VAVILOV: A SUCCESS STORY, WITH LESSONS WORTH LEARNING

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When it comes to Supreme Court of Canada decisions, I am not really known for my unequivocal, consistent, enthusiastic praise. Indeed, in administrative law, I can be rather uncharitable.

Some may recall that in 2016, I wrote an article criticizing the Supreme Court's approach to administrative law. I said that "[Canadian] administrative law is a never-ending construction site where one crew builds structures and then a later crew tears them down to build anew, seemingly without an overall plan."[1] In that article, I targeted the *Dunsmuir v. New Brunswick* case[2] and the glosses on it in the later years.[3]

Many followed with their own views. Much praise for *Dunsmuir*? There most certainly was not!

And, in 2019, sure enough, the Supreme Court tore down the *Dunsmuir* mess. Before us was the Supreme Court's latest structure for the substantive review of administrative decisions, *Canada (Minister of Citizenship and Immigration) v. Vavilov*.[4] A new structure, gleaming, bright, and shiny! With all the hopes every previous structure had enjoyed. Might it survive, we wondered?

Here we are, over five years later. And *Vavilov* still stands.

And as for that oft-visiting wrecking crew, it's nowhere in sight. Today, five years later, *Vavilov* survives. Indeed, as we shall see, it thrives. It has even extended its reach, spreading into all areas of substantive review and arguably procedural review too![5]

Why?

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* Justice, Federal Court of Appeal. The views expressed here are those of the author and not his Court. The text in this article is slightly revised from a keynote address the author delivered at the "Vavilov at 5" conference on June 19, 2025 at the University of Alberta.

1 David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42:1 Queen's LJ 27 at 29.

2 2008 SCC 9 [*Dunsmuir*].

3 See most particularly *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 [*Edmonton East*] (one standard of review for all administrative decisions; review of a statutory interpretation decision the administrator never made; extremely deferential review); *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] (courts are to work to sustain outcomes reached by administrators and fashion reasons that will cooper up those outcomes).

4 2019 SCC 65 [*Vavilov*].

5 See below, notes 20–21.

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Vavilov isn't some figment of some judge's worldview of what ought to be, the product of some judge's bestowal of personal benediction.[6] It isn't a tool made by some judge, scornful of the status quo, trying to transform or remake our law, to achieve some sort of nirvana.[7] Judges with their personal views may come and go, but *Vavilov* remains.

Vavilov isn't a tool to enhance judicial power over other branches of government. Nor is it "conservative" or "liberal," nor does it lean toward the poles of judicial restraint and judicial activism. Debates do rage over the acceptability of the administrative state. But it does not speak to that, nor does it favour one side or the other.

Nor is it so rigid that it causes inapt results in certain contexts or is it so loose that it gives us unpredictable results.

How did *Vavilov* avoid these pitfalls and thread these needles? Why has it been such a success, at least in the sense that for the last five years courts have universally and enthusiastically applied it, without questioning it?

First, *Vavilov* accords with our fundamental public law understandings, understandings that we have had for decades, if not centuries. For example, we live in a democracy where legislation binds us unless inconsistent with the Constitution.[8]

Vavilov incorporates this notion. Legislation matters. All must obey the law on the books. This is especially true for judges who swear an oath to that effect and whose job is to enforce the law. To this end, *Vavilov* declared that legislation is the "polar star" of judicial review.[9] The people the voters elect have the ultimate say about judicial review and the orientation of judicial review courts, not unelected, tenured judges.

Legislation as the "polar star" plays out in two main ways. Under many legislative regimes, the administrative decision-maker is to decide the merits of the case and courts are restricted to a reviewing role, not a supplementary decision-maker on the merits. And judicial interference with administrative decision-making is warranted when, among other things, the administrative decision-maker disobeys legislative constraints.[10]

It plays out in many other ways too. Respect for legislative intent explains *Vavilov*'s default to reasonableness review for administrative decision-making. The legislature, by law, designated the administrator as the merits-decider — including interpreting legislation. It

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6 For an explicit example of a judge basing a decision on personal benediction, see *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 3.

7 See the gratuitous, unwarranted, and ideological shot taken by the Supreme Court of Canada against "Diceyan views" in *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].

8 This is one aspect of what has sometimes been called the "hierarchy of laws." See *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 117; *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at para 30; *Canada (AG) v Utah*, 2020 FCA 224 at para 28; *Sturgeon Lake Cree National v Hamelin*, 2018 FCA 131 at para 54; *Canadian Federation of Students v Ontario (Colleges and Universities)*, 2021 ONCA 553.

9 *Vavilov*, *supra* note 4 at para 33.

10 See the discussion and noteworthy application of this in *Galderma Canada Inc v Canada (AG)*, 2024 FCA 208.

would be against legislative intent — in other words, against the law on the books — for courts to interfere willy-nilly with administrators' decision-making.[11]

Given its respect for legislation and whatever ideologies are expressed in it, *Vavilov* is ideologically neutral and neither favours nor restrains the administrative state.[12] If a government wants plenty of powerful administrative tribunals doing important things and legislates to that effect, *Vavilov* will enforce that legislative will. Similarly, if a government wants to carve back the administrative state and legislates to that effect, *Vavilov* will enforce that legislative will too. If a government wants to adjust the standard of review by way of legislation, *Vavilov* will not stand in the way. Correctness for administrators' interpretations of law? The government simply has to pass a law to that effect. *Vavilov* will not stand in the way.

Vavilov sets out a vision of and respect for the separation of powers. The more that executive action concerns matters outside of the "ken of the courts," the more it should be left alone.[13]

Compare a landlord and tenant tribunal that applies the law to the facts just like a court does, with a Minister of Heritage who has a bag of money to distribute on vague criteria to arts groups. *Vavilov* aptly analyzes this using the language of constraints. In the case of a tribunal applying the law to the facts like a court would, there are tight constraints. On the other hand, a Minister with a bag of money to distribute and general criteria of a policy nature for its distribution has broad discretion and, thus, enjoys few constraints.[14]

Vavilov also understands that it has to govern the substantive review of decisions made under countless types of different statutes made by tens of thousands of administrative decision-makers, ranging from our biggest tribunals such as the Canadian Radio-television and Telecommunications Commission (CRTC), Ministers and their functionaries, policy decision-makers, licensing tribunals having to decide 100,000 applications a year, decisions made by non-legally trained people in a small rural town, and so on. A sensitively designed, contextual approach was the only way to go.

Gone is *Edmonton East*, which outlawed any resort to context and imposed one inflexible standard of reasonableness for all administrative decisions and administrative decision-makers.[15] It was folly for the majority of the Supreme Court in *Edmonton East* to suggest that

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[11] See e.g. *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 22–28; *'Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149; *Sharif v Canada (AG)*, 2018 FCA 205 at paras 26–28.

[12] Most decidedly, *Dunsmuir* and its later appendages were pro-administrative state. Judicial review courts were to strive to uphold the outcomes administrators reached and cooper up their reasons, even to the extent of drafting reasons for them. The lack of any adequacy-of-reasons requirements on administrative decision-makers meant that they could decide serious matters and not explain themselves: see above note 3.

[13] See e.g. *Brar v Canada (Public Safety and Emergency Preparedness)*, 2024 FCA 114 at paras 16–17 [*Brar*]; *Society of Composers, Authors and Music Publishers of Canada v Sirius XM Canada Inc*, 2024 FCA 166 at para 3; *Gitxaala Nation v Canada*, 2016 FCA 187 at para 149; *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295 at paras 171–72.

[14] See the broad discussion of the role of constraints in *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras 24–36.

[15] *Supra* note 3.

an individual non-legally trained person issuing gun licences in Tuktoyaktuk, N.W.T. under a gun licensing law should be on the same footing as the CRTC, supported by a vast Ottawa bureaucracy, holding days of hearings on the meaning of "Canadian content."

Next, *Vavilov* has brought us transparency and accountability. Administrative decision-makers, given a decision-making task under statute, must actually and genuinely grapple with the merits of the case before them and give reasoned explanations on key issues.[16] This has been transformative: continuing legal education for administrative decision-makers greatly expanded after *Vavilov* was decided, and the reasons of administrative decision-makers are just so much better than they used to be.[17]

Vavilov also recognizes the proper roles of administrators and reviewing courts. Administrative decision-makers decide the merits of their cases and provide their reasoning. Reviewing courts independently review what has been done. Each stays in its proper place.[18]

No longer can reviewing courts draft reasons for administrative decision-makers to cooper up their decisions, as was permitted under *Newfoundland Nurses*.[19]

Vavilov has brought us simplicity, workability, and stability. I've taught *Vavilov* at approximately 40 conferences for judges, lawyers, students, or a combination of these. Just about everyone says that it is relatively straight-forward, minimizes debates over arcane things like the standard of review, and allows the courtroom to focus on the meat of the matter: whether the administrative decision should survive.

Vavilov also furthers access to justice. Courts can explain *Vavilov* in plain language to non-legally trained, self-represented litigants. For example, a Federal Court of Appeal pilot project has developed language to guide self-represented litigants on what *Vavilov* means and says. Some of these litigants do a very good job in applying *Vavilov* to their cases. In the courtroom, *Vavilov* is easy to explain, even to the most challenged self-represented litigant.

Vavilov is not just surviving, it is thriving. It is even expanding its reach.

No longer does *Vavilov* apply just to administrative disputes between parties leading to a decision on the merits. It now applies to the procedural fairness decisions of administrative decision-makers.[20] It now also applies to the making of administrative rules, orders-in-council, and regulations.[21]

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16 *Vavilov*, *supra* note 4 at paras 120–21.

17 This is the author's personal experience as a frequent speaker and educator at continuing legal education conferences and his judicial role as a reviewer of administrative decisions.

18 See above note 11.

19 *Supra* note 3. The unsatisfactory nature of the situation under *Dunsmuir* and its extensions was well-expressed in *Bonnybrook Park Industrial Development Co Ltd v MNR*, 2018 FCA 136 at paras 66–95, Stratas JA, dissenting; *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at para 33; *Alexion Pharmaceuticals Inc v Canada (AG)*, 2021 FCA 157 at paras 8–10 [*Alexion*].

20 *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 (*Vavilov* methodology used to determine the standard of review of an administrator's procedural decision). See also *Innovative Medicines Canada v Canada (Attorney General)*, 2022 FCA 210 at para 33 [*Innovative Medicines Canada*].

21 *Auer v Auer*, 2024 SCC 36 [*Auer*]; *TransAlta Generation Partnership v Alberta*, 2024 SCC 37.

The general philosophy is that an administrative decision is an administrative decision is an administrative decision, and all should be reviewed the same way, regardless of irrelevant differences in form. To do otherwise leads us to "[c]omplexity, confusion and incoherence," not "simplicity, clarity and coherence."[22]

Arguably *Vavilov*'s placement of legislation and its interpretation at the centre of judicial review has been strengthened by Supreme Court initiatives to increase the legitimacy of legislative interpretation and greater rigor in that area. Rigor breeds rigor.[23] Gone are the dark days when unelected, tenured judges, even those on the Supreme Court of Canada, injected their own policies into the meaning of legislation through the artifice of "divining the purpose" of legislation.[24]

Of all the successes *Vavilov* has achieved, perhaps the greatest is the unprecedented stability it has brought us. Although there are exceptions — some distressing and troubling ones discussed below — later panels of the Supreme Court have followed the *Vavilov* framework without introducing their own idiosyncratic wrinkles and quirks. This matters. Doctrinal instability and unprincipled judicial invention can tear against the rule of law and the reputation of the justice system.[25]

On the other hand, stability benefits us all, in so many different ways:

> Stability furthers the separation of powers between the judiciary and other branches of government: it keeps the judiciary in a predictable, appropriate lane. Stability brings us certainty, predictability, and freedom: it gives us consistent jurisprudence about what governments can and cannot do and about what they can be required to do. Stability bolsters the rule of law and increases confidence in the legal system. The people we serve deserve to be governed by lasting legal doctrine carefully shaped and sculpted over the years by many—not by the personal diktat of whoever happens to sit in a particular judicial chair at a particular moment of time.[26]

When you have an authority like *Vavilov* that is so successful, why toy with it?

Well, alas, in applying *Vavilov*, the Supreme Court sometimes does toy with it, flirting with instability, departing from *Vavilov* in small but worrisome ways:

- The Supreme Court sometimes rules on contentious issues and new arguments that are alone the preserve of the administrative decision-maker, as merits-

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22 *Innovative Medicines Canada*, *supra* note 20 at paras 33–36.

23 See *TELUS Communications Inc v Wellman*, 2019 SCC 19; *R v Rafilovich*, 2019 SCC 51; *Michel v Graydon*, 2020 SCC 24; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43; *Piekut v MNR*, 2025 SCC 13; *Telus Communications Inc v Federation of Canadian Municipalities*, 2025 SCC 15; *Vavilov*, *supra* note 4 at paras 115–24. See also *Williams v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252; *Canada v Cheema*, 2018 FCA 45 at paras 79–80; *Hillier v Canada (AG)*, 2019 FCA 44.

24 For important academic commentary on this, see Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59:4 Alta L Rev 919; Mark Mancini, "Two Uses of Purpose in Statutory Interpretation" (2024) 45:2 Stat L Rev 1.

25 *Canada v Boloh 1(A)*, 2023 FCA 120 at para 20 [*Boloh*]; *Schmidt v Canada (Attorney General)*, 2018 FCA 55 at paras 91–95.

26 *Boloh*, *supra* note 25 at para 24.

decider, to decide.[27] This runs against *Vavilov*'s recognition that contentious issues and new arguments are for the administrative decision-maker as the merits-decider, not the reviewing court.[28]

- *Vavilov* properly condemned "disguised correctness review," correctness review under the guise of reasonableness review.[29] But the Supreme Court is still not above doing disguised correctness review itself.[30] This harkens back to pre-*Vavilov* days where "do as we say, not what we do" — one could also say "one rule for me and another for thee" — characterized the Supreme Court's approach to administrative law, even according to some of its own members at the time.[31]

- *Vavilov* prescribes one methodology for all cases: a focus on the acceptability and defensibility of the reasons and outcome reached by the administrative decision-maker, shaped by the constraints to which it was subject, wide or narrow depending on certain contextual factors. This methodology does not contemplate resort to a notion of intensity of review, that is, a strict (robust) or less strict (deferential) approach. On this, *Vavilov* was balanced, suggesting that "reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions."[32] But these days the Supreme Court frequently emphasizes, without elaboration and explanation, that reasonableness review must be "robust."[33] In this context, what does "robust" mean? Strict review approaching correctness review under the guise of reasonableness review? Throwing around the word "robust" injects incoherence, uncertainty, and imbalance into an otherwise coherent, concrete, and neutral methodology.

- Recently, the Supreme Court has added a special judge-made rule, a presumption of validity for one form of administrative decision: the making of regulations.[34] The Supreme Court offered no conceptual basis or sound doctrinal justification for this, and there is none. Such judge-made "presumptions" are nothing more than the judicial finger on what should be neutral scales of justice. And special judge-made rules to address differences of form, not substance, lead to needless "[c]omplexity, confusion and incoherence," contrary to *Vavilov*.[35] Here, lessons can be drawn from

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27 See e.g. *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*]; *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 [*Commission scolaire*]; *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 [*Ontario (IPC)*]; *Pepa v Canada (Citizenship and Immigration)*, 2025 SCC 21 [*Pepa*].

28 See discussion in *Terra Reproductions Inc v Canada (AG)*, 2023 FCA 214, citing, among others, *Vavilov*, *supra* note 4 at para 142; *Immeubles Port Louis Ltée v Lafontaine (Village)*, [1991] 1 SCR 326 at 361 (SCC). See also *Klos v Canada (AG)*, 2023 FCA 205 at para 8.

29 *Supra* note 4 at para 294, Abella and Karakatsanis JJ.

30 See e.g. *Ontario (IPC)*, *supra* note 28 (majority reasons), for an egregious instance of this.

31 See Moldaver and Wagner JJ in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 112; Abella J in *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57 at paras 185, 190. See also Paul Daly, "The Signal and the Noise in Administrative Law" (2017) 68 UNBLJ 68.

32 *Vavilov*, *supra* note 4 at para 12.

33 See, in particular, *Mason*, *supra* note 27; *Commission scolaire*, *supra* note 27; *Auer*, *supra* note 21; *Pepa*, *supra* note 27.

34 *Auer*, *supra* note 21.

35 See *Innovative Medicines Canada*, *supra* note 20 at para 36; see also compelling criticisms of the presumption of validity by Mark Mancini, "Sunday Evening Administrative Law Review, Issue #158: A Big SCC Case on Reasonableness, *Dore* and Psilocybin Mushrooms" (10 November 2024), online:

south of the border. Introducing many additional judge-made steps into the standard of review analysis helped to undermine and ultimately destroy *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[36] in *Loper Bright Enterprises v. Raimondo*.[37]

- Mucking up the clarity and conceptual coherence in this area is the occasional eruption of *Charter* values into administrative law. To me, it's much like a crying two year old entering a quiet room: very disruptive, not conducive to order and predictability, and best removed from the room. The academic community and judges have raised serious questions about "*Charter* values" and their use in administrative law.[38] Many query whether this body of law is coherent, intellectually rigorous, and respectful of our written constitutional text and constitutional understandings, like *Vavilov* is.[39] For example, section 1 tells us that the *Charter* protects only "the rights and freedoms set out in it."[40] So where do we get off looking at vibes, feelings, and musings? We live under a rule of law, not the rule of whatever stuff judges want to see, or the vibes they feel.

Why does the Supreme Court do this? Why muck around with something that has been so successful? The answer rests with the reasons why *Vavilov* is such a success story, to which I now turn.

Are there any lessons in *Vavilov* about good judicial decision-making?

There sure are.

The Supreme Court considered and decided *Vavilov* in an unusual but very positive way. *Vavilov* was an exercise in humility.

Humility is one of the hallmarks of great judicial decision-making.[41] U.S. Supreme Court Justice Robert Jackson, speaking about his own court, perhaps put it best of all: "We are not final because we are infallible, but we are infallible only because we are final."[42]

Alas, humility has not always been prevalent in the Supreme Court's offerings in administrative law. For example, during the last couple of decades, the Supreme Court, unlike other comparable apex courts, has tended to cite only itself, as if it has a monopoly on truth and as if all other courts, often more experienced in the area, have nothing useful to say. Sometimes the Supreme Court refers to the thinking of lower courts just to score points off

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[perma.cc/L2MY-JMCR]; Paul Daly, "Standard of Review of Regulations: *Auer v. Auer*, 2024 SCC 36" (8 November 2024), online: [perma.cc/UXK2-SCXY].

36 467 US 837 (1984).

37 603 US 369 (2024).

38 See *Doré*, *supra* note 7.

39 See e.g. *Sullivan v Canada (AG)*, 2024 FCA 7; *Brar*, *supra* note 13 at paras 65–68; and reams of academic and judicial criticism that the Supreme Court has not deigned so far to answer.

40 *Canadian Charter of Rights and Freedoms*, s 1, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

41 John W Morden, "The 'Good' Judge" (2005) 23:4 Advocates' Soc J 13.

42 *Brown v Allen*, 344 US 443 at 540 (1953).

of it, not to explicitly adopt the best of it, to the benefit of the legal system as a whole.[43] Sometimes the Supreme Court departs from what it has said before, the unspoken assumption being that the current crew on the Court is better than those of the past.

But *Vavilov* was different: from the beginning, humility governed the Supreme Court's approach.

In its decision granting leave to appeal, the Supreme Court announced that it was going to rethink the law of substantive review of administrative decision-making. It asked for help.

The administrative law community and its experts responded in many ways. One was an online symposium hosted by the blogs, *Administrative Law Matters*[44] and *Double Aspect*.[45] Together they offered nearly forty articles, all of strong quality. In the end, the majority of the Supreme Court considered the doctrinal approaches in many of these articles, rather than voicing their own personal points of view about the administrative state or "what's best for Canadians." A comparison of the articles with the majority reasons in *Vavilov* shows their profound influence.

Vavilov also drew upon much jurisprudence of many other courts, particularly the Federal Court of Appeal, the appellate court that, by a huge margin, decides the most judicial reviews in Canada, and often the most complex ones too. By being humble, the Supreme Court considered and adopted the best contributions and insights of many judges, over many years — not just the insights of their own nine, some of whom in their pre-judicial or judicial careers were not specialists in judicial review.

Humility is also seen in the fact that seven individual justices jointly authored the majority reasons in *Vavilov*, not just one justice with six others concurring. This sort of co-authorship is rare, at least in the Supreme Court. Each of the seven judges had standing to contribute more to the final product. And looking at that final product, it seems that seven heads, working closely, cooperatively, and constructively, were better than one.

So in terms of Supreme Court jurisprudence, where does *Vavilov* rank?

Vavilov is no grand literary achievement. There are no memorable turns of phrase, soundbites, or quotable quotes. It's unnecessarily long and legalistic.[46] In places, it is repetitive. Important comments on single subjects are scattered throughout, rather than collected and exhibited in one place.[47]

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43 Here, *Auer*, *supra* note 22 is an egregious example of the Supreme Court failing to note the original ideas and rich arguments in the lower court decisions in *Auer v Auer*, 2022 ABCA 375; *Portnov v Canada (Attorney General)*, 2021 FCA 171; *Innovative Medicines Canada*, *supra* note 21, as if it acted alone.

44 Paul Daly, "Administrative Law Matters", online: <administrativelawmatters.com>.

45 Leonid Sirota & Mark Mancini, "Double Aspect", online: <doubleaspect.blog>.

46 There is a serious access to justice dimension here. Lengthy, complex prose means lawyers spend longer to read it and understand it, resulting in higher fees for their clients. It also means that self-represented litigants cannot access the law very easily.

47 See e.g. *Alexion*, *supra* note 19, which tries to collect various quote snippets and exhibit them together in one place.

But after many decades of attempts and failures in the area of substantive review of administrative decision-making, *Vavilov* achieved what once seemed impossible: it works well. In the Supreme Court's 150-year history, *Vavilov* surely occupies a bright place.

Heartiest congratulations, Supreme Court, for building what you did — a lasting structure. Keep it! Defend it! And please, oh please, stop fiddling around with it!

Something tells me *Vavilov* will outlive us all. And, thinking about how our legal system ought to operate — especially when it comes to foundational jurisprudence — isn't that exactly how it's supposed to be?