered the text, context, purpose, as well as the practical implications of his interpretation."[126] The Appeals Officer had not considered — because he had not been referred to it — another provision of the *Code* which deals with the concept of control. This, Justice Rowe held, was not fatal, not least because the Appeals Officer had not been referred to it, but also because the provision in question would, if anything, have bolstered the Appeals Officer's conclusion.[127] Put another way, statutory text, context, and purpose were relevant legal constraints under *Vavilov*, but once the decision-maker had considered them, there was no basis for a finding of unreasonableness. This is the key distinction between *Canada Post* and the Supreme Court's other post-*Vavilov* reasonableness review cases.[128]

3. Situations in Which Reasons Must Not Only Be Present but Adequate

In some situations, however, it will not be sufficient for reasons to be present; they will also have to be adequate. Determining adequacy has aptly been described as "challenging."[129] In my view, there are several points in *Vavilov* at which the majority makes clear that simply

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122 2019 SCC 67 [*Canada Post*].
123 *Ibid* at para 9, citing the *Canada Labour Code*, RSC 1985, c L-2.
124 *Ibid* at paras 16–23.
125 *Ibid* at para 60.
126 *Ibid* at para 43.
127 *Ibid* at para 53.
128 See also *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 at para 74 (failure to give regard to relevant constraints rendered a benefits decision unreasonable; I appeared for the intervener Canadian Telecommunications Association).
129 *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at para 14.

having reasons on a particular point is insufficient or, put another way, "the requirement of a reasoned explanation is higher":[130]

- The decision-maker must "meaningfully grapple with key issues or central arguments";[131]
- The decision-maker must discharge a "justificatory burden" where it departs from longstanding practices or established internal authority;[132]
- The decision-maker must explain why a decision that "has particularly harsh consequences for the affected individual … best reflects the legislature's intention";[133] and
- The decision-maker must "properly justify" an interpretation that expands the scope of its authority.[134]

In respect of these constraints, reasons *tout court* are not enough: they must be reasons that grapple with arguments or provide adequate justification, given a departure from practice, harsh consequences, or an apparent expansion of authority. For instance:

- In *Party A v. The Law Society of British Columbia*, a brief decision about whether or not to anonymize the name of a disciplined lawyer did not grapple with the lawyer's submissions about the unique circumstances of his case;[135]
- In *Canada (Attorney General) v. Honey Fashions Ltd.*, an importer was owed an explanation from the Canada Border Services Agency as to why a past practice had not been followed and how continuing to follow it "would undermine the customs scheme when such agreements had been accepted without question in the past";[136]
- In *Alsaloussi v. Canada (Attorney General)*, the harsh consequences of a three-year suspension of a passport required a "sufficiently individualized" assessment that explained and justified the result, given the relatively minor underlying misconduct;[137] and
- In *Galderma*, the Patented Medicines Prices Review Board could not properly justify an interpretation of its home statute that would permit it to regulate the price of an unpatented medicine.[138]

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130 *Ibid* at para 21 [citation omitted].
131 *Vavilov*, *supra* note 4 at para 128.
132 *Ibid* at para 131.
133 *Ibid* at para 133.
134 *Ibid* at para 109.
135 2021 BCCA 130 at para 64.
136 2020 FCA 64 at para 40.
137 2020 FC 364 at paras 65, 67. See also *Galindo Camayo*, *supra* note 84; Lorne Sossin, "The Impact of Vavilov: Reasonableness and Vulnerability" (2021) 100 SCLR (2d) 265.
138 *Supra* note 58 at paras 13, 15.

I would also add that in a situation where the governing statutory scheme tightly constrains the authority of the decision-maker, the standard of adequacy employed will be more exacting. A good example is *Canadian Frontline Nurses v. Canada (Attorney General)*.[139] Here, Justice Mosley held that the invocation of the *Emergencies Act*[140] by the federal government in 2022 to respond to a series of occupations and blockades at sensitive points around the country was unlawful, because the reasons given were inadequate, given the constraints.[141]

As a legal matter, it is abundantly clear from the text and structure of the *Emergencies Act* (and the legislative history) that a high threshold must be met before declaring a public order emergency. A "reasonable grounds" requirement was inserted precisely to limit the emergency powers of the federal government, as were the various review mechanisms.[142] There must be a threat to the security of Canada;[143] there must be demonstrable lack of provincial capacity;[144] and the provisions of the *Act* relating to public order emergencies impose procedural and substantive requirements relating to provincial consultation and, in the case of an emergency in one province only, consent.[145] As a factual matter, again, it is clear that by the time the *Act* was invoked, the only remaining traces of the emergency situation were in downtown Ottawa, other protests having been dismantled by use of existing tools in co-operation with provincial authorities.

The federal government's reasons therefore had to justify the invocation of a public order emergency in light of these objective legal and factual constraints but fell down in various ways. Justice Mosley's central conclusion was that the evidence did not "support the conclusion that [the purported emergency] could not have been effectively dealt with under other laws of Canada, as it was in Alberta, or that it exceeded the capacity or authority of a province to deal with it."[146] Justice Mosley also concluded that there was no threat to the security of Canada within the meaning of the *Act*, because "the record does not support a conclusion that the Convoy had created a critical, urgent and temporary situation that was national in scope and could not effectively be dealt with under any other law of Canada."[147]

By contrast, in situations where a decision-maker is empowered by relatively broad statutory language, the legal and factual constraints will be less tight, and the justification requirements correspondingly somewhat slacker. Thus, in *Canadian National Railway Company v. Halton (Regional Municipality)*, it was inappropriate to insist that the federal cabinet provide "more extensive reasons" at the end of a lengthy process involving an expert panel and the exercise of ministerial discretion before, finally, cabinet itself weighed in.[148] Cabinet was, here, exercising broadly worded powers and sitting in a supervisory capacity, leading to a less demanding standard of adequacy.

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139 2024 FC 42 [*Canadian Frontline Nurses*].
140 RSC 1985, c 22 (4th Supp) [*Emergencies Act*].
141 *Canadian Frontline Nurses*, *supra* note 139 at para 372.
142 *House of Commons Debates*, 33-2, vol 12 (25 April 1988) at 14765 (Bud Bradley).
143 *Emergencies Act*, *supra* note 140, s 16.
144 *Ibid*, s 3.
145 *Ibid*, s 25.
146 *Canadian Frontline Nurses*, *supra* note 139 at para 254.
147 *Ibid* at para 294.
148 2024 FCA 160 at para 102.

Now, in each of these instances, a judge will ultimately have to make a call about adequacy. This is not a call that can be reduced to a mathematical formula — the exercise of judicial judgment is essential. I would not say that this transforms the reasonableness analysis into a subjective value judgment based on a judge's personal and political predilections. Reasonableness (and adequacy) remains an objective concept, even if there is inevitably some subjectivity in applying it to the facts of a particular case.

4. PRECEDENT

In the case law on constraints, there is some tension between, on the one hand, the *Vavilov* principle of reasons-first review and, on the other hand, the prohibition on *de novo* analysis by reviewing courts. The fact that the constraints are objective in nature suggests that a reviewing court will indeed have to make a determination — if not *de novo*, then at the very least on its own initiative — of whether a particular constraint is indeed relevant in a particular case.

The tension is partly resolved by recognizing that any determination of the relevance of a constraint will have to begin with the administrative decision-maker's reasons for decision. Indeed, if the decision-maker's view is that a particular constraint is *not* relevant, it is difficult to see how a reviewing court could legitimately second-guess that view. Where the decision-maker has not explicitly taken a view on the relevance of a constraint, however, it is difficult to see why a court should be precluded from forming its own view. Reasonableness review requires sensitivity to legal and factual constraints, after all, and a reviewing court can hardly be accused of failing to afford respect to an administrative decision-maker's institutional setting if it is not second-guessing any of the decision-maker's reasons.

The case law on judicial precedent as a constraint helps to illustrate the point. Whether a precedent is relevant to a particular case is a matter that requires objective determination. It is binary: either the precedent is relevant, or it is not.

Where a decision-maker is correct about the applicability of a precedent, there can be no ground for unreasonableness. Indeed, a reviewing court can make this determination itself without trespassing on the terrain of the decision-maker.[149]

Where, by contrast, a decision-maker is wrong about the relevance of a precedent, further analysis is required. There are two possibilities. Either (a) the decision-maker assumed the relevance of the precedent and did not give any reasons on the point, or (b) the decision-maker gave reasons to explain why it found that the precedent was applicable or not.[150]

In the former case, (a), the decision-maker assumed the relevance of the precedent without providing explanation. In such a circumstance, there cannot be any complaint that a reviewing court that takes a different view has intervened to quash a decision as unreasonable. This is because the decision-maker did not give any reasons on the point: there is nothing to defer to. In *Canada (Attorney General) v. Hull*, for example, the Social Security Tribunal had

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[149] See e.g. *Pepa v Canada (Citizenship and Immigration)*, 2023 FCA 102 at paras 12–17.

[150] This is a reformulation of the second part of the framework suggested by Justice Grammond in *Service d'administration PCR Ltée v Reyes*, 2020 FC 659 at para 24.

treated an *obiter* comment by a Federal Court judge as binding on the Tribunal, without acknowledging or explaining why an *obiter* had binding force.[151] This was unreasonable. In a subsequent case with similar facts, decided by the Tribunal before *Hull* had been handed down, the Tribunal had assumed the *obiter* applied and, again, its decision was unreasonable.[152]

In the latter case, (b), the question will again be the adequacy of the reasons given. In *Canada (Attorney General) v. National Police Federation*, the Federal Public Sector Labour Relations and Employment Board had engaged in a detailed treatment of a relevant Supreme Court precedent in the labour law area, and the Federal Court of Appeal accordingly rejected the invitation "to substitute our interpretation of *Wal-Mart* for that of the Board to measure the reasonableness of its interpretation against our own."[153]

The point I take from these cases is that there is a close link between deference and the autonomy of the decision-maker. Where a decision-maker has taken responsibility and positively decided that a particular precedent is applicable — or not applicable — in its particular domain, judicial intervention threatens the autonomy of the decision-maker. It would potentially represent the eulogy for deference feared by Justices Abella and Karakatsanis. By contrast, where a decision-maker has not given reasons on a relevant point, it leaves itself at the mercy of the reviewing court to a significant extent. It is up to the court, by default, to determine whether a particular precedent is relevant or not. If there are no reasons given, there is nothing to defer to and no interference with any decision-making autonomy.

What is true of "precedent" in the previous paragraph is true, I would say, of "constraint" generally in the *Vavilov* framework. Deference is ultimately earned rather than given, but once it is earned, it is difficult to lose. If my conception of constraint is correct, then *Vavilov* provides a workable means of managing the tensions within its own framework. To link back to the major theme of this article, the *Vavilov* framework is itself capable of generating the sociological legitimacy necessary for its own survival.

III. CONCLUSION

The sociological legitimacy of the *Vavilov* framework results from the majority's artful dance between the fault lines of form and substance; judicial supremacy and administrative supremacy; and authority and reason. This dance was also sufficiently artful to secure the normative legitimacy of judicial review, *Vavilov*-style. In selecting the standard of review, form, judicial supremacy, and authority are favoured, with the administrative law values of electoral legitimacy and decisional autonomy to the fore. But in applying the reasonableness standard, substance, administrative supremacy, and reason take centre stage, accompanied primarily by the values of individual self-realization and good administration. Furthermore, 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, reinforcing its sociological legitimacy.

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[151] 2022 FCA 82 at para 32.
[152] *Canada (Attorney General) v Johnson*, 2023 FCA 49 at para 16.
[153] 2022 FCA 80 at para 89.

These features help to explain why, five years on, *Vavilov* seems more durable and robust than the judicial review frameworks that preceded it. Indeed, this recent experience suggests that in trying to answer, "What is the point of substantive judicial review?," we have been looking in the wrong place by appealing to general theories of administrative law. The answer from five years of *Vavilov* seems to be that the point of substantive judicial review is to develop a framework that can generate consensus in the legal community. As a former Prime Minister of Ireland, previously a professor of economics before ascending (or descending) to the political realm, was rumoured to have said when presented with a functioning project by civil servants, "It works in practice, but will it work in theory?" He, of course, was the butt of the joke: academic perfection is not the measure of practical success. *Vavilov* may not make much sense as a matter of theory (though it is normatively legitimate), but it makes a great deal of sense as a practical compromise. Hence, a level of sociological legitimacy for the Canadian law of judicial review that seemed unthinkable a decade ago.