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## Vavilov and the Culture of Justification in Contemporary Administrative Law

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# *Vavilov* and the Culture of Justification in Contemporary Administrative Law

Paul Daly\*

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## I. INTRODUCTION

In *Canada (Minister of Citizenship and Immigration) v. Vavilov*,<sup>1</sup> the Supreme Court of Canada attempted to bring clarity and coherence to Canadian administrative law, an area of legal doctrine long characterized by uncertainty and confusion. The focus in *Vavilov* was on substantive review, where the “merits” of an administrative decision are challenged in judicial review proceedings.<sup>2</sup> Most judicial review cases in Canada involve substantive review of matters ranging from the grant or refusal of passports to national telecommunications policy and turn on whether a decision was, in whole or in part, incorrect or unreasonable. Challenges to the procedural fairness of a decision-making process, or the general structure of an administrative agency, are comparatively rarer. Unfortunately, substantive review — the task Canadian courts are most often asked to undertake — is the area which has been wracked by uncertainty and confusion.

Elsewhere, I have critically analyzed the *Vavilov* decision, carefully scrutinizing its two principal components — a new test for selecting the standard of review and a detailed methodology for conducting reasonableness review — and its two accessory components — the role of past precedents and remedial discretion — with a view to determining whether the Supreme Court’s attempt to resolve the

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<sup>1</sup> [2019] S.C.J. No. 65, 2019 SCC 65 [hereinafter “*Vavilov*”].

<sup>2</sup> *Vavilov*, at para. 23.

uncertainty and confusion is likely to be successful.<sup>3</sup> In this paper, I seek to place *Vavilov* in a broader setting.

Of course, *Vavilov* represents a response to a set of problems which have plagued Canadian administrative lawyers for decades. As the majority made clear at the start of its reasons, it set out to “address two key aspects of the current administrative law jurisprudence which require reconsideration and clarification”, namely “determining the standard of review that applies when a court reviews the merits of an administrative decision” and providing “additional guidance for reviewing courts to follow when conducting reasonableness review”.<sup>4</sup> More broadly, however, *Vavilov* fits into a much larger picture. Recent decades in Canada have seen the seemingly inexorable rise of “a culture of justification in administrative decision making”.<sup>5</sup>

Central to my analysis will be the conception of reasonableness review developed by the majority in *Vavilov*. I will have little to say about selecting the standard of review, the role of precedent or remedial discretion. That is not because these topics are unimportant — they will, going forward, be critically important in the Canadian law of judicial review of administrative action. But they are, essentially, bespoke technical fixes to problems which have arisen in Canada. The articulation of *Vavilovian* reasonableness review, by contrast, is a manifestation of a broader trend toward a culture of justification in administrative law — indeed, in *Vavilov*, the majority reasons placed justification front and centre in their articulation of reasonableness review. Despite the culture of justification’s contemporary status, and a significant amount of scholarship on its benefits, what it actually consists of remains somewhat obscure.<sup>6</sup> I will suggest in Part II that the four strands of reasonableness review woven together by the majority in *Vavilov* — reasoned decision-making, responsiveness, demonstrated expertise and contextualism — provide an account of the culture of justification. I will also argue in Part III that the emphasis on these features in substantive review is consistent with developments, stretching back 50 years, in the law of procedural fairness, the law of substantive review, and the law of justiciability.

Furthermore, in Part IV I will seek to explain — or at least develop a hypothesis capable of explaining — the rise of the culture of justification. While it is tempting to attribute the contemporary importance of justification in Westminster-style systems to global factors such as the post-Renaissance rise of rationality, the growth of popular democracy, the post-World War II culture of human rights, the shortcomings in accountability of the executive to the legislature, or a general

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<sup>3</sup> Paul Daly, “The *Vavilov* Framework and the Future of Canadian Administrative Law” (2020) 33 Can. J. Admin. L. & Prac. 111.

<sup>4</sup> *Vavilov*, at para. 2.

<sup>5</sup> *Vavilov*, at para. 2.

<sup>6</sup> Janina Boughey, “A ‘Culture of Justification’ in Administrative Law” (on file with author).

decline in levels of social trust, I identify two interrelated, relatively mundane explanations which are mostly internal to administrative law.

First, the last half-century has been a formative period for administrative law. General principles of judicial review of administrative action were developed for the first time, facilitated by a set of legislative and regulatory reforms which decoupled the substantive law of judicial review from the procedural confines of the so-called prerogative writs. The rise of the culture of justification, manifested in procedural fairness, substantive review and the law of justiciability, began soon after the general principles of judicial review of administrative action were liberated from their procedural shackles. Second, administrative decisions today are, generally, reasoned and the records produced for the purposes of judicial review are extensive. This was not the case in the past. There is now more for judges to get their judicial review teeth into. Moreover, when judges are faced with extensive reasons and records, there is a natural inclination for them to carefully review those reasons and records and, consequently, to develop the law of judicial review to allow them to correct any errors found in those reasons and records. My hypothesis is that there is a symbiotic relationship between the rise of the culture of justification and the generation of general principles of administrative law accompanied by the production of reasoned decisions accompanied by elaborate records.

Lastly, I will turn in Part V to the future of the culture of justification. I will note that the reader of *Vavilov* might be forgiven for developing a sense of *déjà vu*, for the rich conception of reasonableness review set out in the majority reasons recalls the language used a decade earlier in *Dunsmuir v. New Brunswick*.<sup>7</sup> There, “justification, transparency, and intelligibility” were said to be central to the substantive reasonableness of administrative decisions,<sup>8</sup> but within a few years the Supreme Court had for all practical purposes resiled from this language. A culture of authority — not a culture of justification — began to creep into substantive review. Decisions issued between *Dunsmuir* and *Vavilov* echoed older decisions in which Canadian courts recognized that some decision-makers enjoyed (almost) exclusive authority within their areas of jurisdiction. Such authority can be grounded in political legitimacy, expediency, or technocracy. But *Vavilov* represents a sweeping repudiation of the culture of authority: the culture of justification in substantive review and in administrative law generally seems to be here to stay. If my hypotheses are right, reasoned decision-making, demonstrated expertise, responsiveness, and contextualism will continue to be central features of administrative law well into the future, in Canada and beyond.

In Part II, I describe the articulation of reasonableness review in *Vavilov*. In Part III, I identify other areas of administrative law which have been marked by the rise

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<sup>7</sup> [2008] S.C.J. No. 9, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) [hereinafter “*Dunsmuir*”].

<sup>8</sup> *Dunsmuir*, at para. 47.

of a culture of justification. In Part IV, I discuss potential explanations for this rise. In Part V, I conclude by assessing the future prospects of the culture of justification, both in substantive review and more generally. Throughout, my approach is mostly descriptive and analytical. In the Conclusion, I will offer some brief thoughts on the appropriateness of the culture of justification from a normative perspective. For the most part, however, I am interested in describing and analyzing what the culture of justification *is* in the context of the contemporary law of judicial review of administrative action.

## II. VAVILOVIAN REASONABLENESS REVIEW

The term “culture of justification” first appeared in an article by the South African scholar Etienne Mureinik. He described the culture of justification as one “in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command”.<sup>9</sup> Mureinik was writing in the context of his country’s emergence from the apartheid era; his was a South African prescription for South Africa at a particular moment in time. But the term and the “core” idea “that governments should provide substantive justification for all their actions”<sup>10</sup> have enthusiastically been taken up by scholars of constitutional and administrative law elsewhere in the world.<sup>11</sup> Those scholars who have written extensively about the culture of justification have devoted significant energy to explaining the salutary benefits of the concept — empowering the administrative state,<sup>12</sup> respecting individuals,<sup>13</sup> and informing the review of the proportionality of legislative interferences with fundamental rights<sup>14</sup> — but not as much to providing a detailed account of what a culture of justification entails. Its status is clear; its characteristics, less so.

The discussion in *Vavilov* allows us to flesh the culture of justification out further.

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<sup>9</sup> Etienne Mureinik, “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 S.A.J.H.R. 31, at 32.

<sup>10</sup> Moshe Cohen-Eliya & Iddo Porat, “Proportionality and the Culture of Justification” (2011) 59 Am. J. Comp. L. 463, at 466.

<sup>11</sup> See e.g. David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997), at 279; Michael Taggart, “Deference, Proportionality, *Wednesbury*” [2008] New Zealand Law Review 423; Mark Elliott, “Has the Common Law Duty to Give Reasons Come of Age Yet?” [2011] Public Law 56.

<sup>12</sup> See e.g. David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997), at 279.

<sup>13</sup> See e.g. Kai Möller, “Justifying the Culture of Justification” (2019) 17 International Journal of Constitutional Law 1078.

<sup>14</sup> See e.g. Moshe Cohen-Eliya & Iddo Porat, “Proportionality and Justification” (2014) 64 U.T.L.J. 458.

Prior to *Vavilov*, the Supreme Court of Canada had said little about the meaning or methodology of reasonableness review. Indeed, its pronouncements on or applications of reasonableness review gave very little guidance to reviewing courts on how to determine whether a given administrative decision was reasonable or unreasonable.<sup>15</sup> Acknowledging that the Supreme Court had, in its previous decisions given “relatively little guidance on how to conduct reasonableness review in practice”,<sup>16</sup> the majority set out to provide such guidance. In the majority’s account, reasonableness review is “a robust form of review”.<sup>17</sup> Four strands are woven together.<sup>18</sup>

First, **reasoned decision-making**. The underlying principle is “that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it”.<sup>19</sup> Accordingly, any decision must be “*justified* in relation to the constellation of law and facts that are relevant to the decision”,<sup>20</sup> not merely one that “falls” within a “range” of possible, acceptable outcomes. The onus is on the applicant for judicial review to satisfy the reviewing court that there are “serious shortcomings” in the decision<sup>21</sup> but the decision-maker nonetheless shoulders a heavier burden than she did prior to *Vavilov*.<sup>22</sup> As Diner J. sagely noted in *Ortiz v. Canada (Minister of Citizenship and Immigration)*, whereas under *Dunsmuir* reviewing courts began with the outcome and then looked back at the reasons, *Vavilov* instructs them “to start with the reasons, and assess whether they justify the outcome”.<sup>23</sup> The emphasis here is on reasoned decision-making, rather than reasons *tout court*, for reasons are not required in all cases. Even where reasons

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<sup>15</sup> See e.g. *Canada (Minister of Citizenship and Immigration) v. Huruglica*, [2016] F.C.J. No. 313, 2016 FCA 93 at para. 41 (F.C.A.).

<sup>16</sup> *Vavilov*, at para. 73.

<sup>17</sup> *Vavilov*, at para. 13. See the concurring reasons, at para. 294.

<sup>18</sup> For the most part, subject to a point to be discussed in Part V below, the majority and minority judges occupied common ground on the methodology of reasonableness review. Paul Daly, “The *Vavilov* Framework and the Future of Canadian Administrative Law” (2020) 33 *Can. J. Admin. L. Prac.* 111, at 125-27.

<sup>19</sup> *Vavilov*, at para. 95.

<sup>20</sup> *Vavilov*, at para. 105 [emphasis added].

<sup>21</sup> *Vavilov*, at para. 100.

<sup>22</sup> As I have remarked:

My view is that the methodology of *Vavilovian* reasonableness review is inherently deferential. But it is certainly **arguable** that *Vavilov* has, in respect of supplementation, responsiveness, and justification, set a **slightly higher bar** for decision-makers than the pre-*Vavilov* regime.

Paul Daly, “*Vavilov* Hits the Road (Updated Feb 27)” (February 4, 2020), *Paul Daly, Administrative Law Matters* (blog), online: <<https://pauldaly.openum.ca/blog/2020/02/04/vavilov-hits-the-road/>>.

<sup>23</sup> [2020] F.C.J. No. 142, 2020 FC 188, at para. 22 (F.C.).

are not provided, “the reasoning process that underlies the decision will not usually be opaque” and fit the description of reasoned decision-making.<sup>24</sup>

The emphasis on reasoned decision-making in *Vavilov* is unsurprising, for the most obvious implication of the development of a culture of justification in administrative law is that administrative “decisions should survive review as long as they are shown by the reasons provided to be justifiable”.<sup>25</sup> Reasoned decision-making is, indeed, the “motor” of the methodology of the culture of justification.<sup>26</sup> The central concern of reasoned decision-making is with the adequacy — or substantive reasonableness — of the reasons given in support of a decision.<sup>27</sup>

Second, **responsiveness**. A decision-maker’s reasons must respond to “the central issues and concerns raised by the parties”.<sup>28</sup> This amounts to an obligation not merely to *hear* the parties but to *demonstrate* that they have been *listened to*: “[R]easons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.”<sup>29</sup> Moreover, in situations where a decision will have “particularly harsh consequences for an affected individual”,<sup>30</sup> a decision-maker comes under a “heightened responsibility . . . to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law”.<sup>31</sup> This places the individual at the centre of the reason-giving process, making the “perspective of the

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<sup>24</sup> *Vavilov*, at para. 137. In those situations where no reasons were provided and the record sheds no light on the basis for decision, a reviewing court may focus on the outcome rather than the reasons, but “[t]his does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape” (at para. 138).

<sup>25</sup> David Dyzenhaus, “Proportionality and Deference in a Culture of Justification” in Grant Huscroft, Bradley Miller & Grégoire Webber, eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) 234, at 255.

<sup>26</sup> Michael Taggart, “Deference, Proportionality, *Wednesbury*” [2008] *New Zealand Law Review* 423, at 461.

<sup>27</sup> See e.g. Leighton McDonald, “Reasons, Reasonableness and Intelligible Justification in Judicial Review” (2015) 37 *Sydney L. Rev.* 467. The culture of justification is often associated with the imposition of a duty to give reasons. See e.g. Mark Elliott, “Has the Common Law Duty to Give Reasons Come of Age Yet?” [2011] *Public Law* 56. But there is still no general common law duty to give reasons. Rather, the demands of reasoned decision-making drive administrative decision-makers who wish their decisions to withstand the rigours of judicial review to provide detailed reasons even in the absence of a specific, judicially imposed duty to provide reasons. See further the discussion in Part IV below.

<sup>28</sup> *Vavilov*, at para. 127.

<sup>29</sup> *Vavilov*, at para. 127 [emphasis in original].

<sup>30</sup> *Vavilov*, at para. 133.

<sup>31</sup> *Vavilov*, at para. 135.

individual or party over whom authority is being exercised” vitally important.<sup>32</sup>

This emphasis on responsiveness echoes the Supreme Court’s insistence in *Baker* that a decision-maker should be “alert, alive and sensitive” to important considerations raised by an individual.<sup>33</sup> Already in the light of *Baker*, Mary Liston identified an ethos of justification in Canadian public law,<sup>34</sup> pursuant to which “citizens and residents are democratically and often constitutionally entitled to participate in decisions which affect their rights, interests and privileges”.<sup>35</sup> In a recent book on administrative justice, Zachary Richards suggests that modern trends in public administration have created a new mode of decision-making, which he terms “responsive legality”.<sup>36</sup> Richards does not use, or even refer to, the culture of justification, but his emphasis on the importance of responsiveness meshes very well with the articulation of reasonableness review in *Vavilov*.

Third, **demonstrated expertise**. In general, reasons “are the primary mechanism by which administrative decision makers show that their decisions are reasonable”.<sup>37</sup> Only the “*demonstrated* experience and expertise” of an administrative decision-maker will help to support the conclusion that a given decision was reasonable.<sup>38</sup> Reviewing courts are not to assume that a decision-maker is expert, or indeed that the decision-maker has considered all of the relevant material: its expertise (and its responsiveness and reasoned decision-making) must be demon-

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<sup>32</sup> *Vavilov*, at para. 133.

<sup>33</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817, at para. 75 (S.C.C.).

<sup>34</sup> The phrase is that of the Right Honourable Beverley McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1998) 12 Can. J. Admin. L. & Prac. 171.

<sup>35</sup> Mary Liston, “‘Alert, alive and sensitive’: *Baker*, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law” in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart, 2004) 113, at 114.

<sup>36</sup> Zachary Richards, *Responsive Legality: The New Administrative Justice* (Abingdon, UK: Routledge, 2019), at 3. As he explains:

When justifying decisions according to this type, public officials value responsiveness in that they cling to a generalisation of purpose that aims to distinguish what is truly necessary for each particular applicant, rather than what has come to be taken for granted in traditions and routines. They deeply value flexibility and adaptability and aim to deal with situations on a case-by-case basis, drawing firm justification for their decision from the extent to which they were able to adaptively respond to the overall set of circumstances that presented themselves in that particular case. In this sense, decision makers operating within this mode are chameleon-like and respond with enthusiasm to changed circumstances in the purposive pursuit of good outcomes.

<sup>37</sup> *Vavilov*, at para. 81. See the concurring reasons, at paras. 291, 296.

<sup>38</sup> *Vavilov*, at para. 93 [emphasis added].



strated.<sup>39</sup> Administrative law is not now about top-down assertions of authority but about exercises of public power which are justified to those on the receiving end.<sup>40</sup>

Moreover, expertise is to be demonstrated contemporaneously with the issuance of a decision. The only conceptual point about reasonableness review about which the majority and minority judges disagreed in *Vavilov* was whether reviewing courts should take “a flexible approach to supplementing reasons”,<sup>41</sup> with the majority much less permissive in this regard. Reviewing courts are to refrain from bolstering defective administrative decisions with post-hoc reasoning supplied by the decision-

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<sup>39</sup> See e.g. *Farrier v. Canada (Attorney General)*, [2020] F.C.J. No. 167, 2020 FCA 25, at para. 10 (F.C.A.); *Mattar v. National Dental Examining Board of Canada*, [2020] O.J. No. 779, 2020 ONSC 403, at paras. 51-52 (Ont. Div. Ct.); *Walker v. Canada (Department of Environment and Climate Change, Deputy Head)*, [2020] F.C.J. No. 223, 2020 FCA 44, at para. 10 (F.C.A.).

<sup>40</sup> I note the possibility, raised by Jennifer Raso, “Unity in the Eye of the Beholder? Reasons for Decision in Theory and Practice in the Ontario Works Program” (2020) 70 U.T.L.J. 1, that reasons for administrative decisions are sometimes (and in some systems often) provided not for the benefit of the individual concerned but for purposes internal to the administrative decision-making structure. The culture of justification, as I am describing it, has been developed by those looking at public administration from the perspective of judicial review of administrative action. In determining the reasonableness or fairness of a decision, a court will look to the available material to try and discern a rationale; this is a function of the institutional role of courts in a common law system of administrative law. The result is, in at least some situations, a degree of artificiality as judges treat as “reasons” internal communications which were never intended to be sent to an individual claimant, still less scrutinized by a court. More generally, proponents of a culture of justification should be aware that their prescriptions touch only the tip of the iceberg of public administration. In many administrative decision-making structures, front-line decisions are not judicially reviewed at all. It would be wrong to think that the culture of justification referenced in *Vavilov* guides this sort of decision-making. Equally, however, just because the culture of justification does not permeate all public administration does not mean that it has no relevance to administrative decision-making. In any decision-making structure a final decision, perhaps taken by a tribunal, *will* be subject to judicial review. In respect of these final decisions, it is entirely appropriate to speak of a culture of justification where exercises of state power have to be justified to the individual concerned (and, on judicial review, to the courts). It is also worth noting that the decisions of *some* front-line decision-makers, such as visa officers, are directly reviewed by the courts and, as such, might be coaxed into developing a culture of justification. But Raso’s excellent empirical work serves to remind administrative lawyers that there is a world of difference between the cloistered world of judicial review of administrative action and the sweaty front lines of public administration.

<sup>41</sup> *Vavilov*, at para. 302. For the most part, subject to a point to be discussed in Part V below, the majority and minority judges occupied common ground on the methodology of reasonableness review. Paul Daly, “The *Vavilov* Framework and the Future of Canadian Administrative Law” (2020) 33 Can. J. Admin. L. Prac. 111, at 125-27.

maker in an affidavit,<sup>42</sup> clever counsel at the lectern<sup>43</sup> or by the reviewing court itself.<sup>44</sup> Reviewing courts are not to conduct a “line-by-line treasure hunt for error”<sup>45</sup> or reweigh evidence considered by the decision-maker,<sup>46</sup> and should read administrative decisions “with sensitivity to the institutional setting and in light of the record”.<sup>47</sup> But a reviewing court should not “fashion its own reasons in order to buttress the administrative decision”.<sup>48</sup> If reasoned decision-making, responsiveness and demonstrated expertise are not present in the reasons given to the affected individual or parties, a court should ordinarily not permit them to be “coopered up” later on,<sup>49</sup> for fear that the reasons will not reflect the exercise of expert judgment by the decision-maker as “a decision-maker might be tempted to take a less rigorous approach to decision-making if it knows it can supplement its reasons later”.<sup>50</sup>

Demonstrated expertise was an important component of the influential explanation of “deference as respect” offered by David Dyzenhaus,<sup>51</sup> one of the earliest adopters and tenacious advocates of the culture of justification.<sup>52</sup> When applying an appropriately deferential approach to judicial review of administrative interpretations of law, the question “for the court is not . . . what decision it might have reached had the tribunal not pronounced, but whether the reasons offered by the

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<sup>42</sup> *Saskatchewan (Minister of Energy and Resources) v. Areva Resources Canada Inc.*, [2013] S.J. No. 439, 2013 SKCA 79, at paras. 36, 110 (Sask. C.A.).

<sup>43</sup> *McLean v. British Columbia (Securities Commission)*, [2013] S.C.J. No. 67, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 72 (S.C.C.).

<sup>44</sup> *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 58 (S.C.C.).

<sup>45</sup> *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] S.C.J. No. 34, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 54 (S.C.C.); *Vavilov*, at para. 102.

<sup>46</sup> *Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] S.C.J. No. 12, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 64 (S.C.C.); *Vavilov*, at para. 125.

<sup>47</sup> *Vavilov*, at para. 96.

<sup>48</sup> *Vavilov*, at para. 96.

<sup>49</sup> *Canada v. Kabul Farms Inc.*, [2016] F.C.J. No. 480, 2016 FCA 143, at para. 47 (F.C.A.), *per* Stratas J.A.

<sup>50</sup> Paul Daly, “Reasons and Reasonableness in Administrative Law: *Delta Air Lines Inc. v. Lukacs*” (2018) 31 Can. J. Admin. L. & Prac. 209, at 214.

<sup>51</sup> And applied with gusto by the Supreme Court in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 48 (S.C.C.) and *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, 2011 SCC 62, [2011] 3 S.C.R. 708, at paras. 11-12 (S.C.C.).

<sup>52</sup> David Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14 S.A.J.H.R. 11; “Dignity in Administrative Law: Judicial Deference in a Culture of Justification” (2012) 17 Rev. Const. Stud. 87.

tribunal justify its decision”.<sup>53</sup> Dyzenhaus offered formal and substantive justifications for this approach. The formal justification was that the legislature had chosen the decision-maker, not a court, to resolve the questions at issue. The substantive justification rested on the “considerable expertise” the decision-maker may have developed.<sup>54</sup> But any such expertise had to be demonstrated, as a court should ask whether the reasoning offered by the decision-maker “did in fact and could in principle justify the conclusion reached”.<sup>55</sup> Demonstrated expertise has, as such, roots in the culture of justification.

Fourth, **contextualism**. Reasonableness is heavily dependent on “contextual constraints”: “[W]hat is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review.”<sup>56</sup> Courts are not to attempt to pigeonhole decisions in particular categories with a view to assessing lawfulness but rather to appreciate decisions in their whole context. Judges should also be “acutely aware” that “[a]dministrative justice’ will not always look like ‘judicial justice’”;<sup>57</sup> the context of public administration is often quite different from the context of judicial decision-making. Furthermore, the Supreme Court recognized that there is no bright line between process and substance, acknowledging that whether the duty of fairness requires reasons to be given in a particular case “will impact how a court conducts reasonableness review”.<sup>58</sup>

Again, contextualism features prominently in Dyzenhaus’s scholarship. Already in his explanation of deference of respect, he noted that the approach applied “whether the issue is fact or law (including the tribunal’s powers, other statutes, the common law, and constitutional law)”,<sup>59</sup> eschewing traditional doctrinal boundaries; he has argued in favour of a unified approach to judicial review of administrative action, with the same standards applying in cases involving “rights” and those which

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<sup>53</sup> David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 279, at 303.

<sup>54</sup> David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 279, at 304.

<sup>55</sup> David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 279, at 304. This component was, unfortunately, overlooked by the Supreme Court in the decade after *Dunsmuir*. See Mary Liston, “Deference as Respect – Lost in Translation?” in Paul Daly & Léonid Sirota, eds., *The Dunsmuir Decade/Les 10 ans de Dunsmuir* (2018 Special Issue) Can. J. Admin. L. & Prac. at 47.

<sup>56</sup> *Vavilov*, at para. 90. See the concurring reasons, at paras. 292-293.

<sup>57</sup> *Vavilov*, at para. 92.

<sup>58</sup> *Vavilov*, at para. 76.

<sup>59</sup> David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 279, at 304.

do not;<sup>60</sup> he has been skeptical of the monist distinction between incorporated and unincorporated human rights treaties;<sup>61</sup> and he has insisted that there is no “hard and fast distinction between process and substance”.<sup>62</sup> The point for Dyzenhaus in his scholarship (sometimes solo, sometimes with others) as much as for the Supreme Court in its explication of reasonableness review in *Vavilov* is that the analysis is contextual rather than categorical, based on a variety of substantive considerations rather than on a limited number of bright-line distinctions.<sup>63</sup>

Admittedly, there is some vacillation in *Vavilov* as to the importance of context. In developing a new framework for substantive review, the majority sought to remove the “vexing” contextual factors, such as relative expertise, from the selection of the standard of review.<sup>64</sup> Going forward, statutory appeals will be subject to the appellate review framework (not *Vavilovian* reasonableness review), with extricable questions of law assessed on a correctness basis and everything else — questions of fact and questions of mixed fact and law — on the palpable and overriding error standard.<sup>65</sup> Although this shift attracted vociferous criticism from the minority judges,<sup>66</sup> there is reason to think that context will prove too tenacious an adversary for the majority in *Vavilov*: in classifying issues as extricable questions of law or as mixed questions, courts will inevitably be influenced by the substantive

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<sup>60</sup> David Dyzenhaus, Murray Hunt & Michael Taggart, “The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation” (2001) 1 O.U.C.L.J. 5; David Dyzenhaus, “Proportionality and Deference in a Culture of Justification” in Grant Huscroft, Bradley Miller & Grégoire Webber, eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014), at 234.

<sup>61</sup> David Dyzenhaus, Murray Hunt & Michael Taggart, “The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation” (2001) 1 O.U.C.L.J. 5; David Dyzenhaus & Evan Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker v. Canada*” (2001) 51 U.T.L.J. 193, at 233-34.

<sup>62</sup> David Dyzenhaus & Evan Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker v. Canada*” (2001) 51 U.T.L.J. 193, at 238. See also David Mullan, “*Baker v. Canada (Minister of Citizenship & Immigration)* – A Defining Moment in Canadian Administrative Law” (1999) 7 Reid’s Administrative Law 145, at 151; and Mary Liston, “Transubstantiation in Canadian Public Law: Processing Substance and Instantiating Process” in John Bell *et al.*, eds., *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart, 2016), at 213.

<sup>63</sup> See also Paul Daly, “The Unfortunate Triumph of Form over Substance in Canadian Administrative Law” (2012) 50 Osgoode Hall L.J. 317.

<sup>64</sup> *Vavilov*, at para. 200.

<sup>65</sup> See generally *Housen v. Nikolaisen*, [2002] S.C.J. No. 31, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.).

<sup>66</sup> Justices Abella and Karakatsanis described the majority’s reasons as “an encomium for correctness and a eulogy for deference”: *Vavilov*, at para. 201.

expertise of the decision-maker;<sup>67</sup> and even in applying the correctness standard, may consider that the better answer is the one provided by the decision-maker, especially if the decision-maker has relevant specialized expertise.<sup>68</sup> Accordingly, context is likely to remain important.<sup>69</sup>

Taken together, **reasoned decision-making, responsiveness, demonstrated expertise, and contextualism** provide a relatively detailed picture of the culture of justification. As I will demonstrate in the next Part, the picture painted in the majority reasons in *Vavilov* coheres with the broader tapestry of contemporary administrative law. These characteristics are not found only in the area of substantive review but everywhere in the law of judicial review of administrative action.

### III. JUSTIFICATION IN ADMINISTRATIVE LAW

To observe the mid-20th century literature on administrative law is to look at a world very different from ours. This was the time of the “long sleep” of administrative law,<sup>70</sup> a prolonged period of judicial somnolence which gave rise to fears that we had witnessed the “twilight” of judicial review<sup>71</sup> or, at the very least, stern warnings that we were at a “crossroads”.<sup>72</sup> Standing in the way of progress, clanking their medieval chains,<sup>73</sup> were the tripartite classification of functions into “administrative”, “legislative”, and “judicial” (only the last attracting much in the way of judicial control); a stark distinction between reviewable “rights” and unreviewable “privileges”; a deep divide between “jurisdictional” error, which

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<sup>67</sup> See *e.g.* the range of issues said to be subject to the palpable and overriding error standard in *Yee v. Chartered Professional Accountants of Alberta*, [2020] A.J. No. 291, 2020 ABCA 98, at para. 30 (Alta. C.A.).

<sup>68</sup> See *e.g. Planet Energy (Ontario) Corp. v. Ontario (Energy Board)*, [2020] O.J. No. 442, 2020 ONSC 598, at para. 31 (Ont. Div. Ct.), *per Swinton J.*:

While the Court will ultimately review the interpretation of the Act on a standard of correctness, respect for the specialized function of the Board still remains important. One of the important messages in *Vavilov* is the need for the courts to respect the institutional design chosen by the Legislature when it has established an administrative tribunal (at para. 36). In the present case, the Court would be greatly assisted with its interpretive task if it had the assistance of the Board’s interpretation respecting the words of the Act, the general scheme of the Act and the policy objectives behind the provision.

<sup>69</sup> See also Paul Daly, “The Unfortunate Triumph of Form over Substance in Canadian Administrative Law” (2012) 50 *Osgoode Hall L.J.* 317 and “*Dunsmuir’s* Flaws Exposed: Recent Decisions on Standard of Review” (2012) 58 *McGill L.J.* 483.

<sup>70</sup> Robert Stevens, *The English Judges* (Oxford: Hart, 2005), at 19.

<sup>71</sup> Gerald Le Dain, “The Twilight of Judicial Control in the Province of Quebec?” (1952) 1 *McGill L.J.* 1.

<sup>72</sup> H.W.R. Wade, “Crossroads in Administrative Law” [1968] *Current Leg. Probs.* 75.

<sup>73</sup> *United Australia Ltd. v. Barclay’s Bank Ltd.*, [1941] A.C. 1, at 29.

attracted *de novo* judicial review, and “non-jurisdictional” error, which attracted none at all; and, of course, the procedural and technical restrictions encrusted like barnacles on the hull of the prerogative writs, which had evolved to be the primary means of judicial control of public administration. In that period, despite the creation of an enormous administrative state, with welfare, regulatory and managerial functions, vast swathes of public administration were immune from judicial oversight.<sup>74</sup> Even judicial imposition of *procedural* controls on how public officials could make decisions — putting no fetter on the *substance* of those decisions — could not be taken for granted.

This was soon to change. The origin story of contemporary administrative law involves academics, judges and politicians working in consort to transform judicial review of administrative action.<sup>75</sup> In his classic text, *Judicial Review of Administrative Action*,<sup>76</sup> Professor de Smith “provided the academic systematization of the principles of judicial review”;<sup>77</sup> in landmark decisions such as *Ridge v. Baldwin*,<sup>78</sup> *Anisminic v. Foreign Compensation Commission*<sup>79</sup> and *Padfield v. Minister of Agriculture*,<sup>80</sup> the House of Lords cast aside the tripartite classification, the rights/privileges distinction and the jurisdictional/non-jurisdictional error divide; and politicians effected or permitted, through legislation and delegated legislation, procedural reforms which replaced the barnacled prerogative writs with a unified application for judicial review.<sup>81</sup> Whereas Lord Reid could safely say in the 1960s that England knew no developed system of administrative law, just 20 years later — the blink of an eye in common law terms — Lord Diplock confidently stated: “[T]he English law relating to judicial control of administrative action has been developed upon a case to case basis which has virtually transformed it over the last three decades.”<sup>82</sup>

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<sup>74</sup> See generally Stanley Alexander de Smith, *Judicial Review of Administrative Action* (London: Stevens & Sons, 1959).

<sup>75</sup> For a different perspective, see T.T. Arvind & Lindsay Stirton, “The Curious Origins of Judicial Review” (2017) 133 Law Q. Rev. 91.

<sup>76</sup> Stanley Alexander de Smith, *Judicial Review of Administrative Action* (London: Stevens & Sons, 1959).

<sup>77</sup> John Bell, “Comparative Administrative Law” in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 1259, at 1285.

<sup>78</sup> [1964] A.C. 40.

<sup>79</sup> [1969] 2 A.C. 147.

<sup>80</sup> [1968] A.C. 997.

<sup>81</sup> See e.g. *R. v. Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd.*, [1982] A.C. 617, at 657, *per* Lord Roskill.

<sup>82</sup> *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374, at 407.

Similar transformations occurred in Canada: for Professor de Smith, read Professors Arthurs,<sup>83</sup> Hogg,<sup>84</sup> Mullan<sup>85</sup> and Weiler;<sup>86</sup> procedural reforms were effected at the federal and provincial level;<sup>87</sup> and, over the years, the Canadian judiciary invigorated the law of judicial review of administrative action.<sup>88</sup>

*Nicholson* effected a similar change to *Ridge v. Baldwin*, such that where once procedural protections attached only to decisions taken “judicially”, having an impact on “rights”,<sup>89</sup> they could by the early 1980s be imposed by judges in respect of any decision affecting “the rights, interests, property, privileges, or liberties of any person”.<sup>90</sup> The old law of “natural justice”, closely modelled on the trial-type procedures employed by courts, was replaced by a context-sensitive “duty of fairness”, where the question a reviewing court must ask is: “What procedural protections, if any, are necessary for this particular decision-making process?”<sup>91</sup> In particular, individuals are entitled to fair warning of potentially adverse decisions and an opportunity to respond. Indeed, there is an increasing trend toward “active adjudication”, where an administrative decision-maker becomes more actively involved *within* a hearing process,<sup>92</sup> and, arguably, toward “responsive legality”.<sup>93</sup>

<sup>83</sup> H.W. Arthurs, “Rethinking Judicial Review: A Slightly Dicey Business” (1979) 17 Osgoode Hall L.J. 1.

<sup>84</sup> P.W. Hogg, “Judicial Review in Canada: How Much Do We Need It?” (1974) 26 Osgoode Hall L.J. 337.

<sup>85</sup> D.J. Mullan, “Fairness: The New Natural Justice” (1975) 25 U.T.L.J. 281.

<sup>86</sup> P.C. Weiler, “The Slippery Slope of Judicial Intervention: The Supreme Court and Canadian Labour Relations 1950-1970” (1971) 9 Osgoode Hall L.J. 1.

<sup>87</sup> See *e.g.* David Mullan, “Reform of Administrative Law Remedies: Method or Madness?” [1975] Federal Law Review 340; John Evans, “Judicial Review in Ontario — Recent Developments in the Remedies — Some Problems of Pouring Old Wine into New Bottles” (1977) 55 Can. Bar Rev. 148.

<sup>88</sup> *Re Nicholson and Haldiman-Norfolk Regional Board of Commissioners of Police*, [1978] S.C.J. No. 88, [1979] 1 S.C.R. 311 (S.C.C.).

<sup>89</sup> *R. v. Electricity Commissioners, ex parte London Electricity Joint Committee Company (1920) Ltd.*, [1924] 1 K.B. 171.

<sup>90</sup> *Martineau v. Matsqui Institution*, [1979] S.C.J. No. 121, [1980] 1 S.C.R. 602, at 623 (S.C.C.), *per* Dickson J., dissenting, but in terms that were later adopted in *Cardinal v. Kent Institution*, [1985] S.C.J. No. 78, [1985] 2 S.C.R. 643 (S.C.C.). See *e.g. Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] S.C.J. No. 7, [1987] 1 S.C.R. 181 (S.C.C.), applying procedural fairness to a non-judicial regulatory investigation which concerned privileges, not rights.

<sup>91</sup> David Mullan, “Fairness: The New Natural Justice” (1975) 25 U.T.L.J. 281, at 315.

<sup>92</sup> See generally Robert Thomas, “From ‘Adversarial v. Inquisitorial’ to ‘Active, Enabling, and Investigative’: Developments in UK Administrative Tribunals” and Lorne Sossin & Sarah Green, “Administrative Justice and Innovation: Beyond the Adversarial/Inquisitorial Dichotomy” in Laverne Jacobs & Sasha Baglay, eds., *The Nature of Inquisitorial*



Moreover, the impact of a decision on an individual has come to play an important role in determining the extent of the procedural protections required in a given case: “The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated”.<sup>94</sup>

A wider variety of grounds of review became available of governmental action, a trend visible across the common law world.<sup>95</sup> In Canada, this manifested itself in the development of a “pragmatic and functional” approach to judicial review. Rather than relying on a stark distinction between jurisdictional and non-jurisdictional errors, Canadian courts employed a variety of contextual factors to calibrate the appropriate intensity of review — correctness, reasonableness *simpliciter* and patent unreasonableness — for any given case.<sup>96</sup> On the application of any of these standards, reviewing courts were able to probe the reasons and the record to identify any flaws in an impugned administrative decision: even the standard of patent unreasonableness was not a blank cheque which counsel could brandish at oral argument on judicial review, for even on the application of this highly deferential standard, obvious errors were subject to correction.

No-go areas were eliminated, as the boundaries of non-justiciability were pushed back. In *Operation Dismantle Inc. v. Canada*, the Supreme Court held that a state actor could not shelter from claim of a Charter<sup>97</sup> violation by invoking non-justiciability.<sup>98</sup> All governmental action was, in principle, open to review for Charter compliance. Governmental action with a statutory basis was subject to judicial review in the superior courts,<sup>99</sup> a constitutional control which, the Supreme Court held, could not be ousted by ordinary legislation.<sup>100</sup> Prerogative power has also

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*Processes in Administrative Regimes* (London: Routledge, 2016).

<sup>93</sup> Zach Richards, *Responsive Legality: The New Administrative Justice* (Abingdon, UK: Routledge, 2019).

<sup>94</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817, at para. 25 (S.C.C.).

<sup>95</sup> See generally Paul Daly, “Substantive Review in the Common Law World: *AAA v. Minister for Justice* in Comparative Perspective” [2019] *Irish Supreme Court Review* 105; Dean Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge: Cambridge University Press, 2018).

<sup>96</sup> The apotheosis of this approach was *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982 (S.C.C.).

<sup>97</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

<sup>98</sup> [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441 (S.C.C.).

<sup>99</sup> *Dunsmuir*, at para. 28.

<sup>100</sup> *Crevier v. Quebec (Attorney General)*, [1981] S.C.J. No. 80, [1981] 2 S.C.R. 220 (S.C.C.).



come under judicial scrutiny, haltingly at times<sup>101</sup> but more confidently in recent years, with more attention to the particular context in which prerogative action is sought to be challenged.<sup>102</sup> Judicial review has also been extended to private bodies exercising public power<sup>103</sup> and the law of standing has been significantly liberalized.<sup>104</sup> In all of these areas, contemporary Canadian law is highly sensitive to context.

It bears mentioning, finally, that governmental bodies have a duty to consult with Indigenous peoples when the rights protected by section 35 of the Charter might be affected by regulatory decisions.<sup>105</sup> Even on decisions relating to economic matters of national concern, consultation may be required, in which case the Crown must “act with good faith to provide meaningful consultation appropriate to the circumstances”.<sup>106</sup> Administrative decision-makers, too, may fall under the consultation obligation,<sup>107</sup> meaning they will have to draw Indigenous peoples into their decision-making processes and “show that [they have] considered and addressed the rights claimed by Indigenous peoples in a meaningful way”.<sup>108</sup>

Across all of these areas, a culture of justification can be observed in operation. All exercises of public power must be justified by reference to **reasoned decisions**, with the boundaries of justiciability pushed back dramatically and the scope of judicial review remedies extended widely. It is, moreover, implicit if not explicit that **demonstrated expertise** must be brought to bear by administrative decision-makers who seek to justify their decisions. Nowadays, “it is not open to the government to say, ‘Trust us, we got it right.’”<sup>109</sup> In addition, administrative decision-makers must

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<sup>101</sup> Paul Daly, “Royal Treatment: The Special Status of the Crown in Administrative Law” (2017) 22 Rev. Const. Stud. 81.

<sup>102</sup> *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, [2015] F.C.J. No. 4, 2015 FCA 4, at para. 67 (F.C.A.).

<sup>103</sup> See generally the discussion in *Air Canada v. Toronto Port Authority*, [2011] F.C.J. No. 1725, 2011 FCA 347, [2013] 3 F.C.R. 605 (F.C.A.).

<sup>104</sup> See generally *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] S.C.J. No. 45, 2012 SCC 45, [2012] 2 S.C.R. 524 (S.C.C.).

<sup>105</sup> See Mary Liston, “Transubstantiation in Canadian Public Law: Processing Substance and Instantiating Process” in John Bell *et al.*, eds., *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart, 2016) 213, at 226-30.

<sup>106</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, 2004 SCC 73, at para. 41 (S.C.C.).

<sup>107</sup> *Clyde River (Hamlet) v. Petroleum Geo Services Inc.*, [2017] S.C.J. No. 40, 2017 SCC 40 (S.C.C.); *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017] S.C.J. No. 41, 2017 SCC 41 (S.C.C.).

<sup>108</sup> *Coldwater First Nation v. Canada (Attorney General)*, [2020] F.C.J. No. 149, 2020 FCA 34, at para. 40 (F.C.A.).

<sup>109</sup> *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, [2018] O.J. No.

be **responsive**, giving individuals an opportunity to participate fully in the decision-making process and changing their approach in-hearing if necessary, a requirement which is most visible in the duty to consult Indigenous peoples but which can be perceived in all areas of public administration. And there are few if any rules, as such; in contemporary Canadian administrative law, **contextual** analysis has ousted categorical analysis. In summary, top-down assertions of authority are insufficient in contemporary administrative law: individuals must be treated with concern and respect and all areas of governmental activity will be scrutinized in a context-sensitive manner for compliance with the law of judicial review of administrative action. This is the essence of administrative law's culture of justification.

#### IV. EXPLAINING THE RISE OF JUSTIFICATION

What might explain the increased emphasis in contemporary administrative law on **reasoned decision-making, demonstrated expertise, responsiveness** and **contextualism**? It is, of course, impossible to provide a conclusive answer to this question. Developing a hypothesis is, by contrast, perfectly feasible. Broadly speaking, the hypotheses relating to the rise of the culture of justification can be placed on a spectrum running from exogenous at the one end to endogenous at the other.

Exogenous factors would treat the culture of justification in administrative law as epiphenomenal, a manifestation of broader cultural, economic, social or political forces.<sup>110</sup> It could be a product of the post-Renaissance rise of rationality, which is not easily compatible with top-down assertions of authority. Similarly, the idea that governmental action having an effect on individual interests must be justified (and is unlawful if not) might be thought to be cohesive with the post-World War II emergence of human rights law. Relatedly, the underlying theory of popular democracy, which emerged in its fullest form across the Western world only in the last century, is that individuals are entitled to have a say in how they are governed, carrying with it the implication that governmental decisions adverse to individuals' interests ought to be justified. General declines in levels of social trust, or trust in authority, might also explain increased demands for justification. And, as at least one leading judge has suggested, the decline in the perceived effectiveness of the accountability of the executive to the legislature led courts to occupy the "dead

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4394, 2018 ONSC 5062, at para. 62 (Ont. S.C.J.), *per* Myers J., citing *Tsleil-Waututh Nation v. Canada (Attorney General)*, [2017] F.C.J. No. 601, 2017 FCA 128, at para. 79 (F.C.A.), *per* Stratas J.A.

<sup>110</sup> See *e.g.* Jeffrey Jowell *et al.*, *de Smith's Judicial Review*, 8th ed. (London: Sweet & Maxwell, 2018), at para. 1-003: "Against a general background of increasing expectations of fairness, rationality and justification in public affairs, the courts have developed more exacting legal standards (especially since the 1960s) and have applied these to a wider variety of decision-makers."

ground” vacated by political actors.<sup>111</sup>

Not being an historian, political scientist, philosopher or sociologist, I am not as interested in exogenous factors as I am in endogenous factors. Two appear to me to be relevant: the development of context-sensitive, general principles of administrative law; and the more expansive reasons and records on which administrative decisions are nowadays based. My hypothesis is that there is a symbiotic relationship between these two factors.

The first is the development, since the 1960s and 1970s, of general principles of administrative law. What we now call “administrative law” or “judicial review of administrative action” began to develop, many centuries ago, in the form of the writs of *certiorari*, prohibition, *mandamus*, *quo warranto* and *habeas corpus*. These writs were originally designed, by judges sitting in the King’s common law courts in Westminster, to control the actions of so-called “inferior” courts around the country. Today’s centralized court system was then in the earliest stages of its development; most justice was administered locally or in ecclesiastical courts. Over the centuries, the common law courts extended the scope of the prerogative writs to cover a wider and wider range of bodies, generally reasoning by analogy to justify issuing writs against decision-makers which were not, strictly speaking, “inferior” courts. While the prerogative writs were used to control the actions of an array of administrative decision-makers, there was no “administrative law” as such. As with the common law generally prior to the reforms effected by the Judicature Acts in the late 19th century, there were no general principles but various, discrete bodies of law relating to the individual writs: there was a “law” relating to *certiorari*, prohibition and so on but there was no coherent body of principles which, as a whole, could be described as “administrative law”. In the same way as there was until the end of the 19th century no “law of tort” or “law of contract” but rather “laws” of diverse writs of action, “administrative law” as a body of principles did not exist.

I described the “origin story” of contemporary administrative law in Part III. Suffice it to say that academic, political and judicial efforts had combined to produce, by the end of the 20th century, a recognizable body of principles called “administrative law”, pursuant to which administrative decision-makers were required to act lawfully, rationally and procedurally fairly.<sup>112</sup> Given that administrative law was no longer restrained within procedural shackles, there was no boundary to the development of these principles. Moreover, the casting off of the procedural shackles has been accompanied by the casting off of conceptual shackles:

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<sup>111</sup> *R. v. Secretary of State for the Home Department, ex parte Fire Brigades’ Union*, [1995] 2 A.C. 513, at 567.

<sup>112</sup> *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374, at 410. This typology does not map neatly onto Canadian law, where reasonableness and fairness are now the touchstones for reviewing courts, but it is nonetheless invoked from time to time. See *e.g. Canada (Attorney General) v. TeleZone Inc.*, [2010] S.C.J. No. 62, 2010 SCC 62, at para. 24 (S.C.C.).

the classifications, divides and distinctions which characterized earlier eras have gradually been removed, with contextual analysis to the fore. In the case law, references abound to the importance of context: the duty of fairness is entirely context-sensitive,<sup>113</sup> as is the duty to consult;<sup>114</sup> *Vavilovian* reasonableness review is heavily influenced by context,<sup>115</sup> as are judicial responses to claims of non-justiciability;<sup>116</sup> and in applying the law of standing, judges are exhorted to take a purposive and flexible approach to a multitude of factors.<sup>117</sup>

When judicial review analysis is contextual (rather than categorical), the focus of a reviewing court will invariably be on whether the decision as a whole meets the relevant standard of reasonableness or fairness, which depends on a holistic assessment of the decision. No avenues of analysis or lines of inquiry are categorically blocked off. With context to the fore, the primary question for the judge becomes whether the decision is justifiable, in terms of reasonableness or fairness. The ultimate question, to be assessed holistically, will be whether a given “exercise of delegated public power can be ‘justified to citizens in terms of rationality and fairness’”.<sup>118</sup> Making this determination does not necessarily require “an unstructured (and sometimes instinctive) overall judgement”.<sup>119</sup> That the judge’s determination is contextual does not mean it is a purely subjective assessment of whether the decision should stand or fall. A judge conducting a judicial review is hemmed in by a variety of objective considerations: institutional constraints, constitutional constraints and prior jurisprudence applying the concepts of reasonableness and fairness to other administrative decisions.<sup>120</sup> Nonetheless, I suggest, the development of a culture of justification is much easier where the law of judicial review of administrative action is context-sensitive and does not depend on categorical analysis. Accordingly, my hypothesis is that the decoupling of

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<sup>113</sup> *Knight v. Indian Head School Division No. 19*, [1990] S.C.J. No. 26, [1990] 1 S.C.R. 653, at 682 (S.C.C.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817, at paras. 21-28 (S.C.C.).

<sup>114</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, 2004 SCC 73, at para. 45 (S.C.C.).

<sup>115</sup> *Vavilov*, at paras. 105-138.

<sup>116</sup> *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, [2015] F.C.J. No. 4, 2015 FCA 4, at paras. 65-70 (F.C.A.).

<sup>117</sup> *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] S.C.J. No. 45, 2012 SCC 45, at paras. 35-38 (F.C.A.).

<sup>118</sup> *Vavilov*, at para. 14, citing the Right Honourable Beverley McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1998) 12 Can. J. Admin. L. & Prac. 171, at 174.

<sup>119</sup> Dean Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge: Cambridge University Press, 2018), at 2.

<sup>120</sup> See generally Paul Daly, “Substantive Review in the Common Law World: *AAA v. Minister for Justice* in Comparative Perspective” [2019] Irish Supreme Court Review 105.

administrative law from the prerogative writs and the rise of contextual analysis facilitated the rise of a culture of justification.

Second, and very much relatedly, the reasons and records of administrative decisions reviewed by judges are now much more extensive than in previous eras. In *Anisminic*, the claimant was given a one-page letter stating — not explaining — the Foreign Compensation Commission’s conclusion.<sup>121</sup> Modern records are voluminous; modern reasons extensive. Administrative proceedings are, increasingly, subject to the open-court principle;<sup>122</sup> access to information legislation imposes high standards of transparency on administrative decision-makers; there are many statutory obligations to give reasons for decisions; considerations of fairness between individual and institutional litigants drive the publication on decision-makers’ websites of scores of decisions; and technological advances facilitate the production of reasons even in respect of large numbers of applications “by employing information technology, using decision templates, drop-down menus and other software”.<sup>123</sup> And while courts are not permissive when it comes to what may be put in the record placed before the reviewing courts,<sup>124</sup> they are certainly much less fastidious than they were in previous eras.<sup>125</sup>

The upshot is that a judge conducting a judicial review hearing will have a large volume of material on her desk, reasons running potentially into the hundreds of pages, supported quite possibly by an even more extensive record. It is only natural for courts reviewing reasoned decisions to focus on the internal coherence of the reasons given, interrogating whether they do indeed justify the decision given.<sup>126</sup> A judicial review judge is likely to consider that she has the capacity to test whether

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<sup>121</sup> David Feldman, “*Anisminic v. Foreign Compensation Commission* [1968]: In Perspective” in Maurice Sunkin & Satvinder Juss, eds., *Landmark Cases in Public Law* (Oxford: Hart, 2017).

<sup>122</sup> *Toronto Star Newspapers Ltd. v. Ontario (Attorney General)*, [2018] O.J. No. 2256, 2018 ONSC 2586 (Ont. S.C.J.).

<sup>123</sup> *R. (Agyarko) v. Secretary of State for the Home Department*, [2017] 1 W.L.R. 823, at para. 71, *per* Lord Reed.

<sup>124</sup> See generally *Bernard v. Canada (Revenue Agency)*, [2015] F.C.J. No. 1396, 2015 FCA 263 (F.C.A.). As Crerar J. remarked in *Minster Enterprises Ltd. v. Richmond (City)*, [2020] B.C.J. No. 495, 2020 BCSC 455, at para. 80 (B.C.S.C.):

The invocation of “context” is not a *carte blanche* to admit any evidence even remotely related to the issue before the decision maker. Rather, it reflects the fact that the formal record, if such a record even exists, may not contain all the evidence relevant to the review of the decision in question, depending on the nature of that decision, and the grounds on which it is challenged.

<sup>125</sup> Paul Daly, “Updating the Procedural Law of Judicial Review of Administrative Action” (2018) 51 U.B.C. L. Rev. 705.

<sup>126</sup> See also Michael Taggart, “Deference, Proportionality, *Wednesbury*” [2008] New Zealand Law Review 423, at 463-64.

the decision-maker's conclusions follow from their premises: there is no special expertise required to assess whether a decision is logical and rational, or whether it is justifiable in view of the relevant legal and factual constraints. Where there were no reasons to scrutinize, as in previous eras, it was much more difficult for judges to conclude that an administrative decision should be quashed.

I would push the point further still. Where reasons were never given for administrative decisions, the flaws in those decisions or in public administration generally were concealed from the judicial eye. Once reasons came to be given more or less as a matter of course, public administration was on display, warts and all. As soon as judges became aware of shortcomings in public administration (or even of the *potential* for shortcomings), was it not inevitable that they would develop more exacting standards of reasonableness and fairness to hold administrative decision-makers to account? It is not, I hypothesize, more exacting standards of judicial review which have caused more expansive reason-giving and record-generation; it is expansive reason-giving and record generation which have caused more exacting standards of reasonableness and fairness.

In summary, my hypothesis for the rise of the culture of justification rests on two interrelated factors which are largely internal to administrative law: the development of context-sensitive general principles of judicial review of administrative action; and the expansion of reasons for administrative decisions and the accompanying records for judicial review.

## V. THE FUTURE OF JUSTIFICATION

If my hypothesis is correct, the implication is that the culture of justification in administrative law is here to stay. Even reversals in global trends — the exogenous factors I identified in Part IV — would not cause the culture of justification to putrefy. Reasonableness and fairness will continue to be robust and context-sensitive constraints on administrative action. The details of these constraints may, however, vary over time. The reader of *Vavilov* could be forgiven for having a slight sense of *déjà vu*: in *Dunsmuir*, the language of “justification, transparency and intelligibility” was already said to be central to reasonableness review;<sup>127</sup> yet a few short years after *Dunsmuir*, the Supreme Court had already abandoned these high justificatory standards. In this Part, I will assess the future prospects of the culture of justification in substantive review in Canadian administrative law. I will suggest that *Vavilovian* reasonableness review represents a repudiation of the culture of authority which had crept into substantive review in the years leading up to *Vavilov*. This signals that some decision-makers, who have previously been able to rely on their authority to convince courts to uphold their decisions as reasonable, will henceforth find themselves required to support their decisions with reasoned analysis. The post-*Dunsmuir* slippage is unlikely to be repeated.

To begin with, recall that Mureinik drew a contrast between the culture of

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<sup>127</sup> *Dunsmuir*, at para. 47.

justification and the culture of authority. In a culture of justification, decisions must be justified — reasoned decision-making, responsiveness, demonstrated expertise, and contextualism will be critical. But in a culture of authority, a decision-maker can rule by edicts unsupported by reason.<sup>128</sup> The contrast between justification and authority can be perceived by reference to previous eras of judicial review of administrative action in Canada, in which decision-makers had the “right to be wrong” within their exclusive areas of jurisdiction.<sup>129</sup> A good example is *Commission des relations ouvrières du Québec v. Burlington Mills Hosiery Co. of Canada*.<sup>130</sup> The exclusion of employees under the age of 16 from a bargaining unit by the Commission had resulted in the certification of a negotiating group. The employer’s application for judicial review failed. As Abbott J. explained, determinations as to who was “to be included or excluded from a bargaining unit” was one of the Board’s “principal functions” and fell within its “exclusive jurisdiction”: “provided it exercises that discretion in good faith its decision is not subject to judicial review”.<sup>131</sup> The Commission had authority — conferred by statute — and,

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<sup>128</sup> Authority flows from the legislature, sometimes through an administrative decision-maker. For Mureinik, the hallmark of the culture of authority was that “what Parliament says is law, without need to offer justification to the courts”: Etienne Mureinik, “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 S.A.J.H.R. 31, at 32. Dyzenhaus contrasted “deference as respect” with “deference as submission”. Pursuant to the former, “[t]he legislature, the administration and the courts are . . . just strands in a web of public justification”, the courts occupying a “special role”, “as an ultimate enforcement mechanism for such justification”. David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 279, at 305. Deference as submission, by contrast, “requires of judges . . . that they submit to the intention of the legislature, on a positivist understanding of intention” (at 286), submission which can lead judges to conclude that they “owe no deference to administrative determinations of the law” (at 303) but can also lead them to uphold decisions protected by a privative clause. Either way, deference as submission involves deferring to the authority of the legislature, which is sometimes channelled through an administrative decision-maker. Deference as respect, however, has to be earned and cannot merely be asserted. Reasoned decision-making, responsiveness, demonstrated expertise and contextualism are central to deference as respect, anathema to deference as submission.

<sup>129</sup> Gerald E. Le Dain, “The Twilight of Judicial Control in the Province of Quebec?” (1952) 1 McGill L.J. 1, at p. 5.

<sup>130</sup> [1964] S.C.J. No. 16, [1964] S.C.R. 342 (S.C.C.) [hereinafter “*Burlington Mills*”].

<sup>131</sup> *Commission des relations ouvrières du Québec v. Burlington Mills Hosiery Co. of Canada*, [1964] S.C.J. No. 16, [1964] S.C.R. 342, at 346 (S.C.C.). See similarly *British Columbia (Labour Relations Board) v. Traders Services Ltd.*, [1958] S.C.J. No. 52, [1958] S.C.R. 672 (S.C.C.); *Saskatchewan (Labour Relations Board) v. Saskatchewan*, [1969] S.C.J. No. 56, [1969] S.C.R. 898 (S.C.C.). In another line of cases, “administrative” exercises of discretion were considered unreviewable, provided that statutory requirements had been complied with. See e.g. *Calgary Power Ltd. v. Copithorne*, [1958] S.C.J. No. 66, [1959] S.C.R. 24 (S.C.C.); *Moore v. Canada (Minister of Manpower and Immigration)*, [1968] S.C.J.



as long as it did not egregiously abuse its powers, no court could review the merits of the Commission's decisions.

There is plainly a world of difference between *Burlington Mills* and *Vavilov*: generations of judges, scholars and advocates have woven Canadian administrative law into an altogether different fabric. Nonetheless, one of the problems with Canadian administrative law prior to *Vavilov* was that a culture of authority had crept into substantive review. In *Dunsmuir*, reasonableness review was said to have two components: a decision should fall within the “possible, acceptable outcomes in light of the facts and the law” and the reasoning process leading up to it should bear the hallmarks of “justification, transparency and intelligibility”.<sup>132</sup> It did not take long, however, for the high bar of “justification, transparency and intelligibility” to be significantly lowered: by 2013 it was already enough for a decision's reasoning process to be comprehensible.<sup>133</sup> As for “possible, acceptable outcomes”, it soon became clear that the task of a reviewing court was outcome-focused; as long as the decision fell within the range of possible, acceptable outcomes, a reviewing court ought to uphold it, even if aspects of the decision were curious or key points were glossed over.<sup>134</sup> As long as the reviewing court was persuaded that reasons “could be offered” in support of the outcome, it ought to uphold the decision in question.<sup>135</sup> And almost all administrative decision-making was subject to an across-the-board presumption of reasonableness review.<sup>136</sup> Some decision-makers could therefore rely on their authority — the fact that they had been empowered by statute and were presumptively expert<sup>137</sup> — to prevail in judicial review proceedings, without having to justify their decisions.

Consider the decision of the Federal Court of Appeal in *Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*.<sup>138</sup> The Supreme Court allowed Mr. Tran's appeal but sidestepped the problems illustrated by the Federal Court of

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No. 65, [1968] S.C.R. 839 (S.C.C.). See further Paul Daly, “The Struggle for Deference in Canada” in Mark Elliott & Hanna Wilberg, eds., *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford: Hart, 2015), at 297.

<sup>132</sup> [2008] S.C.J. No. 9, 2008 SCC 9, at para. 47 (S.C.C.).

<sup>133</sup> *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, at para. 89 (S.C.C.).

<sup>134</sup> See generally *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, 2011 SCC 62 (S.C.C.).

<sup>135</sup> *Dunsmuir*, at para. 48; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, 2011 SCC 62, at paras. 14-16 (S.C.C.).

<sup>136</sup> *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Assn.*, [2011] S.C.J. No. 61, 2011 SCC 61 (S.C.C.); *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] S.C.J. No. 47, 2016 SCC 47 (S.C.C.).

<sup>137</sup> *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] S.C.J. No. 47, 2016 SCC 47, at para. 33 (S.C.C.).

<sup>138</sup> [2015] F.C.J. No. 1324, 2015 FCA 237 (F.C.A.).



Appeal's decision.<sup>139</sup> At issue here was the decision of a ministerial delegate, based in large part on a report from a front-line Canadian Border Services Agency official, to refer Mr. Tran to an inadmissibility hearing. Neither the officer nor the delegate was a lawyer. Mr. Tran, a long-time permanent resident of Canada, had been part of a marijuana cultivation operation, for which he received a 12-month conditional sentence.

Section 36(1)(a) of the *Immigration and Refugee Protection Act*<sup>140</sup> provides that individuals are inadmissible to Canada upon conviction for either (i) committing an offence punishable by a maximum term of imprisonment of at least 10 years; or (ii) committing an offence for which a term of imprisonment of more than six months is imposed. Mr. Tran raised issues on both of the branches of section 36(1)(a). First, between his commission of the offence and his conviction, the maximum term of imprisonment had been increased for his offence (production of a controlled substance) from 7 years to 14 years. Pursuant to section 11 of the Charter, Mr. Tran could only be sentenced to a maximum of seven years. But was the delegate so constrained, or could he look to the maximum term of imprisonment at the time he had to decide whether to refer Mr. Tran for an admissibility hearing? Second, was Mr. Tran's conditional sentence a "term of imprisonment" in excess of six months? Mr. Tran made additional submissions on his personal circumstances.

Justice Gauthier upheld the decision as reasonable, but with evident distaste. The first problem was that the delegate had not developed "a purposive and contextual analysis" of section 36(1)(a).<sup>141</sup> Given the issues at stake, the absence of a detailed interpretation in the delegate's decision was a significant shortcoming. For one, the rule of lenity — that penal provisions be construed in favour of the accused — is at least arguably in play. For another, the potential retrospective application of an increase in a sentencing provision calls attention to Charter values.<sup>142</sup> In addition, Mr. Tran observed that the delegate's approach could give rise to absurd situations, such as where the maximum sentence for an offence committed long ago is later increased, rendering the individual suddenly liable to removal from Canada. Yet Gauthier J.A. felt compelled, in light of the Supreme Court's instruction to pay attention to reasons that *could have been offered* — but were not *actually* offered — in support of a decision, to accept *any* reasonable interpretation which was implicit in the delegate's decision: "deference due to a tribunal does not disappear because its decision on a certain issue is implicit".<sup>143</sup> This recalls the *Burlington Mills*

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<sup>139</sup> *Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2017] S.C.J. No. 50, 2017 SCC 50 (S.C.C.).

<sup>140</sup> S.C. 2001, c. 27.

<sup>141</sup> *Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2017] S.C.J. No. 50, 2017 SCC 50, at para. 42. (S.C.C.).

<sup>142</sup> *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, 2012 SCC 12 (S.C.C.).

<sup>143</sup> *Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2017]

approach of reflexive deference to a decision-maker operating in an area of exclusive jurisdiction, *even where they evidently have not even considered the principles at stake*. Yet, as Gauthier J.A. observed, this is what the Supreme Court jurisprudence seemed to require.

Second, it would also have been reasonable for the delegate to construe the provisions *in favour* of Mr. Tran.<sup>144</sup> Indeed, in respect of the second branch of section 36(1)(a), Gauthier J.A. wrote, it is “obviously open” to the decision-makers “to adopt another interpretation should they believe it is warranted”.<sup>145</sup> Another decision-maker could adopt a different interpretation in the future. Concretely, this meant that the rights and obligations of permanent residents and foreign nationals convicted of crimes in similar circumstances to Mr. Tran’s could well depend on whether they appeared before decision-maker A or decision-maker B.<sup>146</sup> The decision-maker had the authority to decide — one way, or another, and back again — and, *à la Burlington Mills*, that was that.

Of course, *Tran* is only one case. Hardly anyone familiar with Canadian administrative law would think that by the mid-2010s the clock had suddenly turned back to 1960. The point is that there is absolutely no chance, post-*Vavilov*, that *Tran* would be decided the same way. The authority of the ministerial delegate — empowerment by statute and presumptive expertise — would not be enough on its own to support the decision. Indeed, in a case argued and decided soon after *Vavilov*, Gauthier J.A. (the author of *Tran*) quashed a decision as unreasonable precisely on the basis that the decision-maker had failed to engage with the key issues and central arguments raised by the applicant, pointedly commenting that whereas she would have upheld the decision prior to *Vavilov*, it could not stand in view of the Supreme Court’s new articulation of reasonableness review.<sup>147</sup>

Given the centrality of **reasoned decision-making, responsiveness, demonstrated expertise** and **contextualism**, it comes as no surprise that Canadian courts post-*Vavilov* have not been sympathetic to decision-makers who might have relied prior to *Vavilov* on their authority rather than their ability to justify their decisions. Ministers, for example, might be said to possess *political* authority in addition to statutory authority. But ministerial decision-making based on sparse or non-existent reasons has been subjected to stringent reasonableness review in the wake of

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S.C.J. No. 50, 2017 SCC 50, at para. 44 (S.C.C.).

<sup>144</sup> *Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2017] S.C.J. No. 50, 2017 SCC 50, at paras. 60 and 87 (S.C.C.).

<sup>145</sup> *Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2017] S.C.J. No. 50, 2017 SCC 50, at para. 87 (S.C.C.).

<sup>146</sup> See also *Martinez-Caro v. Canada (Minister of Citizenship and Immigration)*, [2011] F.C.J. No. 881, 2011 FC 640, at paras. 48-50 (F.C.), *per* Rennie J.

<sup>147</sup> *Farrier v. Canada (Attorney General)*, [2020] F.C.J. No. 167, 2020 FCA 25, at paras. 12, 19 (F.C.A.).

*Vavilov*.<sup>148</sup> For reasons of *expediency*, line decision-makers in busy governmental offices engaged in the mass adjudication of hundreds or thousands of claims for welfare benefits, occupational licences or immigration visas might be given deference on the basis that they simply do not have the time to engage deeply with every file that comes across their desks. But there has not been much post-*Vavilov* sympathy for those toiling on the front lines.<sup>149</sup> In *Rodriguez Martinez v. Canada (Minister of Citizenship and Immigration)*, McHaffie J. observed that while institutional constraints “must inform the assessment of reasonableness”,<sup>150</sup> the demands of responsive mean that a decision-maker — even a line decision-maker — must nonetheless respond to the evidence presented to it.<sup>151</sup> And in *Osun v. Canada (Minister of Citizenship and Immigration)*, a boilerplate comment to the effect that the decision-maker had given a piece of evidence “careful consideration” was insufficient, as the decision lacked an “assessment” of the evidence.<sup>152</sup> Authority is not enough; justification is the order of the day.<sup>153</sup>

Claims of *technocratic* authority are those most likely to challenge the culture of justification. It is instructive to consider labour law. The impetus for deference on administrative interpretations of law originally came from scholars and judges concerned that judicial intervention was undermining the ability of expert labour law decision-makers to perform their functions.<sup>154</sup> Labour arbitrators form part of a relatively small community of labour lawyers and activists: union advocates,

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<sup>148</sup> See e.g. *Alexis v. Alberta (Environment and Parks)*, [2020] A.J. No. 536, 2020 ABCA 188 (Alta. C.A.), especially at paras. 35-41 and 139-146; *Nation Rise Wind Farm Limited Partnership v. Ontario (Minister of the Environment, Conservation and Parks)*, [2020] O.J. No. 2137, 2020 ONSC 2984 (Ont. Div. Ct.).

<sup>149</sup> See e.g. *Samra v. Canada (Minister of Citizenship and Immigration)*, [2020] F.C.J. No. 180, 2020 FC 157, at para. 22 (F.C.); *B. (A.) v. Canada (Minister of Citizenship and Immigration)*, [2020] F.C.J. No. 368, 2020 FC 203, at para. 53 (F.C.); *Li v. Canada (Minister of Citizenship and Immigration)*, [2020] F.C.J. No. 258, 2020 FC 279, at para. 13 (F.C.).

<sup>150</sup> [2020] F.C.J. No. 271, 2020 FC 293, at para. 13 (F.C.).

<sup>151</sup> *Rodriguez Martinez v. Canada (Minister of Citizenship and Immigration)*, [2020] F.C.J. No. 271, 2020 FC 293, at paras. 15-17 (F.C.).

<sup>152</sup> [2020] F.C.J. No. 273, 2020 FC 295, at para. 26 (F.C.).

<sup>153</sup> To be clear, Canada could have a culture of justification in administrative law and substantive review generally even if claims to authority were recognized by courts in some instances. I would not go so far as to say that *Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2015] F.C.J. No. 1324, 2015 FCA 237 (F.C.A.) — regrettable and all as the Federal Court of Appeal’s decision was — evidenced that Canadian administrative law had been subsumed by a culture of authority. Rather, the point being developed in this Part is that *Vavilov* represents a forthright repudiation of the culture of authority.

<sup>154</sup> See e.g. Paul Weiler, “The Slippery Slope of Judicial Intervention: The Supreme Court and Canadian Labour Relations 1950-1970” (1971) 9 *Osgoode Hall L.J.* 1.

management advocates and arbitrators (typically drawn from the union or management side). Everyone knows everyone. And they speak a common dialect, not necessarily one the uninitiated will readily understand. Moreover, labour disputes often have a long history, such that those involved typically are intimately familiar with the case at hand. Finally, labour decisions sometimes have to be taken very quickly. When all or some of these factors are in play, the reasons given by a labour law decision-maker may be sparse, bordering on solipsistic. Yet the decision-maker might nonetheless have a claim to authority based on his or her expertise. It is notable that the post-*Dunsmuir* decision which is most closely identified with the culture of authority — *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*<sup>155</sup> — involved judicial review of a labour arbitration decision. But it would be dangerous to assume that comparable latitude will be shown in the labour law field and analogous areas subsequent to *Vavilov*.

Accordingly, the real test of the culture of justification post-*Vavilov* is likely to come in a case or cases involving *technocratic* authority. But the omens from the case law on *political* legitimacy and authority based on *expediency* do not augur well for labour boards and their ilk. After *Vavilov*, deference will have to be earned, not asserted; expertise must be demonstrated, and will not be assumed.<sup>156</sup> Having seen how the culture of authority crept into substantive review, leading to decisions like *Tran* just a few years after “justification, transparency and intelligibility” were said in *Dunsmuir* to be hallmarks of reasonableness, Canadian courts will probably retain their robust post-*Vavilov* commitment to the culture of justification as embodied in *Vavilovian* reasonableness review’s requirements of **reasoned decision-making, responsiveness, demonstrated expertise and contextualism**.

## VI. CONCLUSION

My orientation heretofore has been descriptive and analytical. I have sought to describe and analyze the culture of justification in contemporary administrative law, with particular reference to the majority reasons in *Vavilov*. As I explained in Part II, the importance accorded to **reasoned decision-making, responsiveness, demonstrated expertise and contextualism** helps to enhance understanding of the culture of justification. In Part III, I expanded on the discussion of *Vavilov*, a case concerned with substantive review – the assessment of the reasonableness of administrative decisions – and described how the culture of justification has permeated other areas of administrative law, such as procedural fairness, justiciability and standing. I then ventured, in Part IV, to explain why the culture of

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<sup>155</sup> [2011] S.C.J. No. 62, 2011 SCC 62 (S.C.C.). See its application in *Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2015] F.C.J. No. 1324, 2015 FCA 237, at para. 44 (F.C.A.).

<sup>156</sup> See e.g. *Mattar v. National Dental Examining Board of Canada*, [2020] O.J. No. 779, 2020 ONSC 403, at paras. 51-52 (Ont. Div. Ct.); *Walker v. Canada (Attorney General)*, [2020] F.C.J. No. 223, 2020 FCA 44, at para. 10 (F.C.A.); *Langevin v. Air Canada*, [2020] F.C.J. No. 245, 2020 FCA 48, at para. 18 (F.C.A.).

justification has risen to such prominence in contemporary administrative law; focusing on endogenous rather than exogenous factors I identified the development of general principles of administrative law and the rise in reasoned decision-making as likely contributors. Finally, in Part V, I assessed the future prospects of the culture of justification. Noting that a culture of authority had crept into substantive review in Canadian administrative law in the years leading up to *Vavilov*, I suggested that the majority's approach represents a repudiation of the culture of authority. Those claiming authority based on *political legitimacy* and *expediency* have been given short shrift by Canadian courts in the wake of *Vavilov*. I cautioned that the commitment of *Vavilovian* reasonableness review to the culture of justification is most likely to be tested in cases involving *technocratic* claims of authority, as in the area of labour law, but noted that the omens for the post-*Vavilov* health of the culture of justification look good.

Having bracketed normative questions at the outset, I return to address them now. There are good normative reasons to support a culture of justification in administrative law, grounded in the rule of law and democracy, two of the unwritten principles of the Canadian constitutional order.<sup>157</sup> Although the majority reasons hardly invoke the rule of law in their elaboration of *Vavilovian* reasonableness review, it is not difficult to discern a thick conception of the rule of law at play (or, alternatively, a substantive and not merely formal conception of the rule of law).<sup>158</sup> As Jeffrey Jowell has observed, the rule of law is “a principle of institutional morality”,<sup>159</sup> from which certain commitments follow for a modern liberal democracy with an administrative state: “The equal dignity of citizens, with its implications for fair treatment and respect for individual autonomy, is the basic premise of liberal constitutionalism, and accordingly the ultimate meaning of the rule of law.”<sup>160</sup> On this thick, substantive conception, the rule of law in modern liberal democracies is concerned with the promotion of individual dignity and autonomy, on an equal basis.<sup>161</sup> In terms of judicial review, “the distinctively judicial public-law task . . . is the protection of individual rights and interests against undue encroachment in the name of social interests”.<sup>162</sup> The effort in *Vavilov* to put the individual at the centre of the reason-giving process and the emphasis placed on

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<sup>157</sup> *Dunsmuir* at para. 27.

<sup>158</sup> Paul Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” [1997] *Public Law* 467.

<sup>159</sup> Jeffrey Jowell, “The Rule of Law Today” in Jeffrey Jowell & Dawn Oliver, eds., *The Changing Constitution*, 7th ed. (Oxford: Oxford University Press, 2011) 1, at 19.

<sup>160</sup> T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), at 2.

<sup>161</sup> Tom Bingham, *The Rule of Law* (London: Penguin Books, 2011), at 55.

<sup>162</sup> Peter Cane, “Theory and Values in Public Law” in Paul Craig & Richard Rawlings, eds., *Law and Administration in Europe: Essays for Carol Harlow* (Oxford: Oxford University Press, 2003) 3, at 15.

**responsiveness** to the individual and **reasoned decision-making** as well as the **contextual** nature of reasonableness review reflect a thick, substantive conception of the rule of law.

There is also a thick, substantive conception of democracy at play. A culture of justification is not designed simply to protect individuals, but to empower them. As Dyzenhaus has observed, a deferential approach to judicial review means that decisions can be upheld because they are justifiable “rather than because the conclusion reached by the body happens to coincide with the conclusion that the judges would have considered correct without the benefit of engagement with the administrative body’s reasons”.<sup>163</sup> In other words, a culture of justification empowers administrative decision-makers, giving them the autonomy to flesh out the meaning of the statutes and constitutional provisions they are required to apply; these are the characteristics of **reasoned decision-making** and **demonstrated expertise** at play. And a culture of justification also empowers the individuals who encounter administrative decision-makers. Because an administrative decision-maker must be responsive to the individuals it encounters, it must take on board their views and arguments about the meaning of statutes and constitutional provisions, always attentive to the **context** in which a decision falls to be made. A culture of justification requires or at least provides for the possibility of the “continuous process of discussion” which is the lifeblood of the unwritten constitutional principle of democracy.<sup>164</sup>

This is not to argue that the culture of justification is a panacea,<sup>165</sup> that its full potential will be realized in every case<sup>166</sup> or that the majority reasons in *Vavilov* are beyond reproach,<sup>167</sup> but simply to suggest that the culture of justification deserves the prominence it now has and seems set to enjoy well into the future.

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<sup>163</sup> David Dyzenhaus, “Proportionality and Deference in a Culture of Justification” in Grant Huscroft, Bradley Miller & Grégoire Webber, eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) 234, at 255.

<sup>164</sup> *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 68 (S.C.C.). See generally Henry Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (Oxford: Oxford University Press, 2002).

<sup>165</sup> See the discussion of Raso’s work at footnote 40 above.

<sup>166</sup> See e.g. the skeptical accounts of administrative discretion in Robert Goodin, *Reasons for Welfare: The Political Theory of the Welfare State* (Princeton, NJ: Princeton University Press, 1988); John Gilliom, *Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy* (Chicago: University of Chicago Press, 2001); and Michael Adler, *Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK* (Aldershot, UK: Palgrave Macmillan, 2018), as well as the analysis in Bernardo Zacka, *Where the State Meets the Street: Public Service and Moral Agency* (Cambridge, MA: Harvard University Press, 2017).

<sup>167</sup> Paul Daly, “The *Vavilov* Framework and the Future of Canadian Administrative Law” (2020) 33 Can. J. Admin. L. & Prac. 111.