THE BUILD UP

• Three distinctions

• 1. Categories versus Context

• 2. Judicial Supremacy versus Administrative Supremacy

• 3. Outcomes versus Reasons
THE BUILD UP

• Two problems

• 1. Selecting the standard of review
   • Complexity and uncertainty

• 2. Applying the reasonableness standard
   • Methodology
   • Reasonableness in the absence of reasons
   • Defective reasons
• Two solutions, one thin, one thick

• 1. Selecting the Standard of Review
  • “Institutional Design”, “Legislative Intent” and the “Rule of Law”

• 2. The Reasonableness Standard
  • Robustness and respectfulness
  • Justification
  • Responsiveness
SELECTING THE STANDARD OF REVIEW

• Institutional design: existence of administrative decision-maker = rbl review

• Reasonableness review in all cases unless
  • Institutional design: legislated standard/appeal
  • Rule of law: uniformity from one final, determinate answer
    • Constitutional questions
    • Overlapping jurisdiction
    • Questions of central importance to the legal system
SELECTING THE STANDARD OF REVIEW

• Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis
  • Vavilov at para. 36

• Any “appeal” attracts the appellate review framework
  • Vavilov at para. 50
SELECTING THE STANDARD OF REVIEW

• Extricable questions of law = correctness

• Mixed questions of fact & law/fact = palpable and overriding error

• Will deference survive? New battlegrounds
  • Classification of question
  • Persuasive authority of administrative decisions
SELECTING THE STANDARD OF REVIEW

• What about *privative clauses*?

• *Irrelevant* to standard of review: only the *magic word* “appeal” matters

• May still have *residual* impact, e.g. on reconsideration/internal review
SELECTING THE STANDARD OF REVIEW

• **Legislated standards** of review must be respected
  • Vavilov, at paras. 34-35

• But they must be **comprehensive**
  • Administrative Tribunals Act, S.B.C. 2004, c. 45
  • Cf. Canada (Attorney General) v. Public Service Alliance of Canada, 2019 FCA 41

• And they must set a **standard** of review
SELECTING THE STANDARD OF REVIEW

• The Rule of Law exceptions
  • Constitutional questions
  • Overlapping jurisdiction
  • General questions of law of central importance to the legal system

• Very narrow conceptual basis

• Compare the Secession Reference, [1998] 2 S.C.R. 217, at paras. 70-78
SELECTING THE STANDARD OF REVIEW

• Possible exceptions will expand

• Possible other exceptions will be added (Vavilov at paras. 69-72)

• But unlikely
  • See e.g. Bank of Montreal v. Li, 2020 FCA 22; 1120732 B.C. Ltd. v. Whistler (Resort Municipality), 2020 BCCA 101; Coldwater First Nation v. Canada (Attorney General), 2020 FCA 34
REASONABLENESS REVIEW

- Six shared propositions:
  - Reasonableness review is robust
  - Always start with the reasons (where available)
  - Reasons are the primary means of demonstrating reasonableness
  - Burden on the applicant
  - Contextual analysis
  - Respectful analysis: administrative justice $\neq$ judicial justice

- Majority: No supplementation

- NB Vavilovian reasonableness review is inherently deferential
“two types of fundamental flaws”
- Vavilov, at para. 101

1. Absence of rational and logical reasoning
- Not much more to say about this…Zenner v. Prince Edward Island College of Optometrists, 2005 SCC 77, [2005] 3 SCR 645

2. Failure to justify in view of factual and legal constraints
- The key area for counsel and courts to master
REASONABLENESS REVIEW

• **Compare** *Dunsmuir*
  • **Para 47**: justification, intelligibility, transparency & range
  • **Para 48**: reasons “which could be offered”

• **With** *Vavilov*
  • Justification
  • Responsiveness
  • Supplementation
REASONABLENESS REVIEW

• Justification

• Expertise irrelevant to selecting the standard of review

• Expertise *very* relevant to *surviving* the standard of review

• Note references to “demonstrated expertise”: paras 14, 81, 93
REASONABLENESS REVIEW

• Responsiveness
  
  • *Listening*, not hearing (para 127)
  
  • Grapple (paras 128, 134)
  
  • “Harsh consequences” (para 133)
  
  • Departures from prior decisions (paras 129-132)
REASONABLENESS REVIEW

• Supplementation

• Get it right first time: Vavilov at para 96

• Very limited scope for help from:
  • Affidavits
  • Counsel
  • Reviewing court
REASONABLENESS REVIEW

• There are some important tensions

• **Jurisdiction** (paras 108-110)
  • No more correctness review on questions of jurisdiction
  • But decision-makers “must” comply with governing statutory scheme

• **Statutory interpretation** (paras 115-124)
  • Duty to consider *text, purpose, context*
  • But no need to do a formalistic exercise in every case
Vavilov is clear that quashing and remitting is usually the appropriate course of action with an invalid decision.

But...

“Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose”

- Vavilov, at para. 142
• Vavilov is now the starting point for analysis

• Important to note that Vavilov is a compromise
  • Correctness review on questions of law on appeal for some
  • Deferential judicial review on a vast range of issues

• It contains important tensions
  • Partly thin, partly thick
  • Categorical in Part II, Contextual in Part III
  • Sometimes interventionist, sometimes deferential
• Thank you and good luck in these trying times

• See also
  • Previous CIAJ Webinars: Six Months of Vavilov and Vavilov for Legislative Drafters
  • “The Vavilov Framework and the Future of Canadian Administrative Law” (2020) CJALP (forthcoming)
  • “Vavilov Hits the Road”, Administrative Law Matters (updated monthly)
  • “Unresolved Issues after Vavilov”, Administrative Law Matters