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Seven Out of Nine Legal Experts Agree: Expertise No Longer Matters (in the Same Way) After Vavilov!

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Seven Out of Nine Legal Experts Agree: Expertise No Longer Matters (in the Same Way) After *Vavilov*!

Audrey Macklin*

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I. INTRODUCTION

When an important case is appealed to the Supreme Court of Canada, interested observers focus their attention on the substantive principles that they hope the Court will articulate. Typically, some uncertainty in the law exists — after all, the case would not be worthy of the Supreme Court’s attention otherwise. But the confusion reigning in standard of review jurisprudence had reached a level where some people’s desire for certainty, especially in the mechanics of deference, broke free from any substantive substrate. Thumb’s second postulate, “An easily-understood, workable falsehood is more useful than a complex, incomprehensible truth”, held even more attraction than usual for some of my exasperated law students.

My unscientific impression is that most lawyers and academic colleagues agree that *Vavilov*¹ delivers greater certainty in the methodology for applying a “reasonableness” standard of review to questions of law. There is a palpable sense of relief

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¹ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.).

about that. Less consensus exists on the virtues of the new approach, which tilts toward a more exacting (and therefore less deferential) approach than whatever it replaced.

Vavilov, of course, does more than that. It affirms that a presumption of deference applies to all decision-makers to whom the legislator has delegated authority, but discards expertise as the dominant rationale for that deference. It excludes elements of administrative decisions subject to statutory appeal from the purview of deference. It heeds Binnie J.'s advice to euthanize jurisdiction as a distinctive category of legal issues that warrants non-deferential review. It reiterates the Court's past resistance to inconsistency as a justification for dispositive judicial intervention. And it demonstrates in reasonable detail (unlike its predecessor, *Dunsmuir*²) how to apply the new reasonableness methodology in the case at bar. The majority holds that

it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies.³

In principle, this should signal an end to the practice of retrofitting poorly motivated outcomes with judicially crafted justifications.⁴ Expertise resurfaces in the application of deference as an attribute that manifests in the quality of reasoning, and which a deferential court should recognize and respect.

Vavilov's companion decision, *Bell and NFL*,⁵ traces the alternate path of an administrative decision subject to statutory appeal to the courts and demonstrates what non-deferential (correctness) review of statutory interpretation looks like. When I read *Vavilov*, my relief at the articulation of a pragmatic methodology for reasonableness review mitigates my principled reservations about other aspects of the judgment. When I read *Bell and NFL*, I experience no such relief.

But these are early days, and the actual meaning of the Supreme Court's revision of the principles governing substantive review will only be revealed in the recursive telling and re-telling of *Vavilov* over the course of judicial reviews and statutory appeals to come from courts around the country in the years ahead. On its best

² *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9 (S.C.C.).

³ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 86 (S.C.C.) [emphasis in original].

⁴ But see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 123 (S.C.C.): "There may be other cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable."

⁵ *Bell Canada v. Canada (Attorney General)*, [2019] S.C.J. No. 66, 2019 SCC 66 (S.C.C.) [hereinafter "*Bell and NFL*"].

reading, I would label the majority's approach to deference on questions of law a type of enlightened statutory interpretation. This method encourages a reviewing court to be receptive and respectful toward a more pluralist, textured and situated approach to ascribing meaning to legal text than traditional techniques of statutory interpretation might otherwise allow. Though it may be less generous than some versions of the deference it replaces, it has much to commend it on the majority's own account. Indeed, one of the questions left dangling by the majority, and made stark by the companion case of *Bell and NFL*, is why a reviewing court should ever eschew an enlightened approach to statutory interpretation.

II. STRANGE BEDFELLOWS

The administrative state imagined by champions of deference, from *CUPE v. New Brunswick Liquor Corp.*⁶ through to the present, is populated by competent, expert and dispassionate administrative actors and intelligent judges with enough confidence and reflexivity to recognize their strengths and their limitations. In this first-best world, administrative actors and judges are bound through mutual respect in a shared project of instantiating the rule of law. The corrective of judicial review does not disappear, but it recedes in importance.

This first-best world certainly corresponds to reality for some significant proportion of administrative actors and judges, in some places and at some historical moments. In the second-best world inhabited by many administrative actors and judges, however, these estimable characters share space with inexpert or simply under-resourced decision-makers, and with judges institutionally unable to shake the conviction that they really are the smartest guys in the room. I believe that these deviations from the ideal case account for the familiar pathologies in the jurisprudence: judicial abdication in the name of deference, correctness review under the guise of reasonableness, and a pervasive sense of unpredictability, randomness and result-oriented analysis.

This gap between the first-best and second-best world is key to understanding the apparent anomaly of Vavilov's counsel advocating a return to the pre-*CUPE* world of muscular judicial review of questions of law. In immigration law, prison law, income support and fields broadly described as regulating marginalized populations, the judicial review narrative did not follow the plotline of sophisticated administrative actors implementing complex and progressive legislative agendas, while dodging the risk of being thwarted by regressive judicial intervention. Instead, the subjects of these administrative regimes worried more about decision-makers of widely varying competence, who were subject to various fiscal and political pressures from inside and outside their institutions, and who operated within a culture of suspicion toward those over whom they exercised authority. The uneven quality of decision-making, and the tilt toward statutory interpretations favourable to the state (and adverse to their clients), made many lawyers in these areas skeptical

⁶ [1979] S.C.J. No. 45, [1979] 2 S.C.R. 277 (S.C.C.) [hereinafter "*CUPE*"].

about both the presuppositions and the actual practice of deferential review. Because the preponderance of judicial reviews were launched by clients denied a remedy, a benefit, or a status, deferential review typically redounded to the detriment of applicants.

Given their experience, counsel for marginalized clients believed they had nothing to lose and something to gain for their clients by advocating for a return to a more exacting judicial review of questions of law, particularly when the issues touched on questions of human rights or related vital interests⁷. In so doing, their position appeared to converge with resurgent voices inside and outside the judiciary who promote a model of judicial review that takes literally the inferiority of “inferior tribunals”, and jealously guards the judiciary as sole guardians of the rule of law against an unruly administration. The fact that proponents of this model tend also to embrace conservative or libertarian politics that are broadly inimical to the interests of marginalized constituencies seems ironic. But this appearance of a common position among two constituencies at different ends of the political spectrum is explicable. Advocates for marginalized groups supported stricter judicial review for contingent and pragmatic reasons. They need not presume a judiciary that is progressive or inclined toward their clients’ interests. But since their clients are typically applicants (rather than respondents) on judicial review, less deferential review would at least offer a more meaningful platform to persuade a court about the defects of the original decision. In this sense, they arrive at their position via a different route than those who espouse a principled objection to a pluralist vision of the rule of law, or an ideological antipathy toward the redistributive dimensions of the modern administrative state.

III. EXPERTISE: LINKAGES AND FAULT LINES

The main tasks set by the majority judgment in *Vavilov* were: first, to clarify the basis for selecting the standard of review; and second, to articulate a methodology for the application of reasonableness to questions of law.⁸ In *Bell* and *NFL*, the majority demonstrates the obverse, namely the application of a non-deferential (correctness) standard of review.

1. Rules of Law

One awkward feature of the majority judgment is that it pastes together two

⁷ I was co-counsel for the intervener Canadian Association of Refugee Lawyers. We did not advocate for a return to “correctness” for questions of law, although we did support greater rigour in the methodology of deferential review. See Factum of the Intervener, Canadian Association of Refugee Lawyers, in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.), online: <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37748/FM130_Intervener_Canadian-Association-of-Refugee-Lawyers.pdf>.

⁸ The majority’s “Note on Remedial Discretion” (paras. 139-142) was not prompted by argument advanced by the Appellant, Respondent or Amicus Curiae.

disparate conceptions of the separation of powers and the administrative state. As Cristie Ford remarks, the selection of standard of review manifests a reversion to a pre-*CUPE* framework that foregrounds the primacy of disciplining the administrative state's exercise of legal authority, and deferring only to the extent that legislative intent requires it.⁹ The Court's method for choosing the standard of review re-asserts the existence of bright lines, stable categories and unambiguous legislative intent, with a view to restoring certainty and predictability. The actual choices about where to draw lines, which categories to reify and what ulterior intent to divine from legislation, happen to point mainly in the direction of greater judicial intervention.

But when the Court turns to articulating a methodology for applying deference, it switches over to the "culture of justification". The term has become a rhetorical touchstone for a vision of the modern administrative state as a holistic enterprise in which all branches of government internalize a commitment to the rule of law, and instantiate it by fulfilling their specific role in the advancement of a culture of justification. Within this model, the Court is not the sole guardian of the rule of law because the principles of legality constitute all actors in the system, albeit in differentiated ways. One means of taking administrative actors seriously as "partners" in the rule of law enterprise is to engage deferentially with their decisions.

2. The Trouble with Expertise

Judges are not theorists, and it is unsurprising that theoretical incongruity lurks in a judgment whose ambitious mission is to weave a practical roadmap out of a tangle of jurisprudence. My interest here lies in pulling on one conspicuous thread from the judgment as a means of isolating some practical implications of the majority's choices: expertise. The majority in *Vavilov* announces that, henceforth, expertise no longer constitutes a reason for curial deference. The sole reason for deference is the fact that the legislator delegated a set of tasks or functions to an emanation of the executive. *Contra* the dictum of U.S. Appeals Court Judge Richard Posner, deference is a birthright of administrative actors. They attract deference because they exist — and because there is no statutory appeal from their decisions.

Recall that in the origin story that began with *CUPE*, the formal trigger for deference was not expertise as such, but the presence of a privative clause. To be sure, recognition of labour boards' expertise (along with the fact of delegation and ambiguity of texts) was vital to legitimating the reading that Dickson J. gave to the privative clause, and to the broader aspiration of modernizing the relationship between the judiciary and the administration. Fifteen years later, the Supreme Court

⁹ Cristie Ford, "Vavilov, Rule of Law Pluralism, and What Really Matters" (April 27, 2020), Paul Daly, *Administrative Law Matters* (blog), online: <<https://www.administrativelaw-matters.com/blog/2020/04/27/vavilov-rule-of-law-pluralism-and-what-really-matters-cristie-ford/>>.

demoted statutory provisions about recourse to court as signal for deference, and elevated expertise to a free-standing rationale. This happened over the course of a few paragraphs in *Pezim*.¹⁰ First, the Court declared the presence or absence of a privative clause “crucial” to determining legislative intent regarding standard of review.¹¹ A page later, the Court announced that “even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal’s expertise”.¹² The expertise rationale for deference quickly expanded beyond the genus “specialized tribunals” to encompass the entire administrative kingdom, and *Canada v. Southam*¹³ completed what *Pezim* began. Expertise in this context means knowledge and competence specific to the sphere of operation of the administrative body.

Unfortunately, however, the Court could never articulate a means for identifying the expertise of administrative actors relative to courts that was practical or meaningful. The test for expertise was indeterminate, and the formal indicia lacked correspondence to actual expertise anyway. This was probably inevitable. In much the same way that courts use an objective standard of “reasonable apprehension of bias” to avoid the harshness of finding actual bias, courts avoided awkward inquiries into an actual decision-maker’s actual competence. But the common law contains a rule against bias that courts enforce; the Court’s assessment of expertise is not underwritten by a legal obligation on the state to adopt a merit-based system for appointing or re-appointing unelected administrative actors — or even members of quasi-judicial tribunals. The minority acknowledges that “concerns were expressed about the quality of administrative decision making by interveners who represented particularly vulnerable groups”, but blithely concludes that

The solution lies instead in ensuring the proper qualifications and training of administrative decision-makers. Like courts, administrative actors are fully capable of, and responsible for, improving the quality of their own decision-making processes, thereby strengthening access to justice in the administrative justice system.¹⁴

To whom do administrative actors owe this responsibility? Where will pressure to ensure proper qualifications come from? Who can hold administrative bodies to account? Certainly not vulnerable groups — they are not silent about qualifications,

¹⁰ *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] S.C.J. No. 58, [1994] 2 S.C.R. 557 (S.C.C.).

¹¹ *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] S.C.J. No. 58, [1994] 2 S.C.R. 557, at 590 (S.C.C.).

¹² *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] S.C.J. No. 58, [1994] 2 S.C.R. 557, at 591 (S.C.C.).

¹³ [1996] S.C.J. No. 116, [1997] 1 S.C.R. 748 (S.C.C.).

¹⁴ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 283 (S.C.C.).

competence and bias, but they lack political influence. The *Retired Judges Case*¹⁵ stands as a rare exception to the Court's unwillingness to address merit and competence among administrative decision-makers as a rule of law issue, and is a potential resource for future development. But in the meantime, the minority seems willing to let vulnerable groups pay the price for an irrebuttable presumption of expertise unless and until elected officials legislate merit-based criteria for appointment and re-appointment, and/or administrative bodies recognize and solve their own shortcomings.

The divergence between the abstract expertise animating deference and the reality for many administrative bodies, especially those serving marginalized populations, grew more apparent once *Dunsmuir* imposed a presumption of deference in respect of most decision-makers, and *Newfoundland Nurses*¹⁶ appeared to invite judges to retrofit poorly motivated outcomes with legally acceptable reasons. Finally, in the 2016 judgment in *Edmonton East*, the majority simply deemed expertise to inhere in administrative decision-makers:

However, as with judges, expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather, expertise is something that inheres in a tribunal itself as an institution.¹⁷

The irrelevance of actual expertise (or its absence) came under particular strain in the sphere of migration and citizenship. Consider *Tran*,¹⁸ decided shortly after *Edmonton East*. Mr. Tran was a permanent resident ordered deported on account of criminality. He had been convicted of a drug-related offence and received a conditional sentence. At issue was whether a conditional sentence is a “term of imprisonment” under section 36(1)(a) of the *Immigration and Refugee Protection Act*.¹⁹ Counsel for Mr. Tran made extensive submissions on this question of statutory interpretation to the Canada Border Services Agency officer tasked with making a report on criminal inadmissibility. In his decision, the CBSA officer stated:

I have reviewed counsel's submissions carefully and thoroughly, and given thought to each relevant point. Many are legal arguments that do not fall into the scope of my duties in this matter.²⁰

It is one thing to ascribe expertise on an institutional rather than individual basis; it

¹⁵ *CUPE v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28, 2003 SCC 29 (S.C.C.).

¹⁶ *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, 2011 SCC 62 (S.C.C.).

¹⁷ *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] S.C.J. No. 47, 2016 SCC 47, at para. 33 (S.C.C.).

¹⁸ *Tran v. Canada (Public Safety and Emergency Preparedness)*, [2017] S.C.J. No. 50, [2017] 2 S.C.R. 289 (S.C.C.).

¹⁹ S.C. 2001, c. 27.

²⁰ *Tran v. Canada (Public Safety and Emergency Preparedness)*, [2017] S.C.J. No. 50, [2017] 2 S.C.R. 289, at para. 14 (S.C.C.).

is another to persist in the face of an individual decision-maker's express disclaimer of expertise. In its judgment, the Supreme Court refused to resolve the applicable standard of review and remained mute about the decision-maker's own declaration of incompetence. The Court opted instead to dodge the problem by adopting the "view that, under either standard of review, the assumed interpretation of section 36(1)(a) by the Minister's delegate cannot stand".²¹

A year later, in *Vavilov*, the Court was confronted with the same dilemma when a delegate of the Registrar of Citizenship admitted that she lacked the skill to interpret her home statute, the *Citizenship Act*.²² At issue was the interpretation of section 3(2)(a) of the statute, which exempted from *jus soli* citizenship those persons born on Canadian territory to diplomats, consular officials, or "other representative or employee in Canada of a foreign government". In the course of discovery, the analyst was pressed to explain the research and reasoning that led to her conclusion that Mr. Vavilov's parents' occupation (espionage) brought him within the exception. She finally replied as follows:

I went to find the policy intent behind this section to determine or to find out what each particular concept and term meant and I did not find that, and I'm not a lawyer and I do not understand the significance of the word "other" here, if that's what you're trying to ask.²³

Once again, the administrative actor conceded her own lack of expertise. The Court does not include this quotation in the judgment, although it was drawn to their attention. In a decision meant to serve as the prototype for standard of review analysis going forward, grounding deference in a deemed expertise that is demonstrably absent in the case at bar is not ideal. The Court can turn expertise into a legal fiction — a proposition known to be partially or totally false, but recognized for its utility — or it can dispense with expertise as a reason for deference. The minority preferred the former, the majority the latter.

I have some sympathy for why the Court resiled from an irrebuttable presumption of expertise. I do not believe the doctrine served vulnerable groups well in enhancing access to justice, even as I would not wish to overstate its significance. One can also acknowledge the plausible inference that the presence of a statutory appeal signals a legislative "choice of a more involved role for the courts in supervising administrative decision making".²⁴ But the majority is not content to simply abandon deemed expertise. It imputes to the legislator an intention that a

²¹ *Tran v. Canada (Public Safety and Emergency Preparedness)*, [2017] S.C.J. No. 50, [2017] 2 S.C.R. 289, at para. 23 (S.C.C.).

²² R.S.C. 1985, c. C-29.

²³ Transcripts of Cross-Examination of Sophie-Marie Lamothe (October 15, 2015), at 15-17, 37, 40 (Respondent's Record, Tab 7 at 114-16, 136, 139).

²⁴ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 46 (S.C.C.).

court ignore expertise in the presence of a statutory appeal. In my view, the majority overplays its hand by asserting first that a statutory appeal provision trumps any other legislative signal and next, that the use of the word “appeal” directs courts to apply the same principles to an appeal from an administrative body as they would apply to an appeal from a first-level judicial decision.²⁵ These were neither necessary nor obvious inferences.

Perhaps the oddest feature of the Court’s reasoning is that it grows less persuasive the more one reads. Reliance on mechanical canons of construction and the suppression of alternative options gives one the sense that the majority is trying too hard to present a contestable interpretive choice as self-evident. One prong of the majority’s reasoning involves bootstrapping its own rejection of expertise.²⁶ According to the majority, one virtue of jettisoning expertise as a rationale for deference is that it clears the path for treating statutory appeals as a clear invitation by the legislature to disregard the expertise of decision-makers subject to statutory appeals. One might have thought the argument should run in the opposite direction, namely, that the expertise of at least some decision-makers subject to statutory appeal should count against reading statutory appeal as precluding any deference. In any case, if *Dunsmuir* stood for the proposition that the presence of a statutory appeal does not matter to the standard of review, *Vavilov* propounds that, when a statutory appeal is present, nothing else matters. Both judgments commit to bright lines in the name of clarity and simplicity, but draw the line in different places. I agree with the minority’s rejoinder that the majority’s categorical exclusion of statutory appeals from the scope of deference is unlikely to deliver on the promise of simplification.²⁷

²⁵ The majority imports the *Housen v. Nikolaisen*, [2002] S.C.J. No. 31, 2002 SCC 33 (S.C.C.) standard of correctness for errors of law, and “palpable and overriding error” for everything else. For an explanation of why this is likely to lead to confusion, increased litigation and perverse outcomes, see Paul Daly, “The Vavilov Framework and the Future of Canadian Administrative Law” (January 15, 2020), online: SSRN <<https://ssrn.com/abstract=3519681>>.

²⁶ One might have expected the majority to leverage the fact that an appellate court enjoys the superior remedial power of substituting an outcome on the merits, which courts on judicial review typically do not. This could support a plausible argument that a court authorized to substitute an outcome on the merits should be entitled to satisfy itself on the merits before doing so. Whether, and to what extent, it should prevail over competing arguments is a separate question. But since the majority also uses the *Vavilov* case to aggrandize the remedial powers of courts on judicial review (enabling them to behave more like appellate courts more frequently), the majority deprives itself of reliance on the remedial distinction between judicial review and appeal.

²⁷ Para. 251 (*per* Abella and Karakatsanis JJ.). For further explanation of why this is likely to lead to confusion, increased litigation and perverse outcomes, see Paul Daly, “The Vavilov Framework and the Future of Canadian Administrative Law” (January 15, 2020), online: SSRN <<https://ssrn.com/abstract=3519681> or <http://dx.doi.org/10.2139/ssrn.3519681>>.

The dethroning of expertise as the chief rationale for deference allows the majority to expand another exemption from deference. Drawing on *Toronto (City) v. CUPE, Local 79*,²⁸ the Court in *Dunsmuir* reserved a correctness standard of review for “general questions of law of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise”. The *Vavilov* majority eliminated the proviso of expertise. In principle, this should enlarge the ambit of questions subject to non-deferential review. The practical impact is unpredictable, however, because the Court proved very reluctant to deploy this exception post-*Dunsmuir*, though not on account of the original decision-maker’s expertise.

Thus far, the majority judgment tilts toward reducing the scope of deference by widening opportunities for correctness review. I suspect that many judges, lawyers, scholars and students did not anticipate the majority’s ruling on statutory appeals. The demise of jurisdiction as a separate ground for correctness and the broadening of the “question of law of central importance” exception were less surprising. However, the majority resists the call to create an exception for a “legal question on which there is persistent discord within an administrative body”.²⁹ This is noteworthy because the concern about inconsistency attracted more critical commentary over the years than did statutory appeals, and also because it would have been easy enough to let expertise do negative work in rationalizing a correctness standard for inconsistency, as the majority did for statutory appeals. Instead, the majority’s stance on inconsistency was justified on “practical grounds, this Court’s binding jurisprudence, and the hypothetical nature of the problem”.³⁰

3. Expertise, Reasoning and Enlightened Statutory Interpretation

Having reformed the test for standard of review, the Court turns to the issue that vexed the legal community most since *Dunsmuir*, namely the methodology for assessing the reasonableness of a decision. The majority transitions to this second phase of the judgment via its discussion of reasons as a bridge between process and substance. In its account of the functions and virtues of reason-giving,³¹ it pivots away from the conservative, court-centric conception of the rule of law and invokes the more recent “culture of justification” approach that conceives of the rule of law as a collaborative project that engages administrative actors as partners rather than subordinates.

To oversimplify, the majority’s approach to the choice of standard of review is

²⁸ [2003] S.C.J. No. 64, 2003 SCC 63 (S.C.C.).

²⁹ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 72 (S.C.C.).

³⁰ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 72 (S.C.C.).

³¹ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at paras. 76-82 (S.C.C.).

animated by respect for the legislator, not for the administrative decision-maker: Courts defer only because they respect parliamentary supremacy, and only to the extent required to give effect to legislative intent. And this majority discerns that the legislator intends that courts defer only because of the fact of delegation (“institutional design choice”), and also that the legislator now intends curial deference to apply in fewer instances.

The “culture of justification” approach to deference does not disregard the legislator, but it foregrounds respect for the decision-maker. Administrative actors have expertise, experience and sometimes even legitimacy that a court might not enjoy, and this assists in explaining both *why* courts should defer and *how* they should defer. The *Vavilov* majority retains respect for the administrative actor in its account of how to apply reasonableness. It endorses a judicial stance of “respectful attention” to the reasons for decision offered by the decision-maker, and this respect derives not simply from the fact of delegation but also from expertise.

At the same time, the majority attaches the word “robust” to its methodology, and one wonders if this signals a not-quite-as-deferential deference. This would be unsurprising. The fact of delegation is a thin thread upon which to hang deference. Without any regard for the legislator’s motives for delegation (expertise is one, though not the only, reason), delegation alone does not necessarily support strong deference. Inevitably, the majority’s conservatism on selection of standard of review seeps into the application discussion, even if the discursive framework for the latter invokes the “culture of justification”.³²

The majority’s elaboration of a method for assessing reasonableness provides fodder for those who suspect that it will quickly become indistinguishable from “correctness” review, but also for those who believe that it will operate as a distinctive form of review that is genuinely less interventionist. I do not think that the judgment makes either outcome inevitable, nor would I expect uniformity in its implementation. How *Vavilov* is operationalized depends vitally on the judicial temperament of those who apply it, and the future modifications, correctives and signals sent by the Supreme Court.

For present purposes, I will simply highlight the places and ways in which the majority references expertise in its methodology, recognizing that a more comprehensive account of the judgment would require greater attention to countercurrents. The majority reiterates that “the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case”. Therefore, the question is how expertise figures into that context.

The majority assumes that most administrative decisions leading to judicial review are subject to a duty to give reasons, and that those reasons will be the primary resource for assessing reasonableness. In these situations, the majority has

³² *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 89 (S.C.C.).

tacitly raised expectations on administrative bodies to ensure that decision-makers possess a certain level of skill in reason-writing. This is distinct from the substantive subject-matter expertise revealed in the reasons themselves. Recall that when the Supreme Court introduced a common law duty to give reasons in *Baker v. Canada (Minister of Citizenship and Immigration)*,³³ the Court was sensitive to the burden and loss of efficiency this would impose on decision-makers, and assured that flexibility in the requirements for reasons would minimize the cost to administrative bodies. Indeed, the Court honoured this on the procedural side by effectively imposing no formal requirements on what would count as fulfilling the duty to give reasons.³⁴

But two decades later, *Vavilov* emphasizes the importance of responsive reasons, because “reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties”.³⁵ This means that decision-makers must demonstrate competence in the mechanics of reason-giving. For example, a failure to “meaningfully grapple with key issues or central arguments raised by the parties”, or to explain departure from long-standing practice, precedent or guideline, may cast doubt on the reasonableness of the decision.³⁶ I do not object to imposing these constraints on decision-makers, and making these expectations patent is a virtue of the majority judgment. It will be important to watch whether courts maintain this standard, because the capacity to deliver meaningful reasons is not a skill that all decision-makers equally possess or can acquire.

When the majority turns to the subject-area expertise of decision-makers, it defends the distinctive array of skills and resources that decision-makers bring to their task:

[T]he concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision – indeed, they may be indicative of a decision maker’s strength within its particular and specialized domain.³⁷

Expertise and specialized knowledge demonstrated through reasons will, according to the majority, facilitate and validate deference:

Respectful attention to a decision maker’s demonstrated expertise may reveal to a

³³ [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.).

³⁴ *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, 2011 SCC 62 (S.C.C.).

³⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 127 (S.C.C.) [emphasis in original].

³⁶ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at paras. 129, 131 (S.C.C.).

³⁷ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 92 (S.C.C.).

reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision.³⁸

These seem like promising endorsements of deference from the majority. But it is important to recognize that the majority's respectful attention is directed at how well administrative actors insert their expertise, experience and specialized knowledge into the methodology of the "modern principle of statutory interpretation". Critics of the majority might identify this as the place where reasonableness tips over into correctness. That may yet turn out to be the case. But across the four decades since *CUPE*, the Supreme Court declined to articulate a distinctively deferential technique for interpreting a statutory provision. The majority does not install the "modern principle" as the paradigm; it brings to the surface what was always already there. Even where a court did not explicitly figure out the "correct" answer and measure it against the outcome reached by the decision-makers, courts either said very little about what made an interpretation reasonable, or they measured reasonableness according to a set of judicially created tools — namely text, context and purpose.

The operative question now emerges more clearly: how much respect will a court show to administrative actors' treatment of the "interplay of text, context and purpose"?³⁹ Again, the majority encourages receptiveness to the distinctive perspective of administrative decision-makers in relation to the specific method of statutory interpretation:

The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.⁴⁰

The majority's version of deference, on its best reading, is what I would call enlightened statutory interpretation. By this I mean an approach to statutory interpretation that adheres to the "modern principle" but is genuinely receptive to input beyond the usual techniques that courts use to discern text, context and purpose. These may include operational implications, alignment with broader statutory mandate, and so on. There is precedent in post-*Dunsmuir* judgments of the Court for judicial openness, as well as resistance.⁴¹ I do not think the minority

³⁸ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 93 (S.C.C.).

³⁹ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 124 (S.C.C.).

⁴⁰ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 119 (S.C.C.).

⁴¹ Compare *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Assn.*, [2011] S.C.J. No. 61, 2011 SCC 61 (S.C.C.); *Canada (Canadian Human Rights Commission)*

proposes a model for assessing the reasonableness that differs dramatically from the majority in qualitative terms. Certainly, the minority dedicates more energy to illustrating various circumstances where courts should restrain themselves in the face of an apparent anomaly, omission or deviation, whereas the majority devotes considerable text to listing indicia of unreasonableness. But the real divergence between majority and minority — and probably the one that actually matters most — is beyond the reach of doctrine. It is a matter of judicial disposition. The minority’s commitment to a conception of the rule of law that embraces (rather than concedes) deference seems to run deeper and stronger, whereas a current of diffidence runs through the majority judgment.

At one point, the majority commends a presumption that “those who interpret the law — whether courts or administrative decision-makers — will do so in a manner consistent with [text, context and purpose]”.⁴² Yet, three paragraphs later, the majority erupts into a decidedly disrespectful admonition:

The administrative decision maker’s task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker’s responsibility is to discern meaning and legislative intent, not to “reverse-engineer” a desired outcome.⁴³

This is not a message crafted by a court that understands itself to be engaged with administrative actors in a shared enterprise of advancing a culture of justification. This is a reprimand directed at a cunning decision-maker who chooses to play fast and loose with the law in order to advance her own ends, and so must be policed by a vigilant judiciary.

Conjuring a recalcitrant decision-maker who chooses an interpretation she knows to be plausible but inferior is troubling, and not only because it weirdly imputes a *mens rea* to an imaginary decision-maker. The more serious problem is that if deference is to mean anything in relation to statutory interpretation, it must permit for the possibility that text, context and purpose will not always point in the same direction, and that administrative decision-makers may manage that challenge differently than a court. Indeed, the frequency with which text, context and purpose are incongruent is probably the basis of most statutory interpretation disputes. But

v. *Canada (Attorney General)*, [2011] S.C.J. No. 53, 2011 SCC 53 (S.C.C.); I discuss the Supreme Court’s disparate treatment of the decision-maker’s statutory interpretation in the two cases online: <<https://www.administrativelawmatters.com/blog/2018/12/14/audrey-macklin-on-the-supreme-court-of-canadas-administrative-law-trilogy>>.

⁴² *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 118 (S.C.C.).

⁴³ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 121 (S.C.C.).

an adjective like “inferior” posits the existence of a “superior” interpretation, which sits uncomfortably close to a “correct” interpretation. Is an “inferior” interpretation one that tilts toward a meaning that aligns more closely with operational realities and consequences than “plain meaning”, or *vice versa*? Does an “inferior” interpretation prioritize consistency with a common law definition, over the severity of the impact of a given interpretation on vulnerable people, or *vice versa*?

I reiterate here that one can find several other statements by the majority that exhort judges to work from the decision-maker’s reasons, to eschew launching into their own interpretive exercise and, as described earlier, to recognize the benefits gleaned from interpretations informed by experience, expertise and specialized knowledge. As I noted earlier, different passages in the majority judgment provide cover for judges of varying dispositions toward deference.

IV. CONCLUSION

I am persuaded by the majority’s promotion of deference in the form of “enlightened statutory interpretation” where pure questions of law are at issue. I am convinced of the benefits offered by expert, experienced administrative decision-makers who can draw on their distinctive role, the breadth of their mandate, their institutional resources and processes, and their informed assessment of the consequences of interpretive choice. I concur that their insights may be otherwise inaccessible to generalist judges, and that these may “actually enrich and elevate the interpretive exercise”.

If all that the majority tells us is true, the question becomes this: Why would courts ever deny themselves the benefits of this demonstrated expertise, since it comes at the cost of impoverishing and diminishing the interpretive expertise? In light of the opportunity to enhance the quality of judicial decision-making, one would hope that a court would *always* want to fully engage with administrative decision-makers’ reasoning process, even on appeal. Yet, the majority declines the opportunity, by insisting that a statutory appeal provision communicates a resolute rejection of deference from the legislator to courts.

One might counter that an appellate court can and should pay careful attention to the reasoning process of the administrative body even under a correctness standard of review. Indeed, the majority seems to acknowledge this:

When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker’s determination or to substitute its own view While it should take the administrative decision maker’s reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.⁴⁴

And this brings me back to my disappointment at the majority decision in *Bell and*

⁴⁴ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 54 (S.C.C.).

NFL. Mary Liston trenchantly critiques the majority's approach to interpreting the relevant provision of the *Broadcasting Act*⁴⁵ in that case. The majority settled quickly on a correctness standard of review, and my reading of its judgment is that it did not carefully consider the CRTC's reasons, and did not situate them against the CRTC's broad policy mandate, its established reputation as an expert body, or the three-year process of consultation and deliberation that preceded its Order. The majority judgment is a dispiriting illustration of arid statutory interpretation, whatever one's view of the outcome. This seems especially unfortunate because there is no obvious correlation between the expertise of a body and whether it is subject to statutory appeal or judicial review. Indeed, many would think that the CRTC is precisely the type of agency that warrants respect for its expertise. If *Bell and NFL* proves typical of a correctness assessment that takes the "decision-maker's reasoning into account", the space for generative engagement between the judiciary and the administration will have shrunk and, along with it, the opportunity for richer, more elevated interpretations of law across the public law spectrum. These are early days, however. One hopes that lower courts will find their way to practising enlightened statutory interpretation on appeal as much as on judicial review simply because it's a better way for courts to do their job.

⁴⁵ S.C. 1991, c. 11. See online: <<https://www.administrativelawmatters.com/blog/2020/04/29/bell-is-the-tell-im-thinking-of-mary-liston/#search-box>>.