

Looking Beyond Standard of Review: Towards a Unified Theory of Administrative Law¹

I. Introduction:

Be it resolved: Canada lacks a unified theory of administrative law.

Generally speaking, the recent focus of much of the administrative law community – practitioners, courts, academics – has been almost exclusively on issues relating to the standard of review. The anticipation that built on Twitter in advance of the release of the Supreme Court of Canada’s decision in *Minister of Citizenship and Immigration v Vavilov*² in the late fall of 2019 is just one sign of the degree to which questions of standard of review have dominated the Canadian administrative law landscape in recent years.

There is no doubt that there is a need for a consistent and easily applicable legal framework for determining the standard of review applicable to administrative decisions, and that the concerns over that lack of clarity reflected in the decade’s worth of jurisprudence between *Dunsmuir* and the *Vavilov* were warranted. However, this almost exclusive focus on the standard of review has arguably caused us to give less attention to number of other equally important aspects of administrative law, the principles that underlie them, and how they relate to the broader issues of access to justice and fairness, and the constitutionally-mandated judicial review of government decision-making.

These questions include, for example, what to make of the fact that litigants are increasingly seeking to subject “political” and “private” decisions to judicial review, and the related issues of standing to challenge government or private decision-making. How does immunity from judicial review in certain circumstances – parliamentary privilege, for example – fit within what we understand to be the purpose of administrative law? Is judicial review the best mechanism for addressing breaches of the *Charter* by administrative decision-makers (or those found in their enabling statutes)? How do we properly deal with the tensions between the rule of law and legality, on the one hand, and deference to “experts”, on the other, and are all decision-makers alike in this regard? How can decision-makers ensure that their decisions are both procedurally fair, and yet timely? Is fair decision-making possible in the administrative law realm, and how should we deal with delays? The list goes on.

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² 2019 SCC 65 (“*Vavilov*”).

Each of these various subsets of administrative law have their own rationales, which guide the courts and litigants in the discrete adversarial disputes in which they arise. However, because of that same adversarial context, how all of these same issues, at a high level, relate to each other, and to the overarching goals of the Canadian administrative justice system generally go unaddressed.

These questions nevertheless all ask us to ponder, as a matter of administrative law theory, what is the goal of judicial review, and administrative law more generally, in Canada, and how best do we go about reaching that goal in a principled fashion? Is such a unified theory, which “works” in relation to all decision-makers, even possible? How do we reconcile the wide ranging “machinery of government” decision-making that courts are empowered to supervise, with the relatively narrow grounds upon which they are permitted to do so. Or, is it enough to simply agree on a core set of underlying principles that will animate the legislature and the judiciary’s approach when dealing with the discrete aspects of administrative law that will inevitably arise on a case by case basis?

This paper is not intended to provide a comprehensive discussion of each of these issues, and the statutes and cases discussed are intended to provide illustrations and examples, as opposed to a complete analysis. Rather, this paper’s goal is modest: to flag the various issues surrounding some of the less prominent issues within administrative law, but that nevertheless give insight as to why we have the system that we do. It is to prompt discussions, with the hope that when given an opportunity to take a step back, we can give thought to whether the rationales and justifications for the various doctrines that make up administrative law are sound, principled, and internally consistent.

II. Administrative Law’s Preoccupation with Standard of Review:

Culminating in *Vavilov*, the last decade of Canadian administrative law jurisprudence has been predominantly, though perhaps understandably, focused on questions of the standard of review. For example, of the 100 or so cases decided by the Supreme Court of Canada since *Dunsmuir* was released in 2008 that deal with administrative law,³ just over 60 of them relate to a dispute or issue relating to the applicable standard of review.⁴

³ The sample was determined by consideration of whether the headnote for the case referenced “Administrative Law” and “Standard of Review” and is therefore admittedly unscientific.

⁴ Attempting to determine a similar ratio for provincial appellate courts, provincial superior courts, and the federal courts is beyond the scope of this paper. However, it is anticipated that the ratio, and the predominance of standard of review as an issue, would be similar.

There has already been considerable post-*Vavilov* jurisprudence dealing with the standard of review of administrative action – be it at common law or through a statutory appeal mechanism – as provincial superior and appellate courts and the federal courts equally attempt to flush out and add further content to the “new” standard of review framework. Academic commentary continues to focus on the issue.

However, when we shift the focus to public law more generally, the scope of *Vavilov* is actually quite narrow, it focuses only on the standard of review framework, and even then only on two aspects of that doctrine.⁵

[2] In these reasons, we will address two key aspects of the current administrative law jurisprudence which require reconsideration and clarification. First, we will chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision. Second, we will provide additional guidance for reviewing courts to follow when conducting reasonableness review. The revised framework that this Court articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190: that judicial review functions to maintain the rule of law while giving effect to legislative intent. We will also affirm the need to develop and strengthen a culture of justification in administrative decision making.

Indeed, as Professor Daly has noted,⁶ *Vavilov* left several issues relevant to the standard of review itself unanswered, including the treatment of internal appeals, administrative decisions allegedly infringing the *Charter*, and procedural fairness.

Whether one agrees with the approach of the Supreme Court majority in *Vavilov*, it’s hard to argue that the clarity that *Vavilov* has sought to bring to the standard of review framework was necessary. Moreover, the standard of review framework – which acts as the manifestation of our understanding of the relationship between statutory decision-makers and the courts who review their decisions for legality – tells us a lot about the broader purposes of judicial review and, by extension, administrative law more generally. However, there are many other issues in the field of administrative law that equally speak to the goals and purposes of our system of administrative law, but often receive less attention.

III. A Hodge Podge of Doctrines:

Given the dominance of the question of standard of review in administrative law generally, it is perhaps easy to understand why many other principles or issues in administrative law may have received less attention, in both the jurisprudence and the commentary. Again, the adversarial

⁵ *Vavilov*, at para. 2, emphasis added.

⁶ Paul Daly, “Unresolved Issues After *Vavilov*”, *Administrative Law Matters*

nature of the court system means that rarely will a case present every single aspect of administrative law for adjudication – that is the stuff of law school exam problems. For this reason, these various doctrines have arguably been adjudicated and developed essentially in silos. However, when examined more closely they offer further insight into the principles and rationales that animate Canadian administrative law, not always consistently.

a. Creating Administrative Decision-Makers:

It was originally somewhat controversial that a government might wish to vest a body other than a court with the ability to adjudicate disputes. However, over time, we have come to not only recognize the benefits of such a system, but accept that in the modern regulatory state, it is often necessary for governments to create statutory decision-makers and review bodies to implement various policies. Passages like the following from *Newfoundland Telephone Co.* are found throughout the Canadian administrative law jurisprudence:

“Administrative boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end. Hospital and medical boards regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and the operation of morticians who are concerned with our mortal remains. Marketing boards regulate the farm products we eat; transport boards regulate the means and flow of our travel; energy boards control the price and distribution of the forms of energy we use; planning boards and city councils regulate the location and types of buildings in which we live and work. In Canada, boards are a way of life. Boards and the function they fulfill are legion.”⁷

Because the existence of a vast regulatory state is no longer controversial, we rarely have reason to revisit the question of why we delegate decision-making authority, and how that impacts questions of expertise and the court’s jurisdiction on review. How should it? Can we have a one-size fits all approach to administrative law, given the breadth of decision-makers that exist in the provinces and within the federal sphere? Is there a tension between rule of law, and perceived expertise? Does it make sense that all exercises of public authority are subjected to judicial review, regardless of the character of the decision, only to compliment that wide jurisdiction to hear judicial reviews with the narrow basis on which courts are permitted to intervene?

Very broadly speaking, there are two spheres of subject matter jurisdiction that an administrative actor may be vested with by the government. The first reflects the transfer of what are essentially private disputes out of the court system and the common law, and into a

⁷ *Newfoundland Telephone Co v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, at p. 634-35 (“***Newfoundland Telephone***”).

statutory regime for adjudication. These would include labour and employment disputes, workplace injuries, landlord and tenant disputes, and human rights complaints. Prior to the advent of the regulatory state, disputes of this nature would have been decided pursuant to contract or tort, or subject to no right or remedy at all, and adjudicated exclusively in the courts. With the creation of this form of decision-maker, private disputes are essentially turned into public ones. The second is the creation of regimes for dealing with disputes between individuals and the state itself. These include immigration matters and all forms of government licensing, among many others. In this sense, the administrative reach of government is expanded, with various bodies and decision-makers created to implement it.

Furthermore, while the courts dealing with administrative law matters generally speak of administrative “tribunals”, the fact of the matter is that the “administrative state” includes a wide range of decision-makers. As Justice Binnie noted in *Dunsmuir*:⁸ “The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a “holistic” approach) also in the case of a minister, a board, a public servant, a commission, an elected council or other administrative bodies and statutory decision makers”. It is important to note, but is often not explicitly recognized, that many administrative decisions, perhaps even most of them, “are not made in an adjudicative context, and the affected parties are not always given a full opportunity to make submissions – much less file extensive evidence, call witnesses, or tender expert reports – prior to a decision being rendered,”⁹ the process that we often default to when thinking about administrative decision-making.

However, the range of administrative decision-making in Canada can “range from the purely adjudicative to the purely policy-based or quasi-legislative, and all manner of decisions falling somewhere in between”.¹⁰ On the more legislative, non-adjudicative end of the spectrum, decision-making includes city bylaws, demotions of principals, exercises of ministerial discretion, policy decisions, Cabinet decisions, and prisoner transfers, among many, many others.¹¹ The context in which these decisions are made varies considerably¹² and it is intended that they affect broad sections of the public, and in certain instances the public at large. These

⁸ *Dunsmuir v New Brunswick*, 2008 SCC 9, at para. 123, emphasis added.

⁹ Wihak & Oliphant, “Evidentiary Rules in a Post-*Dunsmuir* World: Modernizing the Scope of Admissible Evidence on Judicial Review” 28-3 *CJALP* 259 at 323, (“**Wihak & Oliphant**”) p. 336.

¹⁰ Wihak & Oliphant, at p. 336.

¹¹ See, e.g., Wihak & Oliphant, at pp. 336-337.

¹² Wihak & Oliphant, at p. 337.

“decision-makers” hardly fit the definition of “tribunals”, or the model of judicial review set out for tribunals.

Historically, there has generally been understood to be four reasons why governments might wish to create decision-making bodies outside of the courts, or recognize the authority of government actors other than courts and judges to make those types of decisions. First, is for reasons concerned with expertise. A specialist body is created and either has or acquires specific subject matter expertise in the area over which they regulate. Examples include food marketing; transportation; telecommunications or broadcasting; energy; and labour relations. Second, is a desire for innovation. These bodies do not just decide disputes, but rather are also tasked with developing the policies, practices and remedies that will be used in implementing the mandate given to them by the government. The third is to promote initiative. Courts are passive. They only hear those cases that the parties bring to them to decide. Some tribunals, by contrast, are given the authority to investigate matters on their own, and may refer the matter to a tribunal for resolution. The fourth relates to volume and cost. Statutory regimes like workers compensation, employment insurance, income tax assessment, and immigration, among many others, require adjudication with a tremendous frequency that would choke the capacity of the courts to resolve them in a timely manner.¹³

Until *Vavilov*, this rationale of “expertise” had come to dominate Canadian courts’ (and some academics’) understanding of the overarching justification for the administrative state. The following passage from *Canada v PSAC* is illustrative:

“In a complex society such as ours, administrative boards and tribunals are increasingly necessary. The experience and expert knowledge of some boards surpasses that of the courts. They provide a mechanism for speedy resolution of complex, and frequently technical, matters. The tribunals, generally composed of experts in their fields, act independently of government. Two prime examples where the expertise of an administrative body is invaluable are the fields of labour relations and energy”.¹⁴

However, in *Vavilov*, the majority moved away from an overarching justification based on “expertise”, and rejected the view, previously so definitively held a mere six years earlier in *Edmonton East*¹⁵ that “expertise simply inheres in an administrative body by virtue of the specialized function designated for it by the legislature.”¹⁶ Rather, the Court appears to have reignited recognition of “the fact that the specialized role of administrative decision makers lends

¹³ See generally Peter Hogg, *Constitutional Law of Canada*

¹⁴ *Canada (Attorney General) v PSAC*, [1993] 1 SCR 941, at pp. 952-53.

¹⁵ 2016 SCC 47.

¹⁶ *Vavilov*, at para. 28.

itself to the development of expertise and institutional experience is not the only reason that a legislature may choose to delegate decision-making authority.”¹⁷ The Court noted that other compelling rationales for the legislature to delegate the administration of a statutory scheme to a particular administrative decision maker exist, including the decision maker’s proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly and efficiently, and the ability to provide simplified and streamlined proceedings intended to promote access to justice.¹⁸

While the purported justification for more or less deferential approaches to the judicial review of administrative decision-making will often be rooted in what the Court views, at any given time, as the rationale for the creation of these bodies in the first place, what is fundamentally at issue is the balance between government efficiency and specialization, and the rights of citizens to be governed in accordance with the rule of law. Courts have an obligation to police the legality of government decision-making to ensure compliance with the rule of law. But they must do so in a way that does not involve them stepping in the shoes of the decision-maker and substituting their view. This view should account for the diversity of state decision-making in Canada.

In theory, the standard of review analysis has tried to account for the fact that no two decision-makers are identical, with the understanding that reasonableness takes its colour from context.¹⁹ As the Court noted in *Vavilov*, it had an obligation ensure that the framework it adopts “accommodates all types of administrative decision making.”²⁰ Justice Binnie’s administrative law jurisprudence may reflect the most sensitivity to the vast array of decision-making that Canadian administrative law must account for, and no more so than in his reasons in *Canada (Citizenship and Immigration) v Khosa*.²¹

“s. 18.1 of the *Federal Courts Act* must be sufficiently elastic to apply to the decisions of hundreds of different “types” of administrators, from Cabinet members to entry-level *fonctionnaires*, who operate in different decision-making environments under different statutes with distinct grants of decision-making powers. Some of these statutory grants have privative clauses; others do not. Some provide for a statutory right of appeal to the courts; others do not. It cannot have been Parliament’s intent to create by s. 18.1 of the *Federal Courts Act* a single, rigid Procrustean standard of decontextualized review for all “federal board[s], commission[s] or other tribunal[s]”, an expression which is defined (in s. 2) to include generally all federal administrative decision-makers. A flexible and

¹⁷ *Vavilov*, at para. 29.

¹⁸ *Vavilov*, at para. 29.

¹⁹ *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (“*Khosa*”), at para. 59. *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (“*Catalyst*”), at para. 18.

²⁰ *Vavilov*, at para. 11.

²¹ *Khosa*, at para. 28, emphasis added.

contextual approach to s. 18.1 obviates the need for Parliament to set customized standards of review for each and every federal decision-maker.”

Because s. 18.1 “covers the full galaxy of federal decision-makers”, the approach to standard of review at least in relation to federal boards, tribunals and commissions under the legislative code of the *Federal Courts Act* had to “retain the flexibility to deal with an immense variety of circumstances.”²² The Court in *Vavilov* seemed to perhaps implicitly recognize the failure of the *Dunsmuir* framework in this regard.

But to me, this raises an obvious question. If we do not accept a one-size-fits-all approach or justification for the *creation* of administrative decision-makers – tribunals or otherwise – why would we assume that a one-size-fits-all approach to the review of their decisions would be appropriate.²³

b. Which decisions are subject to judicial review, and who can challenge them: Justiciability, Standing, and Access

Another issue in administrative law is the question of which “public” decisions are subject to judicial review and on what basis, and who is permitted to challenge them. On what basis can we justifiably deny a person the right to seek judicial review of a “public” decision that affects them? With a renewed emphasis on the difference between public and private disputes, there has now been a closing of the door on what had been a prior willingness by some courts to entertain applications for judicial review of the decisions of non-governmental or statutory actors, such as churches, political parties, and other voluntary associations. Those cases had also recognized a free standing right to challenge private decisions on the basis of procedural fairness. By contrast, some public disputes are nevertheless either explicitly or effectively immunized from judicial review, despite reflecting an exercise of statutory or public discretion. Finally, the *Charter* is clearly impacting how courts conduct judicial review, who is entitled to challenge those decisions, and the remedies courts can grant as a result, whenever the *Charter* is involved.

²² *Khosa*, at para. 33. See also sections 58 and 59 of *The Administrative Tribunals Act* of British Columbia. The *ATA* distinguishes “expert” tribunals from non-expert tribunals on the basis of whether their enabling statute includes a privative clause. However, the only real difference is that for expert tribunals findings of fact are reviewed on the standard of patent unreasonableness, while for non-expert tribunals findings of fact are reviewed to determine whether there is evidence to support them and they are otherwise reasonable.

²³ I note that there, generally speaking, a uniform *legislative* approach to the standard of review of administrative decision-making. Statutory appeal rights and privative clauses may exist within a particular individual statute.

Public vs. private disputes:

Just because a dispute has a public dimension does not make it a matter of public law, and thereby subject to judicial review. However, until recently, there was a line of cases primarily out of Ontario that had “allowed an applicant to proceed with an application for judicial review of a decision of a voluntary association.”²⁴ These cases took jurisdiction over judicial review applications on the basis of either the perceived “public importance” of the decision, or a belief in the existence of a free-standing right to procedural fairness. This is perhaps understandable, given that much of what is private overlaps with what is public. In *Milberg v North York Hockey League*,²⁵ the Court observed:

“What amounts to a ‘public law’ decision so as to engage the court’s authority to review under the *JRPA* is hardly easy to define with precision when reviewing the jurisprudence. The courts appear to have wrestled with the concept over the years without a clear consensus. Private actors often engage in activities that have a very “public dimension”. At the same time, the government engages in private relationships with individuals and corporations. Because of these parallel relationships, the line between public law and private law is often difficult to draw.”

However, the Supreme Court of Canada recently settled the debate in *Highwood Congregation v Wall*²⁶ where it held that judicial review is not available for the decisions of voluntary organizations, absent the existence of an underlying legal right.²⁷ The Court held that judicial review is limited to public decision-makers:

[14] Not all decisions are amenable to judicial review under a superior court’s supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature – such as renting premises and hiring staff – and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising “a power central to the administrative mandate given to it by Parliament”, but is rather exercising a private power (*ibid*). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

[15] Further, while the private law remedies of declaration or injunction may be sought in an application for judicial review (see, for example, *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(2)(b); *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1., s. 2(1)2; *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, ss. 2 and 3(3)), this does not make

²⁴ *Trost v Conservative Party of Canada*, 2018 ONSC 2733 (“**Trost**”), at para. 27, citing among other cases *West Toronto United Football Club v. Ontario Soccer Association*, 2014 ONSC 5881.

²⁵ 2018 ONSC 496

²⁶ *Highwood Congregation v. Wall*, 2018 SCC 26 (“**Wall**”).

²⁷ See, e.g., *Aga v Ethiopian Orthodox Tewahedo Church of Canada*, 2020 ONCA 10, at para. 34.

the reverse true. Public law remedies such as *certiorari*, may not be granted in litigation relating to contractual or property rights between private parties: *Knox*, at para. 17. *Certiorari* is only available where the decision-making power at issue has a sufficiently public character: D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 1:2252.

Justice Rowe rejected the cases where judicial review of private decisions was allowed, on the basis that they failed to recognize that judicial review is, at bottom, about state decision making:

“The problem with the cases that rely on *Setia* is that they hold that where a decision has a broad public impact, the decision is of a sufficient public character and is therefore reviewable: *Graff*, at para. 18; *West Toronto United Football Club*, at para. 24. These cases fail to distinguish between “public” in a generic sense and “public” in a public law sense. In my view, a decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker’s exercise of power. Simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term. Again, judicial review is about the legality of state decision making.

Therefore, the “proposition that private decisions of a public body will not be subject to judicial review does not make the inverse true”, and “it does not follow that “public” decisions of a private body – in the sense that they have some broad import – will be reviewable. The relevant inquiry is whether the legality of state decision making is at issue.”²⁸ There is no right to judicial review in the “absence of some government action or some exercise of power under a statute.”²⁹ The Court also conclusively held that there is no free-standing right to have decisions reviewed for procedural fairness.

In this sense, judicial review could in some ways be considered a decidedly narrow remedy. It applies only to the subset of all disputes that may arise within Canadian society that are the product of the exercise of statutory or government authority. Indeed, if judicial review was expanded to include all decisions that somehow raised a fairness or “public importance” question, the rationale for the supervisory role of the courts being rooted in s. 96 of the *Constitution Act, 1867* and the need to police the legality of state action loses any relevance. A new rationale would have to be determined.

The fact that, at various times, litigants have attempted to raise these kinds of questions in the courts, perhaps shows the extent to which our “rights-based” society seeks vindication and adjudication in the courts. However, as we will see, within that category of state action, virtually

²⁸ *Wall*, at para. 21.

²⁹ *Trost*, at para. 25.

everything is subject to review by the courts, in the sense that there is a “right” to review of the decision in the courts.

Justiciability:

Generally speaking, in Canada there are very few exercises of public power that are not at least subject to an application for judicial review, in the sense that the reviewing court will have jurisdiction over the application brought: those at the purely political, executive end of the spectrum of administrative decision-making, or that reflect a pure exercise of the Crown prerogative where there is no underlying right or legitimate expectation. In *Democracy Watch*, in the context of discussing whether to hear an appeal that was alleged to be moot, the BC Court of Appeal noted the inherent reluctance of courts to adjudicate what are inherently political disputes:³⁰

[14] Finally, I note that this case raises issues concerning the relationship of the three branches of government – executive, legislative and judicial. It thrusts the court into what is essentially a political dispute. While courts must not be reluctant to address political issues where they are required to do so in order to resolve genuine legal disputes, they also need not go out of their way to deal with them. There is a real sense in which, in this case, the court is being asked to interfere with what are, at least arguably, privileges of the legislature. Given that it is unnecessary to enter into that area to resolve any live dispute, it is my view that we should not do so.

Indeed, there are a few exercises of the Crown prerogative – those that do not give rise to concrete legal rights or legitimate expectations – that will remain immune from judicial review: the hiring and firing of ministers; the bestowal of honours; the making of treaties; the defence of the realm; the exercise of the pardon, or mercy, power; and the dissolution of Parliament.

In *Hupacasath First Nation v. Canada*,³¹ a first nation challenged Canada’s decision to enter into a treaty with China, on the basis that it had a legal right, pursuant to the Crown’s duty to consult, to be consulted first. Traditionally, the entering into treaties by the executive falls under the prerogative over foreign affairs and is not justiciable:

“In rare cases, however, exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis. In those rare cases, assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts’ ken or capability, taking courts beyond their proper role within the separation of powers. For example, it is hard to conceive of a court

³⁰ 2017 BCCA 366 (“*Democracy Watch BCCA*”), at para. 14.

³¹ *Hupacasath First Nation v. Canada*, 2015 FCA 4 (“*Hupacasath*”).

reviewing in wartime a general's strategic decision to deploy military forces in a particular way."³²

However, it was the raising of a legal right – as opposed to a pure challenge to the political decision itself – which made the claim at least in theory justiciable.³³

In *Black v Canada (Prime Minister)*,³⁴ the Prime Minister at the time had intervened with the Queen to oppose the appointment of Mr. Black to the House of Lords. The question was whether such an action, as being an exercise of the Crown prerogative, was justiciable. The Ontario Court of Appeal held that, as the Prime Minister had been exercising the “honours” prerogative, and there was no legal right to or legitimate expectation in a peerage (or in receiving honours generally), the issue was political in nature and was not justiciable.

Interestingly, an exercise of the Crown prerogative that is generally not justiciable, such as the authority over foreign affairs, *can* be made subject to judicial review, if the *Charter* is engaged. In *Operation Dismantle*,³⁵ a challenge was brought to the Cabinet decision to allow the United States to test a cruise missile in Canadian territory.³⁶ While this was a political decision, its implications were said to infringe the *Charter*. On the basis that the *Charter* was engaged, the claim was in theory justiciable, however because the facts pled in support of the claim that the breach of s. 7 was caused by Cabinet's decision were too tenuous, the claim was dismissed.

Therefore, generally speaking, courts are reluctant to use the threshold question of justiciability to prevent a citizen from seeking to challenge executive government decision-making. This is particularly the case when it is alleged that *Charter* rights or values are implicated by the decision. Provided that a decision is the product of state action that has, at minimum, affected a legal right or a legitimate expectation, the decision will be justiciable.

Charter-impacting decisions – is judicial review the right procedure?

Beyond making the non-justiciable justiciable, the *Charter* is having a meaningful impact on judicial review in cases where it is said to be engaged. In *Dore v Barreau du Quebec*,³⁷ the Supreme Court determined that when administrative decisions engage *Charter* rights and values, those decisions should be reviewed by courts under the judicial review framework,

³² *Hupacasath*, at para. 66.

³³ The claim was ultimately dismissed on the basis that a sufficient causal connection between the alleged effects of the treaty and the legal right claimed was not established.

³⁴ *Black v. Canada (Prime Minister)* (2001), 54 OR (3d) 215 (ONCA).

³⁵ *Operation Dismantle v. The Queen*, [1985] 1 SCR 441.

³⁶ It is important to note that this claim was brought pursuant to s. 32 of the *Charter*, not common law judicial review.

³⁷ *Dore v Barreau du Quebec*, 2012 SCC 12.

rather than through the lens of the *Oakes* test. Separate and apart from whether *Dore* should remain the adjudicative framework for determining whether an administrative decision infringes *Charter* rights and values – a matter that the Supreme Court may see fit to revisit – it is worth noting that, when examined closely, general rules about judicial review are not always adhered to when the *Charter* is involved. The issues that the court can consider may expand, standing may be granted on the basis of public interest, the court’s remedial authority expands, and there may be more legitimacy in the court admitting extrinsic evidence, over and above what might be otherwise be included in the “record” before the decision-maker. The processes and the results do not always look like what we ordinarily expect of judicial review, and this extends to the courts’ treatment of the scope of the issues, the admissible evidence, and the available remedies.

Take, for example, the *Insite* decision,³⁸ where the applicants challenged the Minister of Health’s refusal to exercise his discretion to grant an exemption to *Insite* under the *Controlled Drugs and Substances Act* to permit it to continue to operate its life-saving services. The failure to grant the exemption was challenged on both *Charter* (s. 7) and federalism grounds. The Court determined that the Minister’s failure to exercise his discretion to grant the exemption infringed s. 7.³⁹ However, rather than remitting the matter back to the Minister for re-consideration, which would have been the traditionally appropriate remedy, the Court ordered that the exemption be granted. In doing so, it noted there was nothing to be gained and much to be risked if the matter was sent back for reconsideration. Though *Insite* was decided prior to *Dore*, it made no mention of administrative law principles or case law, including *Multani v. Commission scolaire Marguerite-Bourgeoys*.⁴⁰ The Court engaged in a free-standing *Charter* analysis of the exercise of ministerial discretion.

And while *Nova Scotia v. Doucet-Boudreau*⁴¹ did not involve the judicial review of administrative action *per se*, it nevertheless raised the constitutionality of the state’s failure to sufficiently provide and fund minority language education. A remedy was sought pursuant to s. 24(1) of the *Charter*, and resulted in an otherwise extraordinary remedy: the supervision of the implementation of an order placing a positive obligation on the government of Nova Scotia to devote funds and construct schools, in order to remedy a breach of s. 23 of the *Charter*. Put another way, the court’s remedy resulted in a significant intrusion on what would otherwise be

³⁸ *PHS Community Services Society v Canada (Attorney General)*, 2011 SCC 44 (“*Insite*”).

³⁹ No s. 1 argument was advanced.

⁴⁰ 2006 SCC 6.

⁴¹ 2003 SCC 62.

considered the discretion of the legislature and the executive over education policy and the expenditure of public funds.

It is also worth noting that the types of cases where *Charter* issues are present in administrative decision making are not limited to adjudicative or tribunal settings, and the inherent opportunity to contribute to the decision-maker's record and to make meaningful submissions before the decision is made that those settings typically generate.⁴² Generally speaking, however, judicial review is limited to review on the "record" before the decision-maker. When exercises of non-adjudicative discretion – such as the adoption of a policy, bylaw, order, guideline, or other statutory instrument-like "decision" – are at issue, the inherent limits on the "record" before a decision-maker can make extrinsic evidence going to the *Charter* issue necessary. For example, in these cases:

"evidence may be necessary both with respect to establishing the purpose and intention of the legislative or rule-making authority (i.e. legislative facts), and in order to identify the 'severity of the interference' with the *Charter* rights or interests inflicted by the administrative decision that must be balanced against the statutory purpose (i.e. social and adjudicative facts)

...

determining whether an administrative decision that engages *Charter* rights and values is reasonable under *Dore* may require extensive discussion of the statutory purpose of a given legislative regime, as well as testing assertions regarding the impact of certain public action on the rights and freedoms of affected parties."⁴³

Indeed, in recognition of the limits on meaningful judicial review for *Charter* compliance when a narrow definition of the "record" is used in relation to non-adjudicative decisions, Courts have gone so far as to create an exception to the scope of the record allowing for the admissibility of extrinsic evidence – to account for some of the inherent difficulties in adjudicating *Charter* claims in the context of judicial review proceedings.⁴⁴ In *Da'naxda'xw/Awaetlala First Nation v British Columbia (Minister of Energy, Mines and Natural Gas)*⁴⁵ the court noted that "that this is

⁴² Wihak & Oliphant, at p. 345.

⁴³ Wihak & Oliphant, at p. 343.

⁴⁴ Some courts have begun to view affidavit evidence going to show constitutional harms as an "exception" to the general rules with respect to admissible extrinsic evidence on judicial review. See *Lockridge v Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2316 at para. 54 ("the nature of the applicants' submissions fall within the exception to the general rule... [because] (t)he applicants assert that the Decision breached their ss. 7 and 15 *Charter* rights"); *Alghaithy v University of Ottawa*, 2011 ONSC 5879, at para. 29 ("...as with an allegation of breach of natural justice, affidavit evidence must also be permissible to supplement the record to demonstrate a validly raised allegation of constitutional error").

⁴⁵ 2015 BCSC 16, at para. 176.

not a ‘normal’ judicial review case, where there is an application to a tribunal or decision-maker, and a decision (sometimes after a hearing) based on the materials provided (the “record”), which is then the subject of judicial review”. As a result, extrinsic evidence was admitted.

When the *Charter* is involved, the courts are more willing to intrude on the legislative and executive functions of government in fashioning a remedy, and they are more likely to admit extrinsic evidence and not restrict their review of the decision to the record before the decision-maker. We may think this is fine, because as part of the supreme law of Canada, the *Charter* demands that courts exercise a more robust supervisory function over state action. However, it should be acknowledged that none of this resembles “traditional” judicial review, but rather an approach that may sometimes be at odds, *Dore* notwithstanding, with the generally more deferential approach that courts are to take to administrative decision-making.

This also raises questions, particularly when the administrative decision in question involves the *Charter* validity of a policy, as to whether judicial review is the appropriate procedure to determine the issue in the first place. A recent example is *Williams v Trillium Gift of Life Network*.⁴⁶ In *Williams*, the applicant had been denied a place on a liver transplant list on the basis that he did not meet the criteria set out in the policy, because he was an alcoholic and could not meet the sobriety criteria. Rather than seeking judicial review of the denial of a place on the list, the applicant sought a declaration pursuant to s. 52 of the *Constitution Act, 1982* that the policy itself violated the s. 7 and s. 15 rights under the *Charter*. Trillium applied to have the application transferred to the Ontario Divisional Court, on the basis that it involved the review of the exercise of a statutory power and was therefore properly characterized as an application for judicial review.

In dismissing Trillium’s application, the Court noted that the specific relief being sought by the applicants was a declaration pursuant to s. 52(1) of the *Constitution Act, 1982*, and that judicial review legislation could not oust the jurisdiction of the superior court to grant a *Charter* remedy.⁴⁷ The applicant was “doing more than ‘raising *Charter* issues in support of their arguments’” but, rather, “seeking a constitutional remedy.”⁴⁸ The issue was not framed as a question of whether the Policy was reasonable, because it did not reflect a proper balancing of *Charter* rights against the statutory objective but, rather, the question of whether the Policy was

⁴⁶ *Williams v Trillium Gift of Life Network*, 2019 ONSC 6159 (“**Williams**”)

⁴⁷ *Williams*, at para. 33.

⁴⁸ *Williams*, at para. 35.

invalid, because it reflects an unjustifiable infringement of sections 7 and 15(1) of the *Charter*. It was allowed to proceed in the superior court on that basis.

Immunity

There are some exercises of public decision-making that the *Charter cannot* make subject to judicial review. One example is parliamentary privilege. Exercises of parliamentary privilege are immune from judicial review, even for *Charter* compliance, regardless of whether the subject matter of the claim would be justiciable if the decision-maker were not protected by the privilege. In *Chagnon*⁴⁹ the Supreme Court of Canada noted the fundamental incompatibility between parliamentary privilege and judicial review:

[24] When tethered to its purposes, parliamentary privilege is an important part of the public law of Canada (see *Vaid*, at para. 29(3)). The insulation from external review that privilege provides is a key component of our constitutional structure and the law that governs it. Judicial review of the exercise of parliamentary privilege, even for *Charter* compliance, would effectively nullify the necessary immunity this doctrine is meant to afford the legislature (*New Brunswick Broadcasting*, at pp. 350 and 382-84; *Vaid*, at para. 29(9)). However, while legislative assemblies are not accountable to the courts for the ways in which they exercise their parliamentary privileges, they remain accountable to the electorate (Chaplin, at p. 164).

In *Mclver v Alberta (Ethics Commissioner)*,⁵⁰ a sitting member of the Legislature sought judicial review of a decision of the Alberta Ethics Commissioner, which made findings and recommendations regarding Mr. Mclver's breach of the Alberta conflicts of interest legislation. The Court approached the matter as being whether the Ethics Commissioner's decision fell within the scope of parliamentary privilege. If it did, then the matter was immune from judicial review. It mattered not that Mr. Mclver claimed that his own rights to freedom of expression were engaged by the decision:

[50] In this case two parliamentary privileges have collided: Mr. Mclver's privilege of free speech and the Legislative Assembly's privilege to regulate and discipline its members. The Respondents argue that the powers of adjudication when these two privileges conflict is held by the Legislative Assembly, not the Court. Mr. Mclver argues that historically it has been clear that the parliamentary privilege over internal regulation should not be used as a sword to police Question Period in this manner.

Indeed, immunity from judicial review by virtue of parliamentary privilege extends to statutory officers of Parliament or a legislature, and not just to the House and its members. Statutory officers exercise statutory authority – having been created by the Legislature, they derive their

⁴⁹ *Chagnon v Syndicat de la fonction publique et parapublique du Quebec*, 2018 SCC 39 at paras. 23-25.

⁵⁰ *Mclver v. Alberta (Ethics Commissioner)*, 2018 ABQB 240 ("**Mclver**").

authority from statutes. The only difference is that they report to the Legislature, which brings them under the umbrella of parliamentary privilege, and therefore immune to judicial review.

In *Democracy Watch v. British Columbia (Conflict of Interest Commissioner)*,⁵¹ the underlying administrative proceeding was an investigation by the Conflict of Interest Commissioner of British Columbia, an officer of the Legislature, into the fundraising activities of the then-Premier of the province. After an investigation, the Commissioner found that the conduct did not constitute a conflict of interest under the applicable legislation and Democracy Watch sought judicial review. The Commissioner defended the judicial review application on the basis that his proceedings are protected by parliamentary privilege, and were therefore immune from judicial review. The Court agreed:

[35] Nor do I accept the petitioner's submission that *Dunsmuir* has application to the present matter. *Dunsmuir* dealt with judicial review of decisions made by administrative tribunals. An "officer of the Legislature" cannot be equated with an administrative tribunal.

[36] There is an abundance of high authority against the petitioner's position on jurisdiction. It is for the Legislature to consider the conduct of its officers, when they are performing their assigned role, not the courts.

Though just one exception, and one that is clearly well-grounded in history and the separation of powers, the immunity from judicial review of action that falls within the scope of parliamentary privilege, even when the *Charter* is engaged, is nevertheless an exception to what is at least generally understood to be the purpose of judicial review.

Finally, there are some types of administrative decision-making that though clearly justiciable, they are so far down the legislative end of the spectrum that the level of deference afforded to those bodies when their bylaws are challenged for reasonableness makes them, arguably, effectively immune from judicial review. Prime examples are municipal bylaws.

In *Catalyst Paper*,⁵² the Court held that the power of the courts to set aside municipal bylaws is narrow, and limited to ensuring the lawful exercise of power conferred by the legislature. The test is whether the bylaw is one that a reasonable body could have passed, taking into account the broader social, economic and political issues. The deference to be shown to municipal councils is significant, based on the legislative, non-adjudicative function they perform when passing bylaws:

⁵¹ 2017 BCSC 123, appeal dismissed on the basis of mootness in *Democracy Watch BCCA*.

⁵² *Catalyst*, at paras. 9, 15.

[19] The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. “Municipal governments are democratic institutions”, *per* LeBel J. for the majority in *Pacific National Investments Ltd. V. Victoria (City)*, 2000 SCC 64, [2000] 2 SCR 919, at para. 33. In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.

Courts “reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws.”⁵³ As such, “only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside”.

The Supreme Court has held that municipal bylaws are subject to the same common law judicial review framework as all other administrative decision-makers, despite reflecting a function that is decidedly legislative in nature and are clearly entitled to a nearly insurmountable level of deference as a result. The attempt to force the judicial review of municipal bylaws into a one-size fits all view of the relationship between exercises of statutory authority and review by the course adds to the evidence of the struggle to identify a principled, unified theory of administrative law.

Standing

Finally, some comments about standing and the right to challenge an exercise of statutory authority. While judicial review will only be granted to an applicant where he or she enjoys the requisite standing to bring the application,⁵⁴ normally the person challenging the decision is the person directly affected by it and so standing will not be an issue. However, given that the judicial review of state action is firmly rooted in public law, there will be cases where administrative decision-making affects broader interests, particularly again when the decision in question is towards the more legislative or policy-based end of the administrative spectrum, as well as those engaging the *Charter*, are engaged:

“where the decision maker is making a decision of a polycentric nature that may affect a wide range of interests – for instance, promulgating regulations, passing by-laws, or developing rules and guidelines – there will be countless persons or organizations who

⁵³ *Catalyst*, at para. 24.

⁵⁴ See, e.g., *Apotex Inc. v. Canada (Minister of National Health and Welfare)* (1998), 153 FTR 216; *Isaac v City of Mississauga*, 2011 ONSC 8065.

may ultimately be affected, some of whom might ultimately seek judicial review of the decision.”⁵⁵

As such, courts have held that the doctrine of public interest standing can ground standing to challenge administrative action by way of judicial review.⁵⁶ This will be particularly relevant when such standing is “desirable from the point of view of ensuring lawful action by government actors”.⁵⁷ While those with interests what are no different than those of any other member of the public – for example as a landowner or a taxpayer – will not have sufficient enough interest to establish direct interest, they may be able to establish public interest standing. The issue of standing further demonstrates that administrative law is perhaps not amenable to a one-size-fits-all approach.

Conclusions:

The various doctrines discussed above are all in some general sense related to the types of administrative or governmental decisions that should be subject either to judicial oversight generally, or to review by the courts specifically within the confines of administrative law, and on who should be permitted to challenge them, and in what circumstances. They address this issue of why we create these bodies, and highlight that the functions we expect them to fulfill are wide-ranging. And while each area has seen the establishment of its own set of principles or rules governing the adjudication of these issues in disputes where they arise, they are not always addressed through the lens of the judicial review of administrative action generally, at least as traditionally understood. Depending on how one looks at the matter, administrative law may be either the product of a number of discrete and unrelated doctrines and theories, or one theory subject to myriad exceptions.

c. Procedural Fairness – Access vs. Fairness:

The aspect of administrative decision-making that is litigated almost as frequently as standard of review issues is procedural fairness. These cases, too, arise out of an adversarial context, where the court’s focus in on whether the particular individual, in the particular case and circumstances, was afforded the requisite level of procedural fairness by the particular decision-maker in question. However, once the content of the duty of fairness owed by the decision-

⁵⁵ Wihak & Oliphant, at p. 340.

⁵⁶ See, e.g., *Western Canada Wilderness Committee v. British Columbia (Oil and Gas Commission)*, 2014 BCSC 1919, at paras. 46-73.

⁵⁷ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para. 49.

maker in relation to the exercise of power at issue is determined, subsequent cases will only need to focus on where that duty was met in the circumstances.

Interestingly, the law of procedural fairness has not changed much since the decision in *Baker*.⁵⁸ It remains the case that the fact that an administrative decision affects the rights, privileges or interests of an individual is enough to trigger the duty of fairness,⁵⁹ and the content of that duty is determined by the facts and circumstances of each particular case, analysed through the lens of the five *Baker* factors. Notice of the case to meet and a right to be meaningfully heard, as well as the right to an impartial decision-maker, remain the hallmarks of the right to procedural fairness. Moreover, the *Baker* framework explicitly accounts for the nature of the decision and the nature of the statutory scheme, and allows for the differences between the types of exercises of statutory discretion (including by the same decision-maker, exercising different statutory authority within the same enabling statute) to be accounted for.

The following question arises: why were the courts able to come up with a relatively simple, straightforward, multi-factored balancing test for determining the content of the duty of fairness and the circumstances in which it will be breached, and where the exercises of statutory power are equally case-specific, while such a test for determining the standard of review has remained elusive, has failed to meaningfully account for the range of administrative decision-making in a principled way, all the while generating millions of dollars' worth of litigation?

Furthermore, review for procedural fairness is not generally "viewed through the standard of review lens".⁶⁰ Rather, the question of whether a duty of procedural fairness has been met is a legal question, to be answered by the courts.⁶¹ The court must be satisfied that the process employed by the decision-maker was fair, and deference generally speaking⁶² does not play a role. Why, at least for common law judicial review, is a decision-maker entitled to deference when they interpret the substantive requirements of their enabling legislation, but not with respect to the development of the procedures and processes that will be applied in order to implement them? The stated rationale is that it has always been the purview of the courts to determine fairness, as a matter of law. However, historically all questions of law decided by administrative decision-makers were to be within the exclusive purview of the courts. It is only

⁵⁸ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

⁵⁹ *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643

⁶⁰ *Saskatoon Cooperative Association Ltd. V Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2016 SKCA 94, at para. 19.

⁶¹ *Demitor v Westcoast Energy Inc. (Spectra Energy Transmission)*, 2019 FCA 114, at para. 26.

⁶² Some courts have concluded that a decision-maker is entitled to some deference as to their choice of procedure.

with the advent of deference and respect for the decision-making authority were administrative actors afforded deference to their own determinations of legal questions, and the recognition by courts that the legality of state action could still be assured notwithstanding deferential review. Why does the same not apply to legal questions about procedural fairness? The fact that decision-makers have day-to-day experience with the statutory regimes they are tasked with interpreting and applying has been seen as a value-add when dealing with substantive outcomes. Why does this rationale not apply equally to what the regime requires by way of fairness? This is in no way an appeal for greater deference to administrative decision-makers when it comes to matters of procedure but, rather, an attempt to highlight yet another example where administrative law lacks internal consistencies as a public law doctrine.

Separate and apart from the way courts treat fairness issues and issues of substance, however, is the broader issue of how we ensure fairness to the parties, while also ensuring timely access to administrative justice. This tension plays out in particular in relation to the duty to give reasons, another increasingly litigated area.

In *Vavilov*, the Supreme Court arguably raised the significance of the question of sufficient reasons, making the issue relevant to both review of substantive outcomes and procedural fairness. The provision of written reasons is how “public decisions gain their democratic and legal authority through a process of public justification”, which includes reasons that “justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate”.⁶³ As such, reasons “are the primary mechanism by which administrative decision makers show that their decisions are reasonable – both to the affected parties and to the reviewing courts. Not all decision-makers are “tribunal”-like, however, and their processes - for example a municipality passing an bylaw or a law society rendering a decision by vote – do not easily lend themselves to producing a single set of reasons, the duty to give reasons does not apply to all decision-makers.”⁶⁴

For those decisions that do attract a duty to give reasons, fulfilling that obligation in the manner seemingly demanded by *Vavilov* will necessarily take time. While the resulting increase in transparency might be welcome, it will only lead to meaningful results if decision-makers who owe the duty are provided with the resources necessary to allow them to meet it.

⁶³ Stacey & Woolley, “Can Pragmatism Function in Administrative Law?” (2016), 74 *SCLR* (2d) 211, at p. 220.

⁶⁴ *Vavilov*, at para. 137.

Finally, that leads to the question of administrative delay, and the remedies available for it. The framework for determining whether administrative will justify a stay of proceedings was set out in *Blencoe*,⁶⁵ decided over twenty years ago. Suffice it to say, it is a framework that rarely results in a remedy for what is often inordinate delay. As Justice Stratas noted, while writing extra-judicially:

“it is useful to examine the later cases, as they shed light on how courts have been applying *Blencoe*, and the practical effect of *Blencoe*. These cases show that the threshold for obtaining a stay of proceedings is extremely high, and so the remedy is seldom granted. As a result, parties are not getting any relief for severe delay that causes damage to them. This, as we will see, is unsatisfactory, and raises the question whether the remedial armoury needs to be expanded and, if so, how.”⁶⁶

Individuals who are subject to administrative proceedings that have or will have a significant impact on their lives and security of the person should have those matters dealt with in a timely manner. Society as a whole has an interest in the timely resolution of regulatory proceedings. Nevertheless, the *Blencoe* framework continues to be applied rigidly, and is nearly impossible to meet when there has not been either actual “personal” prejudice or compromise to a fair hearing.⁶⁷

Though decided in the criminal context, and therefore addressing delays within that context only, the teachings and insight of *R v Jordan*⁶⁸ particularly as it relates to establishing prejudice should be broader. While administrative delay will not give rise to a breach of s. 11(b) of the *Charter*, and will struggle to meet the threshold for a s. 7 violation, delay in administrative decision-making nevertheless engages the values that these rights reflect. The most important aspect of *Jordan* for the purposes of administrative delay is the Court’s discussion of the relevance of prejudice, so dominant under the *Blencoe* approach. The Court in *Jordan* noted that actual prejudice can be quite difficult to establish. The inherent difficulties with proving actual prejudice are equally applicable in regulatory proceedings. If anything, given the high threshold of *Blencoe*, they are even more difficult. More importantly, however, the Court noted that “whether prejudice has been suffered is simply not relevant to whether the accused had been tried within a reasonable time”.⁶⁹ As a conceptual matter, the Court found that actual

⁶⁵ *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 (“*Blencoe*”).

⁶⁶ The Hon. David Stratas, “Decision makers under new scrutiny: sufficiency of reasons and timely decision-making” (paper delivered at the CIAJ Roundtable on Administrative Law, 3 May 2010), at p. 22.

⁶⁷ A rare recent example where the *Blencoe* framework led to the granting of a stay is *Burke v Saskatchewan Human Rights Commission*, 2019 SKQB 339. However, in this case, the court found that Mr. Burke had established “actual” personal prejudice.

⁶⁸ 2016 SCC 27 (“*Jordan*”).

⁶⁹ *Jordan*, at para. 34.

prejudice should no longer be equated with undue delay, and there is no principled reason to limit this conclusion to the criminal law context.

While requests of disciplinary bodies to adopt *Jordan* whole cloth have been rejected,⁷⁰ the teachings of *Jordan* have been noted as being nevertheless relevant to the question of delay in administrative proceedings.⁷¹ In the appeal of *Re Abrametz*,⁷² the Saskatchewan Court of Appeal has been explicitly asked to revisit *Blencoe* in light of, among other reasons, the impact of *Jordan*. That appeal was heard in the summer of 2019, and remains under reserve.

Why does the *Charter* matter in some areas of administrative law, but not others? What value is there in allowing administrative bodies to escape the criticism of delay and the standards for timely decision-making that the courts have imposed on themselves, particularly when the individual is facing the administrative state through the compulsion of regulatory proceedings?

Administrative law is supposed to result in a *more efficient* process leading to results more quickly than those available through the traditional court system. However, it is clear that this is not always the case, and that significant, multi-year delays are occurring. It is equally clear that any meaningful remedy for that delay is often illusory. Moreover, once a litigant is within the administrative system, they are required to remain within it, until such time as all avenues and remedies within that system are exhausted. Courts will enforce this principle “vigorously”.⁷³ The importance of timely decision-making in these circumstances is clear.

IV. There Is No Unified Theory of Administrative Law in Canada:

We were perhaps lucky to have received in the *Vavilov* Trilogy something close to a unified theory of *the standard of review* of administrative decision-making, whether one agrees with the Court’s approach or not. Time will only tell on that point. However, from the analysis set out above, it is arguable that there is no overarching, unified theory of administrative law in Canada, generally. Canadian administrative law is full of tensions: between efficiency and fairness; between potentially imperfect substantive outcomes and supervision for legality; and when the *Charter* is relevant and when it is not. While there may be theories or rationales animating each of the areas of administrative law discussed above, which may arise alone or in combination in the live disputes brought before the courts, and some of them may even share the same

⁷⁰ See, e.g., *Re Zoraik*, 2017 LSBC 34 (“**Zoraik**”), at para. 17.

⁷¹ *Zoraik*, at para. 18. Despite this statement, the application for a stay in *Zoraik* was denied.

⁷² *Re Abrametz*, 2019 SKLSS 2 (“**Re Abrametz**”).

⁷³ *Canada (Border Services Agency) v CB Powell Ltd.*, 2010 FCA 61, at paras. 30-31, 33; *Nadler v. College of Medicine, University of Saskatchewan*, 2017 SKCA 89.

characteristics. However, we're no better placed to answer the question of whether administrative law reflects a unified, principled theory.

That perhaps begs the question: is such a theory possible? If so, what are the underlying principles that do, or should, influence our approach to the development or recognition of such a theory? Is there one principle that should predominate? How do we go about obtaining that goal in a principled fashion?

The arguable failures of a "one-sized-fits-all" approach to the standard of review – one that is capable of consistent application regardless of the nature of the decision-maker whose decision is under review – and the relative success of the more tailored *Baker* framework, suggests that such a unified theory would be difficult to find. As the Supreme Court noted in *Vavilov*:⁷⁴

[88] In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of "high policy" on the one hand and "pure law" on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.

Perhaps a unified theory of administrative law will remain elusive. And perhaps that's ok. It may be helpful for us to finally acknowledge that, with the wide ranging exercises of state power, and the relevance of the *Charter* to the review of state decision-making, a doctrine that seeks to treat all decision-makers the same, and all administrative processes the same, is destined to result in anything but a principled approach to administrative law. And maybe that is the place to start.

⁷⁴ *Vavilov*, at para. 88.