REMEDIAL DISCRETION IN THE *VAVILOV* ERA AND THE THEORETICAL FOUNDATIONS OF JUDICIAL REVIEW

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In Canada (Minister of Citizenship and Immigration) v Vavilov, *the Supreme Court offered two guiding principles for selecting the appropriate remedy on judicial review. First, Vavilov contends the appropriate remedy should reflect the legislature's choice to delegate matters to administrative decision-makers. Second, the Supreme Court states that the choice of remedy is multi-faceted and must pay regard to substantive reasons for deference, such as expertise and administrative efficiency. Regrettably, the Supreme Court in* Vavilov *did not directly state that the question of the appropriate remedy is to be guided by the culture of justification. However, in my view, the culture of justification is a strong theoretical foundation to explain the remedies that have emerged in the* Vavilov *era, including remitting the decision, direct substitution, indirect substitution and prospective remedies. This would have provided a more solid justification for the chosen intervention in recent cases, such as* Mason v. Canada (Citizenship and Immigration)*, and* Pepa v. Canada (Citizenship and Immigration).

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INTRODUCTION

In *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[1] the Supreme Court of Canada affirmed that courts hold a flexible remedial discretion on judicial review.[2] Since *Vavilov,* the courts have been active in using their remedial discretion to decline to remit the decision back to the decision-maker and instead substitute the decision with the court's own. In this article, I argue that this remedial development, and others, suggest that the court is taking a more "common law constitutionalist" or "culture of justification" theoretical

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1 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

2 *Ibid* at paras 139–42.

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approach to judicial review,[3] at least when it comes to remedies. *Vavilov* is thin on theory,[4] but nevertheless two theoretical approaches can be discerned. The first theory (the statutory interpretation theory) ties deference to Parliament's "institutional design choice to delegate certain matters to non-judicial decision makers through statute."[5] In other words, reasonableness review is justified because Parliament chose to delegate matters to administrative bodies and intended for the courts to defer to the executive writ large.[6] On this approach, "institutional design" is narrow (only Parliament engages in institutional design) and formal (delegation alone is the relevant design feature). The second theoretical approach presented to us in *Vavilov* is based on a "culture of justification."[7] Accordingly, reasons form the decision-maker's authority and prove her legitimacy and expertise.[8] Reasonableness review is thus justified as a rule of law concern.[9] This more common law constitutionalist theory interprets "institutional design" as substantive and pluralistic, meaning that it is not simply Parliament who designs administrative authority, but that the constitution, the common law, and reason-giving all play a role in determining administrative authority.[10]

Much like the foundation of judicial review itself, the court presents us with two rationales for remedial discretion *Vavilov*. The Supreme Court stated that the most appropriate remedy is to remit the decision back to the decision-maker because the legislature "entrusted the matter to the decision maker, and not to the court."[11] However, the Supreme Court also recognized that in limited scenarios, no legislature would intend this remedy to "stymie the … effective resolution of matters."[12] Consequently, where there has been an "endless merry-go-round of judicial reviews and subsequent reconsiderations" or where "a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose,"[13] such as when there is only one reasonable interpretation of a statute, it may be appropriate to directly substitute the decision. These statements suggest that courts are guided by legislative intent when selecting the remedy and might suggest that the theory that guides remedial discretion is the statutory interpretation theory. However, the Supreme Court also acknowledged that the "question of the appropriate remedy is multi-faceted,"[14] and must also be guided by "concerns related to the proper administration of the justice system, the need to ensure access to justice and 'the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place.'"[15] Accordingly, these more substantive reasons for deference also indicate that the primary remedy is to return the decision and generally guide remedial choice. Administrative

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3 Aileen Kavanagh, *The Collaborative Constitution* (Cambridge, UK: Cambridge University Press, 2023); Mark Elliott & Kirsty Hughes, eds, *Common Law Constitutional Rights* (Oxford: Hart, 2020); TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford: Oxford University Press, 2013); Paul Craig, "Ultra Vires and the Foundations of Judicial Review" (1998) 57:1 Cambridge LJ 63.

4 Paul Daly, *A Culture of Justification:* Vavilov *and the Future of Administrative Law* (Vancouver: UBC Press, 2023) at 165.

5 *Vavilov*, *supra* note 1 at para 26.

6 *Democracy Watch v Canada (AG)*, 2024 FCA 158 at para 45 [*Democracy Watch*].

7 *Vavilov*, *supra* note 1 at paras 2, 14.

8 *Ibid* at paras 14, 79.

9 Implied in *ibid* at paras 133–35.

10 *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 28–29 [*Dunsmuir*]; *Vavilov*, *supra* note 1 at para 12.

11 *Vavilov*, *supra* note 1 at para 140.

12 *Ibid* at para 142.

13 *Ibid*.

14 *Ibid* at para 139.

15 *Vavilov*, *supra* note 1 at paras 140, 142, citing *Alberta (Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 55 [*Alberta Teachers*].

efficiency is thus another key guiding principle, and courts should be mindful to collaborate with the administrative state in order to ensure the proper facilitation of good administration through their remedial orders.

Regrettably, the Supreme Court did not directly state that the question of the appropriate remedy is to be guided by the culture of justification. However, in my view, the culture of justification is a strong theoretical foundation to explain the diverse and increasingly collaborative remedies emerging in the post-*Vavilov* era. For instance, the court often returns the case to the original decision-maker with specific instructions about how the future decision should transpire, with the judgment operating more as a guideline. This advisory function fits better with a pluralistic account of the constitutional foundations of review, which views the court as collaborating with the decision-makers to facilitate the proper exercise of legitimate authority. Furthermore, the remedies identified in *Vavilov* (remitting decisions and substituting decisions) can also be seen as supporting the culture of justification. Returning decisions affords decision-makers another opportunity to generate legitimate authority through improved reasons — reasons that the court has implicitly offered guidance on through the benefit of its judgment. Substitution allows the court to protect administrative efficiency and expertise as well as to communicate how to exercise authority in future cases. In my view, explicitly introducing the culture of justification as a guiding principle would help the courts, particularly the Supreme Court, develop a more coherent approach when exercising remedial discretion. In a series of recent cases, the Supreme Court directly substituted the administrative decision, rather than returning the case back for redetermination.[16] In *Mason v. Canada (Citizenship and Immigration)*[17] and *Pepa v. Canada (Citizenship and Immigration)*,[18] the underlying reason for this decision was, I believe, not only that there was one reasonable interpretation of the statute such that the outcome was inevitable, but that the consequences for the individual were particularly grave. If the culture of justification, or more broadly the rule of law, was understood to be a guiding principle for remedial discretion, then it would follow that the remedy must reflect the stakes.

Theoretical foundations are thus important because theory illuminates *how* courts should intervene — whether a remedy should be granted, what remedies are appropriate, and the kinds of remedies that ought to be developed. Conversely, the kinds of remedies that are being developed by the courts may reveal something about how the court perceives its role in judicial review. This article is divided into two sections. In Part I, I outline the two theoretical foundations of *Vavilov*. In Part II, I look at the main remedies of judicial review (remitting the decision and substitution) as well as newer remedial responses (indirect substitution and suspended remedies) and argue that these remedies are guided by the rule of law principle or by a culture of justification. I conclude the article by discussing how that finding may impact

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16 *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at para 161 [*Society of Composers*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 121–22 [*Mason* SCC]; *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at para 114 [*Commission scolaire*]; *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at para 142; *Pepa v Canada (Citizenship and Immigration)*, 2025 SCC 21 at paras 121–32 [*Pepa*]; *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at para 63 [*Mandate Letters*].

17 *Supra* note 16.

18 S*upra* note 16.

how the courts should be approaching remedial creativity and how remedial creativity might help the court develop a more coherent understanding of its constitutional foundations.

I. *VAVILOV* AND CONSTITUTIONAL FOUNDATIONS OF JUDICIAL REVIEW

Issues of the constitutional foundations of judicial review often arise in cases where judges impose common law duties, despite the fact Parliament purports to confer absolute power to an administrative decision-maker. Parliament does this, for instance, by inserting a privative clause or an ouster clause, or conferring an absolute discretion to the decision-maker.[19] When considering constitutional foundations, it is important to note that this question is tightly connected to the basis of administrative authority. The reason these questions are interconnected is because judicial intervention relies upon an administrative actor failing to exercise proper authority. Thus, one's understanding of the basis or nature of administrative authority will inform one's account of whether an instance of judicial review was legitimate. Likewise, if we seek to understand why judges are entitled to review administrative decisions, often despite the natural reading of a statute, we also will need to explain how administrative authority is to be determined.

Vavilov, in my opinion, creates a conflicting account of administrative authority and therefore a confused way of determining the constitutional foundations of judicial review.[20] On the one hand *Vavilov* states that "judicial review functions to maintain the rule of law" and aims to "strengthen a culture of justification."[21] On the other hand, the Supreme Court stated that legislative intent and institutional design are the "polar star" of judicial review.[22] Administrative authority thus has two sources in the *Vavilov* framework. On the one hand, *Vavilov* understands legislative intent as determining administrative authority and sees Parliament's institutional design choices as the foundation for the presumption of reasonableness. On the other hand, *Vavilov* stands for the proposition that the decision-maker's reasons are the "lynchpin of institutional legitimacy"[23] and impliedly that the duty of reasonableness is developed out of a culture of justification. In my view, these foundations are contradictory and lead to different results in practice, particularly in cases involving privative clauses. I will now consider each theoretical approach in greater depth.

A. STATUTORY INTERPRETATION THEORY – A REVIVAL OF *ULTRA VIRES*?

In *Vavilov*, the Supreme Court argued that the "central rationale" for deferring to administrative decisions "has been a respect for the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute."[24] Here, the Supreme Court suggests that administrative actors hold the authority to administer statutory schemes because Parliament delegated them the power to do so. In my view, this approach

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19 Two classic examples are *CUPE v NB Liquor Corporation*, 1979 CanLII 23 (SCC) [*CUPE*]; *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC) [*Roncarelli*].

20 For an in-depth discussion of the conflicts in substantive review, see Megan Pfiffer, "What's the Problem with Substantive Review?" (2024) 69:3 McGill LJ 325.

21 *Vavilov*, *supra* note 1 at para 2.

22 *Ibid* at paras 33, citing *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 149.

23 *Vavilov*, *supra* note 1 at para 74.

24 *Ibid* at para 26.

has the capacity to turn the clock back to the jurisdictional era by placing administrative authority on Parliament's say-so in a formal and narrow sense. It is formal because courts defer simply because Parliament has signalled for them to do so through a delegation of power (sometimes referred to as "deference as submission.").[25] It is narrow because Parliament's choices alone establish administrative authority. This formal and narrow approach to administrative authority threatens to revive jurisdiction because all the decision-maker need do is point to her statute to show her authority, which is deemed both sufficient and necessary for her authorization (all power comes from Parliament; all power must have its source in Parliament).

This foundation interprets administrative authority as primarily stemming from statute, which concomitantly involves seeing reasonableness review, and impliedly the duty to be reasonable, as also coming from Parliament's design. The Supreme Court implies this in *Vavilov* where it states, "in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review."[26] This suggests that reasonableness review is legitimate because Parliament has impliedly agreed that it is acceptable. This is reminiscent of what is known as the ultra vires theory of judicial review.[27] The ultra vires theory contends that common law duties, such as reasonableness and fairness, are best interpreted as implied statutory terms that limit the scope of the jurisdiction held by the administrator.[28] In other words, the decision-maker will be deemed ultra vires not merely where she flouts the exact statutory wording of the statute, but where she acts unreasonably or unfairly.[29] Canadian administrative law used to take this approach, for instance, where it understood that patently unreasonable decisions went to jurisdiction in a wide sense.[30] In my view, by connecting reasonableness review to Parliament's intent, the Supreme Court in *Vavilov* implicitly endorses the idea that reasonableness is a duty developed out of Parliament's choice. Accordingly, when courts conduct reasonableness review, they are implicitly doing so because Parliament intended it. Given reasonableness review is based on the very fact Parliament intends to delegate, this consequently means that Parliament can intend to remove it (usually through a privative clause).

The issue of privative clauses was discussed post-*Vavilov* in the decision in *Canada (Attorney General) v. Best Buy Canada Litd*.[31] In *Best Buy*, Canada argued that the Canadian International Trade Tribunal erred by declining to classify Best Buy television stands as furniture instead of parts of televisions. On the face of it, section 68 of the *Customs Act*[32] limited appeals to questions of law, which was also coupled with a privative clause in section

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25 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 286, 303.

26 *Vavilov*, *supra* note 1 at para 30 [emphasis in original].

27 William Wade & Christopher Forsyth, *Administrative Law*, 10th ed (Oxford: Oxford University Press, 2009) at 30–35.

28 *Ibid*.

29 Christopher Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55:1 Cambridge LJ 122 at 127; John McGarry, "Intention, Supremacy and Judicial Review" (2013) 1:2 Theory & Practice Legislation 255 at 259.

30 *Service Employees' International Union, Local No 333 v Nipawin District Staff Nurses Association*, 1973 CanLII 191 at 388–89 (SCC) [*Nipawin*].

31 2021 FCA 161 [*Best Buy*].

32 RSC 1985, c 1 (2nd Supp), s 68.

67(3)[33] that precluded the court from intervening, except to the extent provided by section 68. Canada argued the Tribunal failed to have regard to a Classification Opinion of the World Customs Organization that classified similar stands as parts of televisions, and that this was a question of law or mixed fact and law.[34] However, Justice Near, in the minority, found that there was no extricable legal question and that this was an issue of mixed fact and law.[35] He argued that "the Supreme Court's dicta in *Vavilov* provide[d] sufficient basis for [the Federal Court of Appeal] to refocus its approach in dealing with statutory appeals … in order to more accurately reflect Parliament's intent."[36] In refocusing, he noted the "plain and ordinary meaning of the provisions indicate Parliament's intent to limit judicial review … to … questions of law."[37] He underscored that if "Parliament's institutional design choices are to be respected, factual issues and issues of mixed fact and law … must *not* be subject to review."[38] Furthermore, Justice Near argued that the Supreme Court in *Crevier v. A.G. (Québec)*[39] explicitly stated that the legislature may oust judicial review on issues not touching jurisdiction.[40] Justice Near implicitly invoked the idea of "pure jurisdictional questions" by stating that jurisdiction was to be viewed as a "more narrow and important category of question than 'questions of law.'"[41] He concluded that "[t]o hold otherwise would be to eliminate any possibility that Parliament could, via statute, restrict the ambit of judicial review."[42]

It is noteworthy that Justice Near revived the concept of jurisdiction in relation to constitutional foundations given that jurisdiction was discarded in *Vavilov* as it pertained to standard of review and conducting reasonableness review.[43] However, it was perhaps challenging to not rely on jurisdiction if one takes "institutional design choices" to be formal and narrow in scope. This is because what is relevant to determining authority is the authorized jurisdiction, which can be freely delegated, in an absolute or limited fashion, by Parliament. In other words, because reasonableness review is implied by Parliament's design choice, it can therefore also be impliedly or directly removed by Parliament's design. Consequently, reasonableness review is not constitutionally protected and can be limited by legislative act[44] so long as there is some "prospect or degree of review."[45]

B. THE CULTURE OF JUSTIFICATION AND COMMON LAW CONSTITUTIONALISM

Although the Supreme Court explicitly endorses a statutory interpretation theory of judicial review, implicitly *Vavilov* does not contemplate statute as the sole basis of administrative authority, nor does it solely contemplate institutional design as a narrow and formal concept. This is because, on the *Vavilov* framework, the decision-maker must also

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33 *Ibid*, s 67(3).
34 *Best Buy*, *supra* note 31 at para 19.
35 *Ibid* at para 24.
36 *Ibid* at para 40.
37 *Ibid* at para 42.
38 *Ibid* at para 46 [emphasis in original.
39 1981 CanLII 30 (SCC) [*Crevier*].
40 *Best Buy*, *supra* note 31 at paras 56–57, referring to *Crevier*, *supra* note 39 at 236–37.
41 *Best Buy*, *supra* note 31 at para 58.
42 *Ibid* at para 60.
43 *Vavilov*, *supra* note 1 at para 65.
44 *Best Buy*, *supra* note 31 at para 52.
45 *Ibid* at para 57, citing *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 at para 102.

provide transparent, intelligible and internally coherent reasoned explanations for their decisions.[46] These reasons must also have regard to the relevant legal and factual constraints that bear upon the decision.[47] Accordingly, the basis of administrative authority is found partially in the *reasons* for which the decision-maker acts. Consequently, it is not just the statute that imprints the decision-maker with democratic and legal authority because, as the Supreme Court stated, "public decisions *gain their democratic and legal authority* through a *process of public justification*."[48] Put differently, legal authority is *not* solely determined by Parliament's institutional design choice because reasons are the "primary mechanism by which administrative decision makers show that their decisions are reasonable" which has "implications for … legitimacy."[49]

On this culture of justification approach, judicial intervention can be explained on the basis that the decision-maker acted without reasonable authority, and the duty to be reasonable is thus untethered from Parliament's institutional design choices. Instead, the duty to be reasonable arises independently out of the rule of law principle to shield individuals against "the perception of arbitrariness in the exercise of public power."[50] Accordingly, the second theoretical foundation of *Vavilov* takes a more common law constitutionalist approach, seeing authority as substantive (that decisions must be justified with reasons) and broad (inclusive of the common law and reason-giving). The pluralistic foundations of administrative authority were confirmed in *Dunsmuir v. New Brunswick*,[51] and affirmed in *Vavilov*:[52]

> By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.[53]

Thus, administrative authority is determined by multiple sources and through a kind of "collaborative enterprise"[54] between Parliament (via statute), the court (via the common law) and the administration (via reason-giving.) Parliament, therefore, does not hold a monopoly over institutional design and "institutional design" can be interpreted from a broader, pluralistic vantage point.

In contrast to Justice Near, Justice Gleason's judgment in *Best Buy* arguably takes a common law constitutionalist approach. She argued that Justice Near's conclusions contradict *Vavilov*'s broader context and the development of administrative law.[55] She agreed

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46 *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at para 7 [*Alexion*].
47 *Vavilov*, *supra* note 1 at paras 85, 99.
48 *Ibid* at para 79, citing Jocelyn Stacey & Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016) 74 SCLR 211 at 220 [emphasis added].
49 *Vavilov*, *supra* note 1 at para 81.
50 *Ibid* at para 79. The court does not explicitly say reasonableness arises from the rule of law principle, but it is implied (*ibid* at paras 127, 133–35).
51 *Supra* note 10.
52 *Vavilov*, *supra* note 1 at para 2.
53 *Dunsmuir*, *supra* note 10 at para 28.
54 Kavanagh, *supra* note 3 at 86.
55 *Best Buy*, *supra* note 31 at para 75.

that privative clauses could not shield patently unreasonable decisions (that touched on fact or law) because this would "violate the rule of law," and these unreasonable decisions were characterized as an excess of jurisdiction.[56] However, Justice Gleason suggested that there has been an important shift in language or the way that administrative authority is characterized,[57] with the concept of jurisdiction being collapsed into reasonableness as the touchpoint for administrative authority.[58] Thus while previously patently unreasonable errors were called jurisdictional, they are now characterized as reviewable under the reasonableness standard. In other words, legality, reasonableness, and fairness are the touchpoints for determining an administrative decision-maker's authority, not jurisdiction, and therefore reasonableness review is protected by *Crevier*.[59] The consequence of Justice Gleason's analysis is that the legitimacy of judicial review is not based in Parliament's choice to delegate, but based on the rule of law principle that decision-makers cannot abuse authority. As was stated in *Vavilov*, "[an] application of the reasonableness standard will enable courts to fulfill their *constitutional duty* to ensure that administrative bodies have acted within the scope of their *lawful authority*."[60] Furthermore, given administrative authority is formed by multiple sources, this means that courts are not necessarily over-stepping when they review decisions that are seemingly protected by a privative clause. In other words, given that determining the source of administrative authority is a collaborative effort between all branches, the court is legitimate in collaborating in that joint enterprise via the practice of judicial review.

The conflicting account of administrative authority presented to us in *Vavilov* thus has real consequences for when the court feels it can intervene in the face of a privative clause. In the recent *Yatar v. TD Insurance Meloche Monnex* decision,[61] the Supreme Court declined to consider how privative clauses affect the availability of judicial review,[62] and so the question remains about how the court should develop these issues in the wake of *Vavilov*. In my view, looking to the way remedies have developed since *Vavilov* might be of use in this regard. As I will argue, the way remedial discretion has developed since *Vavilov* weighs in favour of the common law constitutionalist interpretation of *Vavilov*. If courts wish to advance a coherent theory of judicial review, then looking to the way remedies have developed under the *Vavilov* framework, and the theoretical principles on which they are based, may assist courts in future privative clause cases develop a comprehensive theory of review.

II. REMEDIAL DISCRETION SINCE *VAVILOV*

As noted in the introduction, *Vavilov* presents us with two rationales for the choice of remedy. On the one hand, *Vavilov* contends that the choice of remedy should reflect legislative choice. On the other hand, the Supreme Court implies that the choice of remedy is contextual and must pay regard to substantive reasons for deference, such as expertise and efficiency. It is interesting that the Supreme Court referred to expertise as a guiding principle, given it was clear that this no longer played any role in the standard of review analysis, nor in the Supreme

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56 *Ibid* at paras 78–79.
57 *Ibid* at para 116.
58 *Ibid* at para 117.
59 *Ibid* at para 118, citing Paul Daly, "Unresolved Issues after Vavilov IV: The Constitutional Foundations of Judicial Review", online (blog): [perma.cc/J2A2-2KHC].
60 *Vavilov*, *supra* note 1 at para 67 [emphasis added].
61 2024 SCC 8 [*Yatar*].
62 *Ibid* at para 50.

Court's theoretical approach to judicial review.[63] It is regrettable, therefore that the Supreme Court does not directly suggest that the culture of justification or the rule of law is relevant to determining how the court should exercise its remedial discretion. Omitting to include the rule of law, or the culture of justification, as a guiding principle does not, I will suggest, reflect the general approach to remedial discretion since *Vavilov*. In my view, the court's increasingly creative remedial interventions can be interpreted as coaching the administrative state on how to exercise valid power through improved reason-giving, reflecting a general concern for a "culture of justification" and the rule of law principle.

A. REMEDIAL DISCRETION: GRANTING OR REFUSING RELIEF

In *Vavilov*, the Supreme Court confirmed that the court holds a flexible remedial discretion in judicial review, and this includes over whether to hear the merits of a case,[64] whether to grant or refuse relief after hearing the merits,[65] and over the choice of remedy. The first part of the court's discretion (whether to hear the merits of a case) was confirmed recently by the Supreme Court in *Yatar*.[66] At issue in *Yatar* was whether a limited statutory appeals clause on questions of law precluded reasonableness review for questions of fact or mixed fact and law. In settling this question, the Supreme Court found that regard must be given to "first principles," including the rule of law principle that public authorities are subordinate to the supervisory jurisdiction.[67] The Supreme Court affirmed the finding in *Dunsmuir* that judicial review is "intimately connected with the preservation of the rule of law" and that this "constitutional foundation … guides its function and operation."[68] The Supreme Court also affirmed *Vavilov's* finding that a legislative intent to restrict statutory appeals does not "on its own" affect the availability of judicial review.[69] Justice Rowe, writing for a unanimous court, found that while courts hold a discretion over whether to hear an application of judicial review on the merits, this discretion does not extend to declining to consider the application for judicial review at all.[70] Therefore, at a minimum, the judge must consider the application and whether judicial review is appropriate.[71] In answering whether judicial review is appropriate in the circumstances of the case, the court must consider whether one of the discretionary bases for refusing relief is present. These include: expertise of the decision-maker, convenience of an alternative remedy; expeditiousness; judicial economy; cost; and a balance of the rights of individuals and the policy purposes of the statutory scheme.[72] These considerations, for the most part, reflect the contextual factors the Supreme Court noted in *Vavilov* in relation to remedial choice. As with *Vavilov*'s concern for administrative efficiency

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63 *Vavilov*, *supra* note 1 at paras 27–32.

64 *Strickland v Canada (Attorney General)*, 2015 SCC 37 at paras 1, 38, 40 [*Strickland*].

65 *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 135 [*Khosa*].

66 *Supra* note 61.

67 *Ibid* at para 45.

68 *Ibid* at para 46, citing *Dunsmuir*, *supra* note 10 at para 27.

69 *Yatar*, *supra* note 61 at para 47, citing *Vavilov*, *supra* note 1 at para 52 (this impliedly suggests that "institutional design choices" do not, on their own, affect the availability of judicial review). Furthermore, the institutional design would need to also provide an "adequate alternative remedy": *Yatar*, *supra* note 61 at para 57.

70 *Ibid* at para 49.

71 *Ibid* at para 54; *Strickland*, *supra* note 64 at para 43.

72 *Strickland*, *supra* note 64 at paras 42–44. In answering whether the court should refuse relief despite finding a decision unreasonable, the court will also consider the impact on the public interest or disproportionate impact on the parties or third parties and the purposes and policy considerations underpinning the legislative scheme: see *Khosa*, *supra* note 65 at para 135.

when selecting the appropriate remedy, these factors suggest that remedial discretion is based on a desire to assist the efficiency of the administrative state. In other words, as Jason Varuhas puts it, remedial discretion to refuse relief protects the "precepts of good administration"[73] by ensuring there is a "minimum disruption to public administration."[74]

In *Yatar*, the respondent argued that judicial review was not appropriate in this case because the legislative scheme reflected a policy choice to limit the courts' involvement and aimed to "streamline dispute resolution as well as reduce costs."[75] Justice Rowe disagreed, arguing that while judicial economy is a legitimate concern, the "countervailing consideration is to ensure [individuals] have a meaningful and adequate means to challenge decisions that they consider to be unreasonable having regard to their substance and justification."[76] In other words, while administrative efficiency does indeed guide remedial discretion, so does the rule of law. Consequently, the need to ensure that the court amply supervises administrative authority is a crucial factor in deciding whether judicial review is appropriate. *Yatar* confirms that the rule of law is a guiding principle for remedial discretion as it pertains to refusing relief. This perhaps implies that the rule of law ought to be a relevant guiding principle at *all* stages of remedial discretion, including at the stage of selecting the appropriate remedy. Thus, while *Vavilov* did not expressly endorse the rule of law as a relevant guiding principle, it is plausible that courts could look to *Yatar* as a more general precedent that the rule of law is relevant for determining the exercise of remedial discretion. As I will argue in the next sections, the courts are already implicitly acknowledging that the rule of law guides the choice of remedy.

B. REMEDIAL DISCRETION: SELECTING THE APPROPRIATE REMEDY

1. RETURNING DECISIONS

In *Vavilov*, the Supreme Court stated, "it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons."[77] The Supreme Court found that this remedial response stemmed from the rationale of applying the reasonableness standard to begin with, namely, a respect for legislative intent.[78] However, as noted, the Supreme Court also stated that remitting decisions respects *why* the legislature chose to delegate to the administrative state, namely efficiency, costs, and access to justice.[79] Remedial discretion is thus infused with a concern for substance over form and is guided by two rationales for deference. While legislative intent and efficiency are two important rationales, a third rationale for deference, as discussed above, is the culture of justification. This is the idea that courts should defer to decision-makers when they provide intelligible, coherent and transparent justifications, which prove their expertise

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73 Jason NE Varuhas, "The Public Interest Conception of Judicial Review: Its Procedural Origins and Substantive Implications" in John Bell et al, eds, *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016) 45 at 46.

74 *Ibid* at 67.

75 *Yatar*, *supra* note 61 at paras 59, 65.

76 *Ibid* at para 65.

77 *Vavilov*, *supra* note 1 at para 141.

78 *Ibid* at 140.

79 *Ibid*, citing *Alberta Teachers*, *supra* note 15 at para 55. It is interesting, therefore, that although expertise was removed from the standard of review analysis, the court considers remedies to be guided by these more substantive reasons for deference: see *Vavilov*, *supra* note 1 at paras 27–32.

("deference as respect").[80] This third rationale was implicitly endorsed in *Quele v. Canada (Citizenship and Immigration)*, where the Federal Court noted that remitting decisions communicates a "respect for the legitimacy and competence of administrative decision makers in their area of expertise."[81]

In my view, the court respects this third rationale for deference when they return decisions to administrators. This is because remitting decisions provides administrative bodies with the opportunity to re-demonstrate expertise and generate legitimate authority via an improved process of reasonable decision-making at redetermination. In other words, remitting supports a culture of justification by ensuring decision-makers prove their own legitimacy through responsive reasons that are justified to the individuals subject to the power.[82] By contrast, if courts were to always substitute decisions, decision-makers would never be able to directly rectify the initial wrong that triggered judicial review in the first place, namely, they would never be able to remedy the initial unreasonable process and outcome.[83] Put differently, remitting the decision thus provides the opportunity for the arbitrariness of the original decision to be amended and for good administration to be redeemed. The idea that returning decisions remedies a problematic reasoning process and hence facilitates the culture of justification was implied in *Dugarte de Lopez v. Canada (Citizenship and Immigration)*[84] where the Federal Court noted that:

> By refusing Ms. Dugarte de Lopez's new evidence as it did in the Decision, the [Refugee Appeal Division] actually deprived Ms. Dugarte de Lopez of part of the appeal process to which she was entitled, and in these circumstances, the necessary remedy is to restore this opportunity to her by returning the case to the RAD for reconsideration.[85]

In other words, it is important to remit the decision in order to ensure individuals have a meaningful and adequate opportunity to have their arguments be carefully considered and responded to. Similarly, in *Laramée v. Bénard*,[86] the Court noted it was important to return the decision in order to allow legal subjects the opportunity to have their arguments be carefully considered and responded to in the reasons.[87] This was also implied in *Watts v. Canada (Attorney General)*,[88] where the Court found that because the decision-maker had failed to respond to the arguments advanced by the party, the decision lacked justification and transparency and thus must be returned to the decision-maker so that they could grapple with the issues raised by the parties.[89] These cases suggest that it is the principle of responsive decision-making that guides the choice of remedy. The remedy thus facilitates an important dialogue between the individual and decision-maker and protects the lynchpin of administrative legitimacy by ensuring good reasons are offered for the decision.

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80 Dyzenhaus, *supra* note 25 at 286; *Dunsmuir*, *supra* note 10 at para 48; *Vavilov*, *supra* note 1 at para 84.
81 2022 FC 108 at para 34 [*Quele*].
82 *Vavilov*, *supra* note 1 at para 95.
83 *Ibid* at para 83.
84 2020 FC 707.
85 *Ibid* at para 35.
86 2022 FC 1653.
87 *Ibid* at para 53.
88 2021 FC 12.
89 *Ibid* at para 20.

Moreover, decision-makers redevelop their reasons upon redetermination in collaboration with the court who provide, through the benefit of their reasons, guidance upon how to exercise that proper authority. This guiding function of remedies was acknowledged in the minority opinion of Justice Rowe in *Pepa*, where he argued that the best remedy in that case would have been "referring the matter back *with guidance.*"[90] The fact that the reviewing court's judgment acts as guidance is suggestive of a collaborative constitutional outlook where the court assists the administrative state through coaching it on which constraints are relevant to the exercise of a reasonable decision, while also acknowledging the decision-maker is "best positioned to resolve … interpretive question[s]."[91] We can sometimes see the coaching role that remitting plays in subsequent redeterminations. For instance, in *Scarborough Health Network v. Canadian Union of Public Employees, Local 5852*,[92] the Labour Board directly responded in its redetermination to the parties' submissions in order to address the lack of responsive justification that had rendered the initial decision unreasonable.[93] The Court's judgment thus formed the backbone of the frontline decision-makers reasoning at redetermination and facilitated a learning opportunity by allowing the Labour Board to incorporate the relevant legal constraints that the Court has guided them toward.

A final point is that while the *Vavilov* factors do not explicitly name the culture of justification as a guiding principle, one factor that is suggestive of it is "whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question."[94] This implies that the court should have regard to whether the decision-maker's reasons were responsive to the parties' arguments. For example, it would not be appropriate to substitute decision-making where the decision-maker has not had the opportunity to consider a relevant question because it was not raised by the parties,[95] but it might be appropriate to substitute where the decision-maker did not provide reasons in relation to a relevant constraint that was argued in front of the tribunal by the individual.[96] As I discuss in the next section, this is why the Supreme Court in *Vavilov* decided to substitute the decision.

2. DIRECT SUBSTITUTION

In *Vavilov*, the Supreme Court found that where remitting the matter to the decision-maker would stymie the timely and effective resolution of matters such that no legislature could have intended it, the court should decline to remit a matter.[97] This is particularly so where the outcome is "inevitable" and where remitting the case would thus "serve no useful purpose" or would continue the "endless merry-go-round" of judicial reviews and redeterminations.[98] The Supreme Court also noted that concerns such as "delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and efficient use of public resources may also influence the

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90 *Pepa*, *supra* note 16 at para 152 [emphasis added].
91 *Ibid* at para 217.
92 2020 ONSC 4577.
93 *Scarborough Health Network v Canadian Union of Public Employees*, 2020 CanLII 100039 (ONLA).
94 *Vavilov*, *supra* note 1 at para 142.
95 *Cf Mason* SCC, *supra* note 16.
96 *Vavilov*, *supra* note 1 at para 195.
97 *Ibid* at para 142.
98 *Ibid*.

exercise of a court's discretion"[99] to remit or substitute the matter. The court has used direct substitution to, for instance, grant disability benefits,[100] to prevent a deportation order,[101] to direct a body that it no longer has the jurisdiction to decide an issue,[102] to direct the Immigration Appeals Division (IAD) to hear an appeal that it had initially declined to hear,[103] or, as in *Vavilov*, find that Mr. Vavilov was a Canadian citizen.[104]

In my view, direct substitution is similarly guided by the principles of legislative intent, the administration of justice, *and* a culture of justification. With regards to the proper administration of justice, in *Canada (Attorney General) v. Burke*,[105] for example, an interpretation by the Social Security Tribunal led to thousands of dollars of benefits being unable to be returned (because the tribunal found that the Minister could not revisit original decisions awarding the benefits). The Federal Court of Appeal argued that this was an unreasonable statutory interpretation and directed the administration, partly because there was only one reasonable interpretation of the statute, and partly because it was in the interests of justice to let the court make the decision the Appeal Division should have made, so the Appeal Division's energy could be spent on Ms. Burke application for remission of some or all of the amount owing.[106] This concern for the proper administration of justice was also seen in *Pelletier v. Canada (Attorney General)* where the Court noted that it would "threaten to bring the administration of justice into disrepute"[107] to remit the decision because there had been unreasonable delay.

With regards to a culture of justification, another relevant factor we see emerging (that was not stated in *Vavilov* as it pertains to the choice of remedy) is the impact of the decision on the individual.[108] In *Turkiewicz v. Ontario Labour Relations Board*,[109] the court found there would be no useful purpose in sending the case back because, "one must not lose sight of the fact that there is a person whose life and ability to earn an income has been impacted by these extended proceedings for several years with the accompanying stress, uncertainty and expense."[110] The Court found therefore that "[f]airness and justice" required the case to be brought to a close.[111] This suggests that the gravity of the issues at stake may be relevant to deciding to substitute. The Supreme Court in *Pepa* also implied that the gravity of the situation was relevant to the remedy. In this case, the IAD declined to hear an appeal of Ms. Pepa's deportation order on the basis that her permanent residency had expired. The expiration had occurred while Ms. Pepa was waiting for the hearing but had been valid the moment she had arrived in Canada. The majority found that the IAD's interpretation was unreasonable and furthermore that the "*only* interpretation that does not face … grave disqualifications is the one put forward by Ms. Pepa: that the validity of the permanent

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99 *Ibid*.
100 *Blue v Canada (AG)*, 2021 FCA 211 [*Blue*]. See also *Ahsan v Canada (AG)*, 2025 FCA 38 at para 28.
101 *Mason* SCC, *supra* note 16 at para 121.
102 *Tesfaye v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 2040 at para 72.
103 *Pepa*, *supra* note 16 at para 131.
104 *Vavilov*, *supra* note 1 at para 196.
105 2022 FCA 44 [*Burke*].
106 *Ibid* at para 117.
107 2024 FC 1669 at para 52.
108 *D'Errico v Canada (Attorney General)*, 2014 FCA 95 at para 19.
109 2021 ONSC 1259.
110 *Ibid* at para 64.
111 *Ibid* at para 66.

resident visa … is assessed by the IAD at the time of arrival in Canada."[112] This suggests that the gravity of the situation weighed in favour of there being only one reasonable interpretation which in turn meant the "court should make a pronouncement on that interpretation rather than remitting the matter pro forma for reconsideration."[113] This concern for potential consequences on the individual reflects *Vavilov*'s concern for the impact on the individual when assessing the reasonableness of the decision.[114] This fits with a common law constitutionalist theory that places the need to protect individuals from the "extraordinary degree of power [decision-makers hold] over the lives of ordinary people, including the most vulnerable among us"[115] at the centre of administrative law.

Substitution is an interesting remedy because the court in essence "becomes the merits-decider"[116] and steps in to do what the initial decision-maker should have done. Furthermore, many cases touch on polycentric issues, pushing the court's role from a simple adjudicator to what is functionally an administrative role. For instance, in *Burke*, the Court essentially changed the entire policy around reviewing benefits files as a consequence of finding there was one reasonable interpretation of the statute.[117] This suggests that through substitution the court plays a role in institutionally designing the administrative state by affecting a policy that potentially resulted in many more refunds to the government. Substitution thus fits within a theory of review that sees courts as a partner of institutional design, in contrast to the jurisdictional approach that interprets Parliament alone as the designer of the administrative state. With substitution, the court partners with the administrative state by assisting the final resolution of matters where there has been unreasonable delays, preventing ongoing redeterminations that place strain on the administrative system, resolving systemic problems by finding there is only one reasonable interpretation, or stepping in where there is a pattern of unreasonable decision-making.[118] However, these positive aspects to substitution need to be balanced against the possibility of judicial overreach. As the Court stated in *Quele*:

> It would be ironic, to say the least, if the discretionary remedy associated with the standard of reasonableness, a standard anchored in the recognition of and respect for the role of administrative decision makers, were to become the cause for transferring those decision makers' powers to the courts of justice responsible for their supervision.[119]

Similarly, Justices Côté and O'Bonsawin in *Pepa* argued that substitution should only be used "in the clearest of cases. This approach ensures that reviewing courts avoid engaging in a disguised correctness review."[120] In other words, substitution may both assist the administration in its goals, but it also has the potential to undermine the administrative decision-makers role and the "guiding principles animating *Vavilov*."[121]

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[112] *Pepa*, *supra* note 16 at para 129 [emphasis in original].
[113] *Ibid* at para 121.
[114] *Vavilov*, *supra* note 1 at paras 133–35.
[115] *Ibid* at para 135.
[116] *Mamut v Canada (Citizenship and Immigration)*, 2024 FC 1593 at para 120.
[117] *Burke*, *supra* note 105 at para 117.
[118] Implied in *Curtis v Bank of Nova Scotia*, 2025 FC 207 at paras 94–96. See also *McIlvenna v. Bank of Nova Scotia (Scotiabank),* 2019 FC 1610 at paras 25–26, where the Federal Court directed the Commission because the Commission dismissed the case three times on the same unreasonable basis.
[119] *Quele*, *supra* note 81 at para 34 [citations omitted].
[120] *Pepa*, *supra* note 16 at para 216.
[121] *Ibid*.

In *Vavilov* itself, the Supreme Court substituted the Registrar's decision because Mr. Vavilov explicitly raised all the relevant legal constraints to the Registrar, and she thus had ample opportunity to weigh in on the issues.[122] Consequently, the Supreme Court found that there would be no useful purpose in remitting the decision to the Registrar. However, if the Supreme Court had used the culture of justification as a guiding principle for determining the appropriate remedy, then it might have considered offering the decision-maker a chance to respond in a redetermination decision. While it is true that returning the decision would not have given Mr. Vavilov any further opportunity to be "heard" (because the Registrar had heard all his arguments), it would have given him the opportunity to be "listened to"[123] by a decision-maker who was "actually alert and sensitive to the matter before it."[124] This would ensure that the decision is justified, not in the abstract through a substituted court decision, but directly from the administration to Mr. Vavilov.[125]

Furthermore, does a court substitute the decision-makers *reasons* for the decision, or simply the *outcome*?[126] *Vavilov* suggests that substitution is justified when an *outcome* is inevitable, thus seemingly placing more emphasis on reasonable outcomes, than reasonable processes.[127] Furthermore, the Supreme Court rejected the idea that it could supplement reasons in *Vavilov*,[128] also implying that substitution only substitutes the outcome. However, if the court only substitutes the outcome, and not the reasons, this results in the bizarre consequence that the unreasonable process is left intact. Institutional legitimacy is therefore brought into question because decisions are robbed of the reasonable process through which they gain their authority. Consequently, there is reason to doubt the proposition that there is no useful purpose in remitting a decision. For instance, in *Vavilov*, the Supreme Court found that the decision-maker failed to "grapple with and justify her interpretation."[129] In choosing not to remit, the court removes a learning opportunity and removes the chance to provide the reasons that would grant the outcome its legitimacy. As such, substitution is justified when other factors outweigh this potential disruption to the culture of justification, such as where the impact on the individual is great or where systemic problems, such as persistent dueling interpretations of home statutes, imply a need for one reasonable interpretation in order to protect the rule of law.

3. INDIRECT SUBSTITUTION

While the Supreme Court has, for the most part, directly substituted administrative decisions, lower courts have often been returning cases back to the decision-maker, but with specific instructions about how the decision-maker should conduct redetermination. For instance, in the case *Sexsmith v. Canada (Attorney General)*,[130] the Court provided a detailed bullet point list that firearms officers must consider when weighing the use of a restricted

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122 *Vavilov*, *supra* note 1 at para 195.
123 *Ibid* at para 127 [emphasis omitted].
124 *Ibid* at para 128.
125 *Ibid* at para 95.
126 *Cf Pepa*, *supra* note 16 at para 144, Rowe J, dissenting in part ("ordinarily, the courts should not substitute its own reasons and outcome for that of the administrative decision maker").
127 The Supreme Court states that both are relevant to determining the reasonableness of decisions; see *Vavilov*, *supra* note 1 at paras 82–87.
128 *Ibid* at paras 96–97.
129 *Ibid* at para 183.
130 2021 FCA 111 [*Sexsmith*].

firearm — upon redetermination *and* in future cases.[131] This could be called a method of "indirect substitution."[132] In these instances, the reviewing court often states that redetermination decisions must be made "*in accordance with [the] reasons*"[133] rather than with the benefit of the court's reasons, and often directs that the decision should be rendered within a certain time period.[134] In my view indirect substitution demonstrates an important collaborative outlook to judicial review, where the court responds to systemic problems and works to help the administrative state. This is because the judgment operates as a guideline, coaching administrative decision-makers on how to exercise their discretion in a way that transcends the interests of the parties. Furthermore,indirect substitution aims to respond to systemic problems with the way in which administrators are executing statutory policy. As noted in *Singh v. Canada (Citizenship and Immigration)*,[135] indirect substitution "avoid[s] a repetition of the substantive shortcomings in previous decisions … [and] may provide guidance to the decision maker to achieve that end."[136] This suggests that judicial review prospectively determines the future interactions between the parties, assisting the administrative state by providing clarity and certainty to future decision-making, which is also an important rule of law concern.

Another type of indirect substitution is where the court remits decisions back (either to the same or different decision-maker) without specific bullet points for the decision-maker to consider, but similarly using the language of "reconsideration in accordance with these reasons."[137] Unlike the "benefit of the court's reasons," phrasing, this remedy implies that the decision-maker *must* take into account the court's judgment, and incorporates the court's reasons into the order.[138] We see this particularly in immigration and social security cases (which are often situations where there are endless merry-go-rounds of reviews and redeterminations). For instance, in *Yavari v. Ontario (Minister of Finance)*,[139] the Ontario Supreme Court declined to issue a mandamus order but stated that the decision-maker must "conduct a fresh review in accordance with these reasons and taking into account the effect of COVID-19 on the missing of the statutory deadline by the applicant to become a permanent resident by 10 days."[140] Similarly in *Meneen v. Tallcree First Nation*,[141] the Court was not persuaded that remitting the decision would "stymie the timely and effective resolution of the matter," but "to ensure that it does not, the re-determination will be conducted in accordance with these reasons."[142] In other words, to ensure an effective resolution of the matter, the court underscored its reasons were to be accorded with, thereby heavily structuring the process and outcome of the redetermination by incorporating their reasons into the order.

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131 *Ibid* at para 35.
132 *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206 at para 71.
133 See e.g. *Sexsmith*, *supra* note 130 at para 46 [emphasis added].
134 *Singh v Canada (Citizenship and Immigration)*, 2022 FC 1643 at para 41 [*Singh*]; *Al Khatib v Canada (Citizenship and Immigration)*, 2020 FC 3 at para 15.
135 *Supra* note 134.
136 *Ibid* at para 38 [citations omitted].
137 See e.g. *Zavarella v Canada (Attorney General)*, 2025 FC 927; *Mir v Canada (Citizenship and Immigration)*, 2025 FC 555; *Canadian Pacific Railway Company v Canada (AG)*, 2024 FCA 124; *Toth v Canada (Mental Health and Addictions)*, 2025 FCA 119; *Zhou v Canada (AG)*, 2024 FCA 170.
138 Colin Feasby, "Just Words? Judicial Reasons as Remedy in Administrative Law" (2025) 63:1 Alta L Rev.
139 2024 ONSC 5296.
140 *Ibid* at para 48.
141 2025 FC 791 [*Meneen*].
142 *Ibid* at para 33.

The court has even used indirect substitution, instead of direct substitution, where it has found there is only one reasonable interpretation of a statute. For instance, in *Canada (Attorney General) v. Hull*,[143] the Federal Court of Appeal found that the General Division of the Social Security Tribunal's interpretation of section 23(1.1) of the *Employment Insurance Act*,[144] upheld by the Appeal Division, only had one reasonable interpretation.[145] It was thus unreasonable to find that the claimant's mistake on her parental benefits form did not prevent her from obtaining higher benefits. Upon redetermination, the Appeal Division stated it was bound by the court's decision[146] and that the "legislation is clear, as confirmed by the Federal Court of Appeal"[147] and found that the General Division had erred in law in its interpretation. The redetermination decision, in a sense, echoed the Federal Court of Appeal's decision, noting for instance that the General Division did not conduct a proper statutory interpretation exercise, which would have led to one reasonable choice.[148] The Federal Court of Appeal thus successfully substituted the decision, albeit indirectly, by incorporating the reasons into the order, which operated as a blueprint for the redetermination. Furthermore, the idea that courts can indirectly substitute decisions where there is one reasonable outcome contrasts with the Supreme Court's implication in *Pepa* that where there is "one reasonable interpretation" the court, in a sense, has a duty to pronounce on the interpretation and substitute the decision.[149]

Indirect substitution can be seen as more collaborative than direct substitution. Indirect substitution encourages institutional learning and reflects a dialogue between courts and administrative bodies, fostering better future decisions, as well as contributing to systemic reform and administrative competence. Indirect substitution also follows the principle of administrative efficiency by speeding up the processing of decision-making. It also fits with *Vavilov*'s general turn to a culture of justification, with the court in essence explaining to decision-makers how to generate proper reasonable authority. Indirect substitution also suggests that the courts, not just Parliament, are engaged in a process of institutional design through their remedial orders. For instance, in *Safe Food Matters Inc. v. Canada (Attorney General)*,[150] the Court provided detailed guidance to the decision-maker about how to undertake its redetermination[151] because, the Court said, it was the first time they had reviewed the body.[152] These guidelines, in my view, essentially designed how a newer administrative body is to function, communicating the demands necessary to satisfy the duty of reasonableness and assisting the body by pre-emptively avoiding the merry-go-round of judicial reviews and reconsiderations.[153] This also facilitates the culture of justification by coaching newer decision-makers on how to produce well-reasoned, responsive decisions.

4. SUSPENDED REMEDIES

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143 2022 FCA 82 [*Hull*].
144 SC 1996, c 23, s 23(1.1).
145 *Hull*, *supra* note 143 at para 42.
146 *Canada Employment Insurance Commission v JH*, 2022 SST 954 at para 34–35.
147 *Ibid* at para 39.
148 *Ibid* at para 33.
149 *Pepa*, *supra* note 16 at para 121.
150 2022 FCA 19.
151 *Ibid* at para 65.
152 *Ibid* at para 64.
153 *Ibid*.

One of the consequences of my analysis so far is that judicial remedies often function in an advisory and prospective manner, shaping how future decisions are made and fostering institutional accountability. We have seen this also in the way the courts have been developing more prospective remedies through suspending their declarations or quashing orders. For instance, in *Federation of Nova Scotia Naturalists v. Canada (Environment and Climate Change)*,[154] the Federal Court suspended a quashing order for 10 months to ensure that an endangered shorebird was legislatively protected. The Court found the Minister's "Amended Recovery Strategy" for the shorebird was unreasonable because it failed to grapple with the central arguments raised by the environmental group and therefore left the Court without any reasoning by which to assess the Minister's interpretation.[155] The Court then stated that "consistent with [this] analysis" was the quashing and remitting of the decision.[156] The implication is that because the Minister had not engaged in a process of responsive justification, it was appropriate to send the decision back so that the decision-maker could generate reasons that "would withstand reasonableness review."[157] This fits with the analysis I provided above that decision-makers need to have the opportunity to be responsive to the parties via redetermination.

However, the Court also heard that redetermination could take at least nine months, leaving a regulatory gap in the protection of the bird.[158] This is because if the decision was immediately quashed, the effect would be that the bird would be partially protected by the remaining aspects of the "Amended Recovery Strategy" that had not been quashed, and partially by the previous "Recovery Strategy" that would be resurrected by the quashing.[159] To prevent uncertainty, the Court suspended the declaration for 10 months.[160] Similarly in *Bertrand v. Acho Dene Koe First Nation*,[161] several First Nations elections were postponed due to the COVID-19 pandemic. The Court found that the federal regulations postponing the elections were invalid,[162] and further than the council lacked the power to extend its own term of office.[163] If the declaration to that effect *were* to be effective immediately, the council would be illegally holding office. In order to ensure elections could be held within a reasonable time, the judge suspended the declaration for 60 days.[164] In both these cases, therefore, it was the rule of law that guided the remedial discretion as both cases were trying to prevent a "gap" in some aspect of legal order.[165] This suggests again that the rule of law is an important guiding principle for remedial discretion.

Another example of a prospective remedy is *Meneen*, where the Court indirectly substituted the decision by providing a long list of factors that the decision-maker had to follow on redetermination.[166] One such factor stated that redetermination must occur within four months, otherwise the Applicant would be immediately reinstated to his office.[167] This

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154 2025 FC 983.
155 *Ibid* at paras 98–101.
156 *Ibid* at para 104.
157 *Ibid* at para 102.
158 *Ibid* at para 105.
159 *Ibid* at para 106.
160 *Ibid* at para 107.
161 2021 FC 287.
162 *Ibid* at para 91.
163 *Ibid* at para 64.
164 *Ibid* at paras 102–04.
165 *Re Manitoba Language Rights*, 1985 CanLII 33 at para 55 (SCC) [*Manitoba Language Rights*].
166 *Supra* note 141 at para 30.
167 *Ibid* at para 37.

delayed mandamus order thus structured how the body could conduct its redetermination (arguably an act of institutional design)[168] and required the Court to monitor compliance with the order in an ongoing fashion. This suggests that prospective judicial remedies are not merely endpoints but facilitate ongoing institutional dialogue, which fits with a more collaborative and pluralistic understanding of judicial review. [169]

A final example of a suspension of a remedy, albeit a slightly different way, is *Association des cadres de la société des casinos du Québec v. Société des casinos du Québec*.[170] In this case the Administrative Labour Tribunal (ALT) had certified a casino managers' union, but in so doing, found that Quebec's labour relations regime infringed the guarantee of freedom of association.[171] The ALT thus declared that the statutory provision was inoperative. The Superior Court reviewed the ALT's decision on a standard of correctness[172] and found that the code did not breach the freedom of association. The Court of Appeal of Quebec then reinstated the ALT's decision, but interestingly, suspended the decision of the ALT for 12 months.[173] This was strange because the ALT did not issue a declaration of invalidity (which can be suspended)[174] but found that the statutory provision was inoperative between the parties. As Justice Côté noted in the Supreme Court of Canada decision, usually declarations are suspended if there is a compelling public interest,[175] which there would not be in this instance because the inoperability decision only functions between the parties. The Quebec Court of Appeal suspended the effect of the tribunal's decision, it said, to "give the government the opportunity to take the steps it considers appropriate, should it wish to do so."[176] For our purposes, this case demonstrates that the court is becoming more creative with its remedial discretion. It also points toward a collaborative understanding of judicial review because the court is signalling to the government that it needs to respond to a problem of institutional design. Finally, this case suggests that the court itself is engaged in an instance of institutional design by potentially creating a new tribunal remedy. Given that the remedy would not be a suspended declaration of invalidty, but a suspended declaration of inoperability, I wonder if there needs to be a compelling public interest to trigger suspension. For instance, tribunals could use this remedy to signal to Parliament that there have been many findings of inoperability that need to be addressed by the legislature. Accordingly, maybe the fact there has been significant systemic issues would be enough to trigger such a remedy.

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168 *Ibid* at paras 34–41.

169 The idea that courts could suspend orders and monitor compliance is perhaps similar to the structural injunction developed in the United States: see Robert E Easton, "The Dual Role of the Structural Injunction" (1990) 99:8 Yale LJ 1983. It is also similar to the suspended quashing orders in the United Kingdom: see *R (ECPAT UK) v Kent County Council*, [2024] EWHC 1353 (Admin).

170 2022 QCCA 180 [*Société des casinos* QCCA].

171 *Association des cadres de la Société des casinos du Québec et Société des casinos du Québec inc*, 2016 QCTAT 6870 at paras 439–43.

172 Constitutional questions are reviewed on a standard of correctness: See *Vavilov*, *supra* note 1 at paras 55–57.

173 *Société des casinos* QCCA, *supra* note 170 at para 11.

174 *Manitoba Language Rights*, *supra* note 165.

175 *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at para 157.

176 *Société des casinos* QCCA, *supra* note 170 at para 11.

C. SUBSTITUTION IN THE SUPREME COURT (*MASON V. CANADA (CITIZENSHIP AND IMMIGRATION)*)

As noted above, the Supreme Court has declined to remit in most of its post-*Vavilov* decisions.[177] Therefore, the Supreme Court has arguably departed from its statement in *Vavilov* that the primary remedy would be remitting the decision, choosing instead to directly substitute decisions. This contrasts with the lower courts who have been more reticent about using substitution, noting that it should be exercised only in the "clearest of circumstances."[178] The lower courts have instead been developing indirect substitution and suspended remedies as alternatives to remitting decisions. In this section, I analyse the Supreme Court's decision in *Mason* and critique the Supreme Court's decision to use direct substitution, arguing that other remedial responses would have been preferable.

In *Mason*, the Immigration Appeal Division (IAD) interpreted "acts of violence" in section 34(1)(e) of the *Immigration and Refugee Protection Act*[179] as broad, with any act of violence triggering its application.[180] The question on judicial review was whether the violence needed to threaten national security. The Federal Court of Appeal found that the IAD offered a reasonable interpretation, because it was "'alive to [the] essential elements' of the text, content and purpose" of the provision.[181] Mr. Mason attempted to invoke Article 33 of the *Refugee Convention*[182] before the Federal Court of Appeal to support his interpretation (an argument he had not raised to the IAD).[183] However, the Federal Court of Appeal found it could not entertain the argument because it went to the merits of the interpretation of the provision.[184]

The Supreme Court overturned the Federal Court of Appeal's decision, concluding the IAD did not reasonably interpret the statute. In so doing, the majority declined to find a new category of correctness,[185] and applied a "reasons first" approach.[186] The Supreme Court found the decision was unreasonable because it was not responsive to several of the parties' arguments, namely, critical points of statutory context and the broad consequences of the interpretation.[187] The IAD also did not address the significant consequences of the decision on the individual (in this case, deportation),[188] and the Supreme Court noted that the burden of justification is higher in these circumstance, stating the "reasons must reflect [the] stakes."[189] Finally, the Supreme Court found that the IAD's failure to apply the *Refugee Convention* was unreasonable (even though the issue was not raised before the decision-

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177 *Society of Composers*, *supra* note 16 at para 161; *Mason* SCC, *supra* note 16 at paras 121–22; *Commission scolaire*, *supra* note 16 at para 114; *York*, *supra* note 16 at para 142; *Pepa*, *supra* note 16 at paras 121–32; *Mandate Letters*, *supra* note 16 at para 63.

178 *Canada (AG) v Impex Solutions Inc*, 2020 FCA 171 at paras 90–92; *Pepa*, *supra* note 16 at para 216, Côté and O'Bonsawin JJ, dissenting.

179 *Immigration and Refugee Protection Act*, SC 2001, c 27, s 34(1)(e).

180 *Mason*, *supra* note 16 at para 20.

181 *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 46 [*Mason* FCA], citing *Vavilov* at para 120.

182 *Convention Relating to the Status of Refugees*, Can TS 1969 No 6, Article 33 [*Refugee Convention*].

183 *Mason* FCA, *supra* note 181 at para 72.

184 *Ibid* at para 73.

185 *Mason* SCC, *supra* note 16 at paras 39–54.

186 *Ibid* at paras 8, 58–63.

187 *Ibid* at paras 84–97.

188 *Ibid* at paras 98–103.

189 *Ibid* at paras 76, 81.

maker).[190] The majority thus concluded that these relevant constraints pointed to only one reasonable interpretation of the statute and that therefore it would "serve no useful purpose" to remit the decision back to the IAD.[191]

In my view, the Supreme Court's finding that there was only one reasonable interpretation was doubtful. As the Federal Court of Appeal noted, the interpretation of the statute is "somewhat complicated and the outcome is open to some debate,"[192] suggesting there were multiple reasonable interpretations. In definitively finding that there was one reasonable interpretation, partially on arguments not raised before the decision-maker, the Supreme Court conducted a disguised correctness review, rather than focusing on the reasons based on the arguments that were raised to the decision-maker. Furthermore, the only factor the Supreme Court considered when deciding to substitute the decision was that the outcome was inevitable. The implication is that substitution is an inevitable conclusion of the "one reasonable interpretation," rather than part of a contextual analysis as to the best way for the court to exercise its remedial discretion. The Supreme Court thus ignored one crucial factor for determining a remedy namely, whether "the decision maker had a genuine opportunity to weigh in on the issue in question."[193] If judicial review has a hortatory or guiding role, as Justice Rowe noted in *Pepa*,[194] then the decision-maker should have the benefit of the court's reasons to be able to weigh in on the issue that became more acute during the review process.

The primary reason the Supreme Court found the IAD's decision to be unreasonable was that there was a lack of a responsive justification. However, by choosing not to remit, the Supreme Court offered no opportunity for the decision-maker to provide a responsive justification and hence to remedy the initial rule of law concern. Furthermore, remitting decisions treats the decision-maker as though they have agency to respond, trusting that they will indeed follow the court's judgment, which thus infuses the remedy with deference and coaches the decision-maker to develop better administrative practices. By contrast, directly substituting decisions acts like a command, possibly undermining the collaborative and guiding function to review.[195] Direct substitution often gives the individual the benefit they were searching for, such as citizenship, access to a premises,[196] disability benefits, or in this case the removal of a deportation order. This undercuts *Vavilov*'s insistence on remedial discretion by fusing the remedy to a duty to provide a certain benefit, and implies judicial review is about vindicating rights rather than facilitating good decision-making.[197]

There were, in my opinion, other, better ways for the Supreme Court to exercise its remedial discretion in this case. One approach the Supreme Court could have taken would have been to balance the fact that the decision-maker did not have an opportunity to weigh in on the issue, with the sensitive high-stakes circumstances of the case. As noted above, the impact on the parties is impliedly now a relevant factor for determining substitution, which

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190 *Ibid* at paras 104–17.
191 *Ibid* at paras 120–21.
192 *Mason* FCA, *supra* note 181 at para 8.
193 *Vavilov*, *supra* note 1 at para 142.
194 *Supra* note 16 at para 152.
195 For an argument that most court orders are commands, see Stephen Smith, "Why Courts Make Orders (And What this Tells Us About Damages)" (2011) 64 Curr Legal Probs 51.
196 *White v Upper Thames River Conservation Authority*, 2020 ONSC 7822 at paras 41–43.
197 *AXA General Insurance Ltd v Lord Advocate*, [2011] UKSC 46 at para 159.

would fit with *Vavilov*'s concern for individual rights, particularly when conducting reasonableness review. Given the Supreme Court in *Pepa* implied that the gravity of the consequences on the individual was relevant to the remedy, then maybe in future cases the Supreme Court might start to raise the rule of law or the culture of justification as a principle that guides its remedial discretion. Consequently, the problem with *Mason* may not be the substitution itself, but the lack of engagement with guiding principles, including the culture of justification, as well as a lack of engagement with the other contextual factors established in *Vavilov*.

Another remedial response that the Supreme Court could have suggested for future cases is the one suggested by the Federal Court of Appeal. The Federal Court of Appeal noted that if individuals raised the *Refugee Convention* as an argument before the IAD in future cases, this may lead to different interpretations of the statute. While different interpretations are acceptable on the *Vavilov* framework,[198] "persistent discord can cause serious concerns about consistency and the rule of law."[199] The Federal Court of Appeal thus suggested that in cases where there are duelling interpretations of the home statute, the decision-maker could use the reference procedure located in section 18.3(1) of the *Federal Courts Act*[200] so the court could pre-emptively provide a definitive answer.[201] The court would not need to defer to the decision-maker because they would be pronouncing the correct state of the law.[202] This gets to the same outcome as substitution but in a collaborative fashion because the could is asked to *ex ante* resolve a conflict. As such the court would not be overreaching because decision-makers ask for advice on this issue and consequently, judicial intervention is justifiable.

Another remedy the Supreme Court could have considered is indirect substitution. In her minority judgment, Justice Côté argued that correctness review should have applied in order to more frankly acknowledge that the issues transcended the interests of the parties and raised issues of broad significance and general importance.[203] One reason Justice Côté found that the rule of law demanded correctness is because there was internal administrative conflict in a high stakes situation.[204] But as we saw above, indirect substitution also aims to respond to systemic problems and transcends the parties in the case by providing future advice to the administrative body. In my view, the failure to apply the *Refugee Convention* in immigration decision-making, even if it was not raised by the parties, would surely qualify as a systemic issue worthy of indirect substitution. The Supreme Court could have responded to the high stakes situation by providing clearer guidance on what factors the IAD must take into account on redetermination. This guidance would thus have transcended the interests of the parties and responded to systemic problems while still deferring to the decision-maker. The Supreme Court also could have considered remitting but with the statement that the decision-maker must redetermine "in accordance with these reasons," which would have incorporated the reasons into the order and therefore bound the decision-maker to consider the *Refugee Convention*.

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198 *Vavilov*, *supra* note 1 at para 129.
199 *Mason* FCA, *supra* note 181 at paras 72–75, discussing at para 75 *Vavilov*, *supra* note 1 at para 132.
200 RSC 1985, c F-7, s 18.3(1).
201 *Mason* FCA, *supra* note 181 at para 77.
202 See also *Reference re Broadcasting Regulatory Policy CRTC 2010-167*, 2012 SCC 68 (the Supreme Court did not engage in any standard of review analysis but merely answered the question *de novo*).
203 *Mason* SCC, *supra* note 16 at para 125.
204 *Ibid* at paras 163–67.

Similarly these indirect substitution methods also could have been considered in *Pepa*, especially given the "one reasonable interpretation" of the statute that the majority propounded caused some absurd results for the application of the statute in other circumstances.[205] Consequently, it might have been better to have indirectly substituted the decision by providing a list of factors that decision-makers must consider when interpreting their statute in relation to deciding whether a person holds a valid visa for the purposes of receiving an appeal. Finally, perhaps the Supreme Court in *Mason* could have suspended a mandamus order, stating that if redetermination did not occur within a certain period, then it would direct the IAD that Mr. Mason was admissible to Canada. This still would have given the administrative body an opportunity to grapple with the *Refugee Convention* in its reasons while communicating that if it did not, the court would intervene.

To my mind, the Supreme Court had a greater remedial flexibility than the majority seemed to believe it possessed in both *Mason* and *Pepa*. The Supreme Court seemed to think that substitution had to follow from a finding of one reasonable interpretation of the statute, but we saw that the lower courts often balanced inevitability against other contextual factors, which pointed away from substitution. The majority in *Pepa* did not, for instance, consider the guiding principles laid down in *Vavilov*, nor the contextual factors that assist in pointing to the remedy (other than "inevitability"). This gave the impression that remedial discretion is absolute, unmoored from the guiding principles and contextual factors laid out in *Vavilov*. In my view, remedial discretion would be more coherently exercised if it were to be guided by three principles: legislative intent, administrative efficiency, *and* the culture of justification. To enliven the third principle, the Supreme Court should consider clarifying that the rule of law or culture of justification is a factor and guiding principle that assists in selecting the appropriate remedy. This would bring remedies into harmony with the second theory of *Vavilov* and provide a solid justification for the direct substitution in *Mason* and *Pepa*. Given the recent affirmation in *Yatar* that the rule of law is relevant to influencing the court's discretion to hear the merits of a case, and the implications in *Pepa*, the Supreme Court simply needs to explicitly endorse it as a contextual factor in a future decision.

III. CONCLUSION

To conclude, remedies inform our understanding of how the court perceives its role in the *Vavilov* era. In my view, the development of remedial flexibility points in favour of the common law constitutionalist interpretation of *Vavilov*. This is because remedial flexibility sees the court's role as collaborative, contributing to the "institutional design" of administrative bodies, for instance through offering particular guidelines that administrators need to consider when exercising discretion, rather than seeing its role as purely policing a jurisdictional boundary. The fact remedies have a kind of designing function perhaps suggests that at a more theoretical level we should interpret *Vavilov*'s concept of "institutional design" as both substantive (acknowledging why Parliament might delegate decisions to administrators, such as for their expertise) and broad (inclusive of the common law, reason-giving, and constitutional principles), rather than narrow (only Parliament engages in institutional design) and formal (design is tantamount to delegation alone). Thus, when future cases touch on constitutional foundations, such as cases involving privative clauses, it might

[205] *Pepa*, *supra* note 16 at paras 151, 217.

be worth thinking about the cohesion of the *Vavilov* framework as whole and how the development of remedies weighs in favour of a more common law constitutionalist approach being taken, rather than the jurisdictional approach some judgments are attempting to revive.

The converse is also true — that one's theoretical approach will determine the kinds of remedies one wishes to see develop. For instance, an ultra vires position may limit the importance of tribunal expertise to the determination of the remedy because such things are not relevant to determining a statutory jurisdiction per se. Furthermore, an approach that focuses on jurisdiction would be more inclined to less remedial creativity, focusing instead on the legislature's choice to delegate. As such, one would be inclined to criticize direct substitution because it undermines the legislature's choice to delegate the matter to the decision-maker. By contrast, a common law constitutionalist approach that places emphasis on the impact on the individual may believe substitution is important in cases where the consequences of the decision are particularly harsh for the individual. The *Mason* case study suggests that it would be helpful to clarify the theoretical approach that underlies remedies. Both *Mason* and *Pepa* implicitly relied on *Vavilov*'s culture of justification when selecting a remedial response that reflected the stakes. Bringing the culture of justification theory to the foreground would perhaps slow the criticisms that the Supreme Court is engaging in disguised correctness through substitution by taking the focus of remedies away from legislative intent and toward a culture of justification.

In my view, there are thus three guiding aims of remedial discretion: legislative intent, good administration, and the culture of justification. These principles import substantive *limitations* into remedial discretion, structuring its exercise, and if these three principles were more clearly acknowledged by the courts, this would help to ensure discretion is exercised coherently. These principles also *empower* courts to facilitate good administration and support the culture of justification through its remedial discretion. Thus, an approach that aims to support a culture of justification may be inclined to other kinds of remedial creativity, for instance, by seeing damages be developed as a remedial response to protect individual rights, or a collaborative approach might think that courts should remain seized of a matter through ongoing monitoring, for instance, by suspending a remedy. In my view, therefore, remedies and theory have an important interdependent relationship: focusing on remedies explains something about how the court perceives its role in review, and similarly theory provides courts with guiding principles as to how they should exercise their remedial discretion in particular cases. Consequently, scholars and courts could pay more attention to the interdependency of remedies and theory when developing either subject matter.