THE STANDARD OF REVIEW AND THE DUTY TO CONSULT AND ACCOMMODATE INDIGENOUS PEOPLES: WHAT IS THE IMPACT OF *VAVILOV*?

ROBERT HAMILTON* AND HOWARD KISLOWICZ**

Following the Supreme Court of Canada's landmark decision in Vavilov*, an especially relevant issue in Canadian jurisprudence is how courts have applied* Vavilov*'s new standard of review framework. This article seeks to answer how the* Vavilov *framework affects decision-making regarding the duty to consult and accommodate. While* Vavilov *establishes a general presumption of reasonableness review for administrative decisions, it also carves out several exceptions to that presumption where the standard of correctness applies. The exception for section 35 Aboriginal and treaty rights under the Constitution Act, 1982 is relevant to the discussion in this paper, including what that exception means for cases involving the duty to consult and accommodate. Most cases involving duty to consult and accommodate questions regarding "trigger" and "scope" have been reviewed on a correctness standard, while all other issues have been reviewed on a reasonableness standard. The authors argue that the logic in* Vavilov *suggests that a broader range of issues should be subject to the correctness standard than is currently the practice.*

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* Assistant Professor, Faculty of Law, University of Calgary.
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I. INTRODUCTION

The *Coldwater Indian Band v. Attorney General of Canada*[1] decision from the Federal Court of Appeal was one of the most politically fraught decisions in recent years. The case dealt with the Trans Mountain Pipeline Expansion project, the subject of extensive disagreements and charged rhetoric. Federal approval of the project was challenged in political and legal venues by the provincial government of British Columbia, several municipalities, environmental groups, and many Indigenous nations. On the other side, industry groups and several Indigenous nations voiced their support for the project. Alberta's premier criticized the federal government for not getting the project under development,[2] despite the federal government having twice approved the project. In *Coldwater,* several Indigenous nations whose territories the project would cross argued that the project approvals ought to be quashed because the Crown had not fulfilled its duty to consult and accommodate (DTCA). Indeed, one year earlier the project approvals had been quashed on that very basis when the Federal Court of Appeal held that the Crown had failed to meet its constitutional obligations to consult and accommodate the relevant Indigenous nations.[3] The federal government's response to that decision was to reinitiate consultation in order to remedy the deficiencies identified by the Court. *Coldwater,* then, was the second time that the project approvals were before the Court on DTCA issues. This time, the Court sided with the Crown, holding that the steps it took to remedy the shortcomings in the initial consultations were adequate to the task. This was hardly a surprising outcome, but it set the table for ongoing conflict over the pipeline as the Indigenous nations concerned continue to voice their opposition to the project, asserting that their consent is required before development on their lands can occur.[4]

A seemingly more mundane aspect of the judgment also drew attention for how it distributes decision-making authority in the constitutional order. The Governor-in-Council (GIC) approved the pipeline expansion and authorized the relevant permits. To do this, the GIC had to determine whether the DTCA had been adequately discharged. Because consultation is a Crown obligation, this meant that the Crown assessed the constitutionality of its own conduct. This is understandable: the Crown must make a decision, and one of the things it must consider is whether its constitutional obligations have been fulfilled. What caught the attention of some commentators, however, was the standard of review that the Federal Court of Appeal applied in assessing this Crown decision.[5] The Federal Court of Appeal applied a reasonableness standard, holding that "it is critical that we refrain from forming our own view about the adequacy of consultation as a basis for upholding or overturning the Governor in Council's decision."[6]

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1 2020 FCA 34, leave to appeal to SCC refused, 39111 (2 July 2020) [*Coldwater*].

2 See e.g. Dean Bennett, "Jason Kenney Stands by Saying Trudeau 'Can't Read a Briefing Note Longer than a Cocktail Napkin,'" *Global News* (16 May 2018), online: <globalnews.ca/news/4213451/jason-kenney-comments-on-justin-trudeau-trans-mountain-pipeline-trust-fund-millionaire/>.

3 *Tsleil-Waututh Nation v Attorney General of Canada*, 2018 FCA 153, denied leave to SCC, 38379 (2 May 2019) [*Tsleil-Waututh*].

4 See e.g. Tsleil-Waututh Nation Sacred Trust Initiative, "Federal Court Decision Disappointing, But Not The End of The Story" (4 February 2018), online: <twnsacredtrust.ca/federal-court-decision-disappointing-but-not-the-end-of-the-story/>.

5 See e.g. comments from Dwight Newman, Jocelyn Stacey, and Paul Daly, online: <twitter.com/andrew_leach/status/1224868833275432960>.

6 *Coldwater*, *supra* note 1 at para 28.

Aside from the troubling notion of a deferential judicial stance toward the Crown assessing the constitutionality of its own conduct, *Coldwater* was of interest as one of the first cases to apply the new standard of review framework adopted by the majority of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*.[7] In this instance, however, *Vavilov* did not seem to change the analysis. As outlined below, aside from a few notable outliers, in cases involving the DTCA questions of trigger and scope (for instance, is there a duty to consult in a given case and, if so, how much consultation is required) have been reviewed on a correctness standard, while all other issues, including the process of consultation and the adequacy of consultation, have been reviewed on a reasonableness standard. While the Court in *Coldwater* identified *Vavilov* as providing the framework for administrative law decisions, in following the principles just outlined, *Coldwater* seems to have been decided much as it would have been before *Vavilov*. *Coldwater* therefore largely leaves open the question of how the *Vavilov* framework affects decision-making regarding the DTCA. In this article, we seek to answer that question. This will be important going forward, as much of the recent litigation regarding the constitutional rights of Indigenous peoples has focused on the DTCA. These cases usually begin in an administrative context, such as a ministerial decision or a decision of a regulator. Questions of the standard of review will frequently arise.

There are at least two challenges in thinking through how *Vavilov* might change the standard of review in DTCA cases. First, *Vavilov* departs from the previous administrative law jurisprudence in establishing that, where litigation is conducted pursuant to a statutory appeal process (as distinguished from an application for judicial review), the standard of review will generally follow the case law on appeals.[8] On a question of law, the standard of review will generally be correctness; where the question is of fact or mixed fact and law, the standard of review will be that of "palpable and overriding error."[9] The challenges that arise in a DTCA context are (1) that most often the issues in dispute between the Crown and the Indigenous involve a heavy factual element, and (2) it is unclear how the palpable and overriding error standard differs from the reasonableness standard. It is likely the palpable and overriding error standard is more deferential than the reasonableness standard, leaving open the possibility that where a legislature foresees issues surrounding the DTCA, it might be able to create additional insulation of executive decisions from judicial scrutiny. As we discuss this in Part III, this strikes us as the opposite of *Vavilov*'s anticipation that, in general, statutory appeals are legislative signals for less rather than more deference.[10]

Second, while *Vavilov* establishes a general presumption that the standard of review for an administrative decision will be reasonableness,[11] it also carves out some exceptions to this presumption, in which the standard of review will be correctness. The relevant exception for this article is for questions regarding "the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*."[12] There are important ambiguities about what precisely this means for DTCA cases. On one hand, DTCA litigation does not determine Aboriginal rights; the DTCA was initially designed to apply where Indigenous peoples asserted an Aboriginal right that had not yet been adjudicated. Though it was later extended to established rights,

7 2019 SCC 65 [*Vavilov*].
8 *Ibid* at paras 36–52.
9 *Housen v Nikolaisen*, 2002 SCC 33 at para 1.
10 *Vavilov*, *supra* note 7 at para 36.
11 *Ibid* at paras 23–32.
12 *Ibid* at para 55.

it remains a procedural duty held by the Crown rather than an Aboriginal right per se. This would suggest that the correctness exception does not apply to DTCA issues. On the other hand, the DTCA is a constitutional obligation understood as a limit on the exercise of sovereignty; it shares much in common with the other issues to which *Vavilov* applies the correctness standard. We discuss these challenges in Part IV and argue that *Vavilov*'s logic suggests that a broader range of DTCA issues should be subject to the correctness standard than is currently the practice. In brief, the constitutional issues for which correctness clearly applies — questions of federalism and of the separation of powers — are concerned with the allocation of sovereignty among the non-judicial branches of the state. Aboriginal rights and the DTCA are motivated by similar concerns, in particular how the prior occupation and sovereignty of Indigenous peoples limits the sovereignty and constitutional authority of the Canadian state. The constitutional imperative to adequately consult Indigenous peoples should, therefore, be reviewed on a standard of correctness. More precisely, the question whether consultation was sufficient to discharge the Crown's constitutional obligations in a given case should not attract judicial deference and should be reviewed on a standard of correctness. Such an approach is more consistent with the honour of the Crown, the constitutional principle that generates the DTCA, and the justifications supporting the existence of the constitutional exception in *Vavilov*.

II. DTCA PRE-*VAVILOV*

The Supreme Court of Canada provided the first statement on the standard of review in DTCA cases in *Haida Nation v. British Columbia (Minister of Forests)*.[13] The Court's discussion on the issue, all expressed provisionally and in *obiter,* has been repeatedly cited as the foundation of the law in this area. The Court held:

> On questions of law, a decision-maker must generally be correct. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness.
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> The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question." What is required is not perfection, but reasonableness. As stated in *Nikal*, … "in … information and consultation the concept of reasonableness must come into play. … So long as every reasonable effort is made to inform and to consult, such efforts would suffice…". The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

[13] 2004 SCC 73 [*Haida*].

> Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.[14]

Many lower courts subsequently interpreted this passage as articulating a clear framework: questions as to the "existence or extent"[15] of the duty to consult should be reviewed on a correctness standard; questions of the adequacy of the consultation and accommodation should be reviewed on a reasonableness standard.[16] *Ka'a'Gee Tu First Nation v. Attorney General of Canada*, for example, is frequently cited as an authoritative restatement of the *Haida* principles. There the Federal Court held that "[a] question as to the existence and content of the duty to consult and accommodate is a question of law reviewable on the standard of correctness. A question as to whether the Crown failed to discharge its duty to consult in making the decision typically involves assessing the facts of the case against the content of the duty."[17] This view became something close to a consensus, the ambiguities discussed below notwithstanding.[18]

Yet, this position was far from inevitable following *Haida*, in which an important ambiguity went unresolved. Specifically, the Court left considerable opacity regarding the distinction between the *process* and *adequacy* of consultation. While *Haida* spoke only to process — holding that process will "likely fall to be examined on a standard of reasonableness"[19] — subsequent cases and commentary elided the distinction. In *Ka'a'Gee Tu First Nation*, for example, the question was framed explicitly as whether the Crown "discharged" its obligations. In other words, the reasonableness standard applies not only to the determination of whether the process designed to carry out consultation was sufficient

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14 *Ibid* at paras 60–63 [citations omitted].

15 *Nunatsiavut Government v Attorney General of Canada (Department of Fisheries and Oceans)*, 2015 FC 492 at paras 100, 108, 109 [*Nunatsiavut*].

16 See e.g. *ibid*. Aside from fealty to precedent, the close adherence to *Haida* in the lower courts is a result of the administrative law principle not requiring a standard of review analysis where the issue has already been determined: "A standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the Court is well-settled by past jurisprudence, the reviewing court may adopt that standard" *Nunatsiavut*, *ibid* at para 99, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62 [*Dunsmuir*]; *Council of the Innu of Ekuanitshit v Attorney General of Canada*, 2014 FCA 189 at para 38, leave to appeal to SCC refused, 36136 (5 March 2015) at para 38 [*Ekuanitshit*].

17 2007 FC 763 at para 91 [*Ka'a'Gee Tu First Nation*]. See also *The Tzeachten First Nation v The Attorney General of Canada*, 2008 FC 928 at paras 23–34 [citation omitted]:

> [A] question as to the existence and content of the duty to consult and accommodate is a question of law reviewable on the standard of correctness and further that a question as to whether the Crown discharged this duty to consult and accommodate is reviewable on the standard of reasonableness. Accordingly, when it falls to determine whether the duty to consult is owed and the content of that duty, no deference will be afforded. However, where a determination as to whether that duty was discharged is required, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with …] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

See also *Brokenhead Ojibway Nation v AGC*, 2009 FC 484 at para 18: "In the result the question of the existence and content of a Crown duty to consult in this case will be assessed on the basis of correctness. The question of whether any such duty or duties were discharged by the Crown will be determined on a standard of reasonableness."

18 Dwight Newman puts the near-consensus that emerged in the lower courts clearly: "the correct approach is surely to consider the determination of the triggering of consultation based on the correctness of any decision on that issue, and to consider the carrying out of consultation based on a reasonableness standard": Dwight Newman, "The Section 35 Duty to Consult" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 349 at 363.

19 *Haida*, *supra* note 13 at para 62.

to meet the Crown's legal obligations, but whether those obligations were *actually met*. The "process" of consultation discussed in *Haida* was read as synonymous with the "adequacy" of consultation. These are, however, analytically and practically distinct concepts. The consultation "process" refers to the procedures and means of consultation and asks whether they were designed in such a way that they *could* permit sufficient consultation to occur. Adequacy of consultation speaks to whether the Crown's consultation as actually carried out was sufficient to discharge its constitutional obligations to consult and accommodate. In *Tsleil-Waututh*, for example, the Federal Court of Appeal held that the Crown's consultation *process* was designed in such a way that following that process *could* sufficiently discharge the duty to consult.[20] Yet, the Crown had nonetheless failed to *adequately* consult owing to problems in executing that process.[21] There are, therefore, four distinct assessments that might be reviewed in relation to the DTCA: trigger (does the Crown duty arise in this specific instance), scope (how much consultation will be required to satisfy the Crown's obligations), process (what procedures or mechanisms has the Crown established to carry out its obligations), and adequacy (has the Crown in fact discharged its obligations). The distinction between process and adequacy is important, especially in light of the Court's discussion of process in *Haida* and the conflation of the two — at least insofar as the standard of review is concerned — in some later cases.

Following *Haida,* the Supreme Court did not address the standard of review question again until 2010.[22] *Beckman* stands as a possible point of divergence, or clarification, in the doctrine. The Court held:

> In exercising his discretion under the Yukon *Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. *The standard of review in that respect, including the adequacy of the consultation, is correctness*. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. In other words, if there was

20 *Tsleil-Waututh*, *supra* note 3 at paras 513–56. See also *Gitxaala Nation v Her Majesty the Queen*, 2016 FCA 187 at para 203 [*Gitxaala Nation*]. For discussion see David V Wright, "Duty to Consult in the Bigstone Pipeline Case: A Northern Gateway Sequel and TMX Prequel?" (6 June 2018), online (blog): <ablawg.ca/2018/ 06/06/duty-to-consult-in-the-bigstone-pipeline-case-a-northern-gateway-sequel-and-tmx-prequel/>.

21 *Tsleil-Waututh*, *ibid* at para 557. The language the Court uses here is important. The Federal Court of Appeal held that "Canada's execution of Phase III of the consultation process was unacceptably flawed and fell short of the standard prescribed by the jurisprudence of the Supreme Court." In so doing, it drew the crucial distinction between the design and the execution of the consultation process and held that it was the execution, not the design, that was inadequate. Thus, while the Court did hold "the consultation process fell short of the required mark for reasonable consultation," this was in reference to the execution of the process, not the design itself which the Court had described as adequate over the previous 40 paragraphs. The same distinction was drawn in *Gitxaala Nation*, *ibid* where the Court held that "[t]here are four more concerns expressed by the applicant/appellant First Nations. We view these as overlapping and interrelated. They all focus primarily on Canada's execution of Phase IV of the consultation framework" and further "[t]o this point we have rejected the arguments advanced by the applicant/appellant First Nations that Canada's execution of the consultation process was unacceptable or unreasonable. However, for the reasons developed below, Canada's execution of the Phase IV consultation process was unacceptably flawed and fell well short of the mark. Canada's execution of Phase IV failed to maintain the honour of the Crown" at paras 229–30.

22 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Beckman*] and *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*].

> adequate consultation, did the Director's decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes?[23]

As the Federal Court has noted, this "could be understood to suggest that the correctness standard applies when assessing whether the Crown's efforts were adequate to meet its duty to consult."[24] Indeed, it is difficult to read the plain wording in any other way. The question following *Beckman*, then, was whether it aligned with *Haida,* and the interpretation *Haida* had been given in the lower courts, or whether it signalled a change in the law. Interestingly, there has been very little discussion in the case law about what seems, on its face, an important modification or clarification of the law.[25]

The few lower court cases that substantively addressed *Beckman* favoured the continuity of the *Haida* standards, either rejecting *Beckman* or reading it as consistent with the earlier case law.[26] Frequently, lack of clarity and inconsistency remained concerning the standard of review and impact of *Beckman*.[27] For example, *Council of the Innu of Ekuanitshit v. Attorney General of Canada*[28] cited *Beckman* for the principle that the adequacy of consultation should be determined on a *reasonableness* standard as an issue of mixed fact and law.[29] In *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)* even the scope of the duty to consult was held to be reviewable on reasonableness.[30] The Alberta Court of Appeal in *Cold Lake First Nations v. Alberta (Tourism, Parks and Recreation)* held that adequacy of consultation is a question of mixed fact and law and that a reasonableness standard therefore applied to "the issue of the adequacy of the consultation process and the final decision to end consultation and proceed with the project."[31] This decision overturned an Alberta Court of Queen's Bench decision that had relied on *Beckman* in holding that adequacy of consultation would be reviewed on a correctness standard and that the remaining elements of the Crown's decision would then be reviewed on a

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23 *Beckman*, *ibid* at para 48 [emphasis added].

24 *Nunatsiavut*, *supra* note 15 at para 107.

25 *Ibid* at paras 99–120.

26 *William v British Columbia*, 2018 BCSC 1425 ("[t]here is no dispute about the existence of a duty to consult in this case. The adequacy of the consultation process is to be examined on a standard of reasonableness: *Haida* at para. 62; *Prophet River* at paras. 49-52; *Ktunaxa* at para. 77" at para 71). See also *Conseil des innus de Ekuanitshit c Le procureur général du Canada*, 2013 FC 418 at para 97 [citations omitted]:

> Applying the principles established by *Haida*, the consensus in the case law is that a question regarding the existence and content of the duty to consult is a legal question that attracts the standard of correctness. A decision as to whether the efforts of the Crown satisfied its duty to consult in a particular situation involves 'assessing the facts of the case against the content of the duty'…. This is a mixed question of fact and law to be reviewed on the standard of reasonableness.

See also *Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)*, 2013 ABCA 443 at paras 37– 39 [*Cold Lake* ABCA]; *Katlodeeche First Nation v The Attorney General of Canada*, 2013 FC 458 at paras 126–27; *White River First Nation v Yukon Government*, 2013 YKSC 66 at para 92.

27 Newman, *supra* note 18. This may be what Dwight Newman had in mind, for instance, when he wrote that "some courts have wandered imprecisely in their language on the standard of review when consultations have been challenged" at 363.

28 *Ekuanitshit*, *supra* note 16.

29 *Prophet River First Nation v British Columbia (Environment)*, 2017 BCCA 58 at para 44:

> The jurisprudence supports the respondents' contention that the adequacy of consultation and accommodation is a question of mixed fact and law: *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379 at paras. 60 and 84; *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189 at para. 82…. What constitutes "adequate" consultation is determined through a combined legal and factual analysis of the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right: *Haida*, *supra* note 13 at paras. 43–45; and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at paras. 29–32.

30 2013 BCSC 977 at para 108.

31 *Cold Lake* ABCA, *supra* note 26 at paras 39–40.

reasonableness standard.[32] This was one of the few cases where the court drew the line between correctness and reasonableness after adequacy was determined. In *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, Justice Garson, in dissent, understood *Beckman* as holding that correctness applied to the determinations as to the adequacy of consultation but held that it was applicable only on its narrow facts.[33]

Nunatsiavut provided a considered analysis of *Beckman* and its treatment in the lower courts, concluding that *Beckman* was not "intended to alter, in every case, the standard of review with respect to the question of whether the Crown adequately consulted and accommodated to one of correctness."[34] The Court sought to find consistency between *Haida* and *Beckman*. First, it held that "the Crown must correctly identify the legal parameters of the content of the duty to consult in order to also properly identify what will comprise adequate consultation."[35] This is in line with the case law after *Haida* holding that "scope" or "extent" ought to be reviewed on a correctness standard. Here, however, "adequacy" is considered at the outset: the term is used to refer to the assessment of what level of consultation will be required to satisfy the Crown's duty rather than whether that duty has in fact been satisfied.[36] Accordingly, the Court held that to proceed without having determined what would constitute adequate consultation "would be an error of law."[37] However, if those parameters are correctly identified, then the sufficiency of the subsequent consultation employed, the question of whether the duty was discharged in a given case would remain a question of reasonableness. The Federal Court considered this consistent with both *Haida* and *Beckman*, though this consistency is found only by reading the "adequacy" referred to in *Beckman* as part of the "scope" analysis rather than at the stage of considering whether the duty was discharged.[38] Several legal tactics have been used, then, to maintain the *Haida* approach after *Beckman*: interpret the cases as consistent, distinguish them on the facts, or find grounds to ignore *Beckman* altogether. The most frequent trend in lower courts has been to proceed as if *Beckman* changed nothing.[39] The Supreme Court of Canada, for its part, has largely ignored *Beckman,* relying on the same four paragraphs and basic parameters from *Haida* as the lower courts. In *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations*), for example, the Court held that the Minister's assessment that adequate consultation had occurred was "entitled to deference."[40]

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32 *Cold Lake First Nation v Alberta (Tourism, Parks and Recreation)*, 2012 ABQB 579 at para 42.

33 2011 BCCA 247 at paras 194–98. In fact, Justice Garson argued that the correctness standard was applied to the determination of adequacy in *Beckman* only because a modern treaty was at issue in that case, suggesting a different standard of review applies to consultation in respect of rights recognized in a modern treaty than other section 35 rights. This suggestion does not appear to find explicit judicial support elsewhere.

34 *Nunatsiavut*, *supra* note 15 at para 114.

35 *Ibid* at para 115.

36 *Ibid*.

37 *Ibid* at para 115.

38 *Ibid*.

39 See e.g. *Yellowknives Dene First Nation*, where the Federal Court of Appeal held:

> The existence and the extent or content of the duty to consult are legal questions, reviewable on the standard of correctness. The adequacy of the consultation is reviewable on the reasonableness standard…. I agree that this articulation of the standards is consistent with the jurisprudence of the Supreme Court of Canada.

Yellowknives Dene First Nation v The Minister of Aboriginal Affairs and Northern Development, 2015 FCA 148 at paras 47–48 [citations omitted]. The same Court held in *Squamish Indian Band*: "The adequacy of the Crown's consultation effort is to be assessed against a standard of reasonableness. Perfect satisfaction of the duty is not required. The Crown is required to make reasonable efforts to inform and consult": *The Squamish Indian Band v Minister of Fisheries and Oceans*, 2019 FCA 216 at para 31.

40 2017 SCC 54 at para 77 [*Ktunaxa*].

The Minister's conclusion concerning the constitutionality of the Crown's conduct, the Court held, ought to be reviewed on a reasonableness standard.[41]

In the lead up to *Vavilov* then, the general approach to the standard of review in DTCA cases was largely settled, even if beset by a non-negligible lack of clarity on important questions. The central debate in the case law was where, precisely, the correctness standard arose. Many cases read *Haida* as holding that the adequacy of consultation was a question of mixed fact and law and that administrative decision-makers were owed deference on that account. The cases that took *Beckman* up drew a sharper distinction between *process* and *adequacy* and read questions of adequacy as "threshold questions of constitutionality."[42] This latter approach has the benefit of reading the cases harmoniously: there is no conflict between *Haida* and *Beckman* if we distinguish between process and adequacy and read adequacy as a threshold question of constitutionality that attracts a correctness standard. *Haida*, after all, does not consider the distinction between process and adequacy, and *Beckman* can be read as a refinement of the doctrine. Yet, the dominant approach has read the cases as incommensurate and treated *Beckman* as an outlier or ignored it altogether. Lower courts have frequently dismissed the clear statement of the Court in *Beckman* almost as if it were a mistaken statement. From a practical perspective, it appears the extent of any doctrinal uncertainty has rarely been an issue: the Crown often concedes that the duty has been triggered (existence) and that consultation lies at the high end of the spectrum (scope or extent), removing those issues, which are clearly to be reviewed on a correctness standard, from consideration. Most courts have been content to review the remaining issues — whether consultation was adequate — on a reasonableness standard. That this may at times allow the Crown's determinations of the constitutionality of its own conduct to be reviewed on a reasonableness standard, as in *Coldwater,* has not been seen as problematic by courts,[43] despite the separation of powers concerns some commentators have raised.[44]

The question we are concerned with is whether this approach to the review of consultation issues will continue after *Vavilov*. One area where *Vavilov* makes clear changes is in statutory appeals. We analyze these changes in Part III. There is greater ambiguity with respect to the standard of review in applications for judicial review. We discuss this in Part IV and argue that the principles articulated in *Vavilov* in support of a correctness standard on constitutional questions support applying a correctness standard for a greater range of questions in the DTCA context than is currently the practice of courts.

III. *VAVILOV* AND DTCA CASES: STATUTORY APPEALS

In this section, we discuss how *Vavilov*'s changes affect DTCA issues when they arise in the context of a statutory appeal, meaning when the relevant statute provides for a direct appeal from an administrative decision to a court. In general, the standard of review on questions of law in this context will be correctness. However, on questions of fact or mixed

41 *Ibid* at para 82.

42 Paul Daly, "Unresolved Issues after Vavilov II: The Doré Framework" (6 May 2020), online: <www.administrativelawmatters.com/blog/2020/05/06/unresolved-issues-after-vavilov-ii-the-dore-framework/>. Daly uses this phrase in another context, and it is not used by the courts, that we know of, in relation to the duty to consult. Yet, it is apt here: *Beckman* treats the question of whether the Crown has adequately consulted, that is, whether it has discharged its constitutional obligations, as a threshold question of constitutionality to be reviewed by the courts on a correctness standard.

43 *Coldwater*, *supra* note 1.

44 See Part I above.

fact and law, courts are only to overturn a decision if there is a palpable and overriding error. This, we argue, is a more deferential standard than the standard of reasonableness that would apply in the judicial review context. As issues in DTCA cases tend to be heavily factual, this leaves it open to a legislature to insulate decisions likely to raise DTCA issues by creating a statutory appeal on questions of fact and mixed fact and law. Where the appeal is restricted to questions of law, as has been the case in the few statutory appeal DTCA cases post-*Vavilov*,[45] the standard will be correctness.

Vavilov established a general presumption of reasonableness review. However, the *Vavilov* majority interpreted the presence of a statutory appeal as an important signal from the legislature: "[w]here 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."[46]

In some cases there is no need to even sort out issues of fact, law, and mixed fact and law, because the statutory appeal is limited to questions of law alone, as in *Fort McKay*.[47] The *Responsible Energy Development Act*, which applied in the case, removes jurisdiction from the Alberta Energy Regulator to consider the adequacy of consultation with an Indigenous group.[48] The issue of law was whether the Regulator could nevertheless consider the Crown's relationship with the Fort McKay First Nation and "matters of reconciliation"[49] in making its decision. The Alberta Court of Appeal reviewed the question on the correctness standard and held that statute did not remove jurisdiction to consider these broader issues, which are distinguishable from the adequacy of consultation.[50] The selection of the standard of review is not surprising: if the only issues available for appeal are issues of pure or extricable law, they will be reviewed on a correctness standard. When statutory rights of appeal are framed in this way, they leave the other findings of the decision-maker subject to judicial review, to which a different standard of review analysis applies.

In addition to a simpler standard of review analysis, the *Vavilov* majority also understands statutory appeal mechanisms to invite *more* scrutiny from courts for administrative decisions as compared to a judicial review application.[51] We see this most clearly on questions of law, which will now be subject to a correctness standard in a statutory appeal, but would likely be reviewed on a reasonableness standard in a judicial review application. This suggests that, in a statutory appeal, courts will feel more comfortable overturning administrative decisions.[52] We wonder, however, whether the assumption that statutory appeals mean *less deference* will hold in the DTCA context; the application of *Vavilov*'s logic might lead to *more deference* in a statutory appeal for DTCA cases where questions of fact and mixed fact

45 *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 [*Fort McKay*]; *Sipekne'katik v Alton Natural Gas Storage LP*, 2020 NSSC 111.

46 *Vavilov*, *supra* note 7 at para 36.

47 *Fort McKay*, *supra* note 45 at paras 28–29.

48 *Responsible Energy Development Act*, SA 2012, c R-17.3, s 21 (such jurisdiction is left with the province and the Aboriginal Consultation Office).

49 *Fort McKay*, *supra* note 45 at para 57.

50 *Ibid*.

51 *Vavilov*, *supra* note 7 at para 36. The minority judgment criticizes the majority for stripping away "deference from hundreds of administrative actors subject to statutory rights of appeal" at para 199.

52 There is, however, some indication that courts may prefer to have the guidance of administrative decision-makers on issues of law even where the standard is correctness: *Planet Energy (Ontario) Corp v Ontario Energy Board*, 2020 ONSC 598 at para 31.

and law are subject to appeal. The issues in contention between Indigenous peoples and the Crown in DTCA cases tend to be heavily fact-based. As noted above, the Crown will often concede that the DTCA exists, and even that deep consultation is required; the dispute is likely to focus on whether the consultation carried out by the Crown met the requirements of deep consultation, or whether a Crown decision has the potential to affect an asserted Aboriginal right.[53] These are likely to be understood as either issues of fact or mixed fact and law, which means that the standard of palpable and overriding error will apply.

There is some ambiguity as to whether the palpable and overriding error standard is meaningfully different from the reasonableness standard, but the palpable and overriding error standard is probably *more deferential*. In *HL v. Canada (Attorney General)*, the Supreme Court of Canada held that the phrase "'palpable and overriding error' is at once an elegant and expressive description of the entrenched and generally applicable standard of appellate review of the findings of fact at trial," but "should not be thought to displace alternative formulations of the governing standard."[54] These alternative formulations include a standard of overturning inferences of fact that are "'clearly' wrong," or findings of fact that are "*unreasonable*" or "unsupported by the evidence."[55] In other words, there is case law to support the claim that the reasonableness standard and the palpable and overriding error standard at least overlap. In a more recent decision, however, the Supreme Court quoted from two appellate decisions to explain the palpable and overriding error standard.[56] In Justice Stratas' words,

> Palpable and overriding error is a highly deferential standard of review…. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.[57]

Notable here is Justice Stratas' characterization of a "highly" deferential standard. In *Vavilov*'s framing of the reasonableness standard, such a statement is inapposite. What is reasonable in a given case will be set by the context, but the standard itself is meant to be the same in all cases.[58] This incompatibility may signal that the standards of reasonableness and palpable and overriding error are not simply alternative expressions of the same idea, though they may share some common features. The Supreme Court also quoted Justice Morissette, who held that "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye."[59] Compare this with *Vavilov*'s description of an unreasonable decision, which might contain "a failure of rationality internal to the reasoning process" or may be "in some respect untenable in light of the relevant factual and legal constraints that bear on it."[60] Indeed, in contrast with the "highly deferential" palpable and overriding error standard, the Supreme Court describes reasonableness review as "a robust form of review."[61] These two descriptions suggest that the standards are not equivalent. The Ontario Divisional

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53 *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215 at para 77.
54 2005 SCC 25 at para 55.
55 *Ibid* at para 56 [emphasis added].
56 *Benhaim v St-Germain*, 2016 SCC 48 at paras 38–39 [*Benhaim*].
57 *Her Majesty the Queen v South Yukon Forest Corporation*, 2012 FCA 165 at para 46 [citations omitted].
58 *Vavilov*, *supra* note 7 at paras 88–90.
59 *Benhaim*, *supra* note 56 at para 39, citing *JG v Nadeau*, 2016 QCCA 167 at para 77.
60 *Vavilov*, *supra* note 7 at para 101.
61 *Ibid* at para 13; Daly, *supra* note 42.

Court has warned against the conflation of the standards on two occasions,[62] and some commentators have argued that "when it comes to findings of fact in statutory appeals, it appears likely that they will now be more difficult to overturn."[63]

In sum, if the palpable and overriding error is more deferential than the reasonableness standard, and the issues between the parties in a DTCA dispute are likely to centre on questions of fact or mixed fact and law, then a legislature could, at least in theory, secure *more* deference for executive decisions in the DTCA context by setting up a statutory appeal instead of leaving those decisions to be challenged in judicial review applications. This seems to be the opposite of the Court's expected effect of a statutory appeal mechanism, and so calls out for some more specific analysis from the Supreme Court as to whether such a maneuver is permissible given the constitutional interests involved.

IV. *VAVILOV* AND DTCA CASES: JUDICIAL REVIEW APPLICATIONS

When it comes to judicial review applications, *Vavilov* raises a different set of questions. As discussed above, the *Haida* line of cases and *Beckman* offer two alternative paths for how the standard of review should apply in DTCA cases. Under *Haida* and the cases that followed it, correctness is the standard on questions of the existence of the duty to consult and the determination of where on the spectrum the DTCA lies.[64] All other questions — the determinations of fact underlying these legal questions, whether the process adopted by the Crown was sufficient to discharge the DTCA, and the Crown's determination that it had discharged the DTCA — would be reviewed on a reasonableness standard. Under *Beckman*, a category of questions — those relating to the adequacy of consultation — would be reviewed on the correctness standard.[65] The question we take up in this section is, given what *Vavilov* has to say about constitutional questions, is *Beckman*'s approach, or something like it, more appropriate? As suggested above, this question is of particular relevance where the court is reviewing the Crown's own assessment of the adequacy of its consultation.

The courts have tended to continue following the *Haida* approach in the post-*Vavilov* context. Two judicial review applications, *Coldwater* at the Federal Court of Appeal[66] and another at the Manitoba Court of Queen's Bench[67] had begun but were not completed before *Vavilov* was released. Both Courts concluded that *Vavilov*'s changes did not impact the selection of the standard of review in their respective cases.[68] For the Federal Court of Appeal, this was because "the scope of the duty to consult under section 35" was not in

62 *Miller v College of Optometrists of Ontario*, 2020 ONSC 2573 at para 79; *Houghton v Association of Ontario Land Surveyors*, 2020 ONSC 863 at para 15.

63 Gerard J Kennedy & Alyssa Clutterbuck, "When *Vavilov* Makes Judicial Review More Difficult: Findings of Fact in a Statutory Appeal" (27 April 2020), online: <www.cba.org/Sections/Administrative-Law/Articles/2020/When-Vavilov-makes-judicial-review-more-difficult>.

64 Again, we refer to this as the *Haida* approach because it represents the principles for which lower courts have cited *Haida*. *Haida* itself is largely silent on these issues: *Haida*, *supra* note 13.

65 Kate Glover Berger, "Diagnosing Administrative Law: A Comment on Clyde River and Chippewas of the Thames First Nation" (2019) 88:1 SCLR: Osgoode's Annual Constitutional Cases Conference 107, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1363&context=sclr> at 130–32.

66 *Coldwater*, *supra* note 1.

67 *Manitoba Métis Federation Inc v Brian Pallister*, 2020 MBQB 49 [*Manitoba Métis Federation*].

68 *Coldwater*, *supra* note 1 at para 27; *Manitoba Métis Federation*, *ibid* at para 55 (the Court noted that the parties to the case agreed to this conclusion and declined to make further submissions after *Vavilov* was decided).

issue.[69] The Federal Court of Appeal's approach was followed by the British Columbia Supreme Court in *Redmond v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*.[70] A distinct but related question to the "scope" of the DTCA is whether the DTCA is triggered at all. Though often not at issue between the parties, the Manitoba Court of Queen's Bench held that this question is reviewed on a correctness standard and, by extension, where there is dispute about whether the honour of the Crown is triggered, correctness applies as well.[71]

We suggest that *Vavilov* is more ambiguous in its impact on judicial review applications than the cases make it out to be. Part of the ambiguity is owing to the Supreme Court of Canada's choice of terms in describing the constitutional exceptions in *Vavilov.* The Court referred to determinations concerning the "scope of Aboriginal and treaty rights" as attracting a correctness standard on review.[72] This can be read as either inclusive or exclusive of the DTCA. In favour of the inclusive reading, the "scope of Aboriginal and treaty rights"[73] can be understood as a restatement of the status quo outlined above. Since *Haida* there has been no question that a determination of the scope (such as "extent," the depth of consultation required) of the DTCA is reviewable on a correctness standard. Including the "scope of Aboriginal and treaty rights"[74] in *Vavilov's* constitutional exception can simply be seen as a restatement of this approach. Further, insofar as judicial review applications address Aboriginal rights, they are most likely to be focused on the DTCA, especially since the Supreme Court of Canada has held that the determination of Aboriginal rights per se should not be done in a judicial review application, but in a trial.[75] It would be odd, then, for the Supreme Court to explicitly speak to section 35 rights without consideration of the DTCA when discussing the standard of review. Thus, it is difficult to make sense of the Supreme Court's holding in *Vavilov* excepting "the scope of Aboriginal … rights"[76] from the presumption of reasonableness review without including within that phrase, at least, the scope of the DTCA. As noted above, the Federal Court of Appeal and British Columbia Supreme Court took this approach.[77]

The problem with this view is that "Aboriginal and treaty rights"[78] and the DTCA are two clearly distinct concepts. It is difficult to see how the stated exception could refer to the duty to consult, both because "Aboriginal and treaty rights"[79] is a verbatim clause from section 35 with a clearly defined meaning and because the duty to consult was designed to apply specifically where those rights are "being seriously pursued in the process of treaty negotiation and proof."[80] That is, it arises before the rights have been recognized at Canadian law.

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69 *Coldwater*, *supra* note 1 at para 27.
70 2020 BCSC 561 at paras 22–26 [*Redmond*].
71 *Manitoba Métis Federation*, *supra* note 67 at para 60.
72 *Vavilov*, *supra* note 7 at para 55.
73 *Ibid*.
74 *Ibid*.
75 *Ktunaxa*, *supra* note 40 at para 84. But see *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55 in which the scope of an Aboriginal right to cut timber was addressed in a judicial review application. This case, however, precedes the development of the DTCA in *Haida*.
76 *Vavilov*, *supra* note 7 at para 55.
77 *Coldwater*, *supra* note 1 at para 27; *Redmond*, *supra* note 70 at paras 22–26.
78 *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
79 *Ibid*.
80 *Haida*, *supra* note 13 at para 27.

In sum, there are good reasons supporting either reading of the "scope of Aboriginal and treaty rights"[81] as it pertains to the DTCA. If "scope of Aboriginal and treaty rights"[82] includes the DTCA, it is a restatement of the law, at least insofar as the scope of DTCA is considered (trigger, process, and adequacy are not mentioned). That would seem to suggest that the Court intended the status quo to prevail by explicitly mentioning scope. Further, courts may have a desire to maintain consistency with pre-*Vavilov* case law where possible.[83] If the phrase is read as referring only to determining Aboriginal rights but not to the duties that attach to asserted rights, then *Vavilov* is silent on the DTCA and what the new approach to the standard of review means for consultation cases. In either case, *Vavilov* is silent on much of the consultation framework, inviting us to consider whether the approach to DTCA should change in light of the new regime.

The crux of the issue is whether the DTCA is the *type of constitutional question* on which some deference may be afforded administrative decision-makers, or whether it is the type that must receive a single correct answer. This requires consideration of whether the DTCA, or any dimension of it, is analogous to, consistent with, or otherwise included within "[q]uestions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state" or "other constitutional matters."[84] As we now explain in more detail, while the DTCA is an uneasy fit within the phrase "aboriginal and treaty rights,"[85] the reasoning supporting the exception from the presumption of reasonableness for the sake of the rule of law in *Vavilov* supports the inclusion of the DTCA in the exception in some form. We note, before getting into this, that there is an argument that DTCA cases should be treated similarly to *Charter* cases, which are currently reviewed on a reasonableness standard. We explain why we reject this argument in Part V.A below. In short, section 35 issues implicate questions of the division of constitutional authority in a way that individual rights protected under the *Charter* do not.

A. DIVISION OF POWERS, SEPARATION OF POWERS, AND QUESTIONS OF JURISDICTION

Since at least 1998, the Supreme Court of Canada has consistently held that questions of federalism are to be reviewed on a correctness basis.[86] Might the reasoning supporting this holding also support correctness review for DTCA issues? Part of the challenge in assessing this question is that the Supreme Court has never explained precisely *why* division of powers issues are subject to the correctness standard. *Vavilov*[87] relies on *Dunsmuir*,[88] which in turn relies on *Westcoast Energy Inc. v. Canada (National Energy Board)*[89] and *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board)*

81 *Vavilov*, *supra* note 7 at para 55.
82 *Ibid*.
83 *Osman Ali Abdi v The Minister of Citizenship and Immigration*, 2020 FC 172 at para 27.
84 *Vavilov*, *supra* note 7 at para 55.
85 *Constitution Act, 1982*, *supra* note 78, s 35.
86 [1998] 1 SCR 322 at paras 40–42 [*Westcoast Energy*]; *Dunsmuir*, *supra* note 16 at para 58.
87 *Vavilov*, *supra* note 7 at para 55.
88 *Dunsmuir*, *supra* note 16.
89 *Westcoast Energy*, *supra* note 86 at para 40.

v. Laseur,[90] but the closest any of these cases come to an explanation is *Dunsmuir*'s reference to the "unique role of s. 96 courts as interpreters of the Constitution."[91]

How might we explain correctness review for division of powers and separation of powers questions? We start by noting that the concern grounding correctness review here is distinct from that which grounds correctness review for "general questions of law of central importance to the legal system as a whole," which can be understood as motivated by a concern for consistency in the system.[92] Paul Daly argues otherwise, claiming that the *Vavilov* exception to reasonableness "is engaged only where a 'final and determinate' judicial interpretation is necessary to ensure 'consistency.'"[93] Daly's focus was on whether *Charter* issues raised by administrative decisions will continue to be reviewed on a reasonableness standard, an issue we address below in Part V.A. But to the extent that he argues that correctness review is prescribed by *Vavilov* only if consistency is at stake, we disagree. The paragraph Daly refers to provides that correctness review is justified for the range of constitutional questions listed above and for "questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies."[94] For the Supreme Court, correctness review is justified because it "respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary."[95] There are really two justifications here: (1) preserving the role of courts as constitutional interpreters and (2) ensuring consistency for the sake of the rule of law. While both justifications may be at play in some cases, they may also operate independently. Not all questions of central importance to the legal system, such as solicitor-client privilege,[96] have a constitutional status, but correctness review is nonetheless justified. Conversely, concerns about the division of powers can be very specific and not really addressed to questions of consistency. For instance, in cases where division of powers questions arise as to whether a particular entity or employee falls under federal or provincial jurisdiction for the purposes of determining which labour and employment legislation applies, courts undertake a "functional analysis."[97] This makes for idiosyncratic decisions focused squarely on the particular facts of each case.[98] The analysis in one case is not likely to have broad precedential value, but correctness review nonetheless applies.

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90 2003 SCC 54.

91 *Dunsmuir*, *supra* note 16 at para 58; *Dunsmuir* also cites David J Mullan, *Administrative Law*, Essentials of Canadian law (Toronto: Irwin Law, 2001) at 60, which refers to the unique role of the courts and the likelihood that constitutional questions will be beyond the expertise of administrative decision-makers.

92 *Vavilov*, *supra* note 7 at para 53. Admittedly, the majority does not clearly separate the motivations for correctness review on the different categories of questions, treating them all as questions "for which the rule of law requires consistency and for which a final and determinate answer is necessary" (*ibid* at para 53 [citations omitted]).

93 Daly, *supra* note 42, citing *Vavilov*, *supra* note 7 at para 53.

94 *Vavilov*, *ibid.*

95 *Ibid* [citations omitted]. See also para 56: "The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard." Even in unique situations where consistency is not at issue, the requirement of determinate and defined limits remains.

96 *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53.

97 *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45 at para 61.

98 *Berens River First Nation v Teresa Gibson-Peron*, 2015 FC 614; *Fox Lake Cree Nation v Denis Anderson*, 2013 FC 1276.

In other words, correctness review is justified for division of powers and separation of powers questions not only for the sake of consistency but also by the need to ensure that legislatures and executive actors exercise only the amount of sovereignty allocated them by the Constitution. As the Supreme Court of Canada held in the 1970s, the Constitution defines the "bounds of sovereignty" and circumscribes legislative supremacy; "it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power."[99] In the 1980s, the Supreme Court confirmed: "It is inherent in a federal system such as that established under the *Constitution Act*, that the courts will be the authority in the community to control the limits of the respective sovereignties of the two plenary governments."[100]

Though there is no reasoning in *Vavilov* on this point, this justification supports the inclusion of section 35 issues in the exception to the presumption of reasonableness review. The "scope of Aboriginal rights" ought to be understood as stemming from the same concerns that arise from the division of sovereignty among the legislatures and among the branches of government. Though framed in the language of rights, and often treated by the courts in ways that resemble a *Charter* analysis, the logic underlying Aboriginal rights has more in common with the allocation of sovereignty to state institutions than it does with *Charter* rights. Aboriginal rights are sourced, as the Supreme Court of Canada has recognized, in the prior occupation of the territory by organized societies with their own laws; in other words, Aboriginal rights stem from Indigenous peoples' "pre-existing sovereignty over the territory of Turtle Island."[101]

What section 35 protects, then, are not a range of discrete liberal rights analogous to those under the *Charter* but held by a distinct minority. Rather, the "rights" that section 35 recognizes and affirms reflect pre-existing Indigenous sovereignty and law. They are shaped by the body of intersocietal law — both customary and positive in form — that developed through the interaction of these pre-existing systems with incoming European legal systems.[102] At common law, Indigenous legal orders survived the assertion and acquisition of Crown sovereignty through the doctrine of continuity.[103] As such, they act as a limit on Crown sovereignty, both by protecting a sphere of activities from legislative and executive encroachment and by recognizing a variety of distinct legal orders that the Crown is constitutionally bound to respect.

This was put clearly by the Supreme Court in *R. v. Sparrow*, the first decision interpreting section 35, when it cited Professor Noel Lyon's statement that "Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."[104] This is a recognition that under the model of constitutional supremacy arrived at with the adoption of the *Constitution Act, 1982*, section 35 provides the

99 *Amax Potash Ltd v The Government of Saskatchewan*, [1977] 2 SCR 576 at 590.

100 *Northern Telecom v Communication Workers*, [1983] 1 SCR 733 at 741.

101 Richard Stacey, "Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada's Sovereignty Deficit?" (2018) 68 UTLJ 405 at 408 [footnote omitted] [Stacey, "Honour in Sovereignty"].

102 *R v Van der Peet*, [1996] 2 SCR 507 at para 31. See also Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 SCLR (2d) 595.

103 *Mitchell v MNR*, 2001 SCC 33 at paras 9–10 [*Mitchell*].

104 [1990] 1 SCR 1075 at 1106 [*Sparrow*], citing Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26:1 Osgoode Hall LJ 95 at 100.

courts with the authority to supervise the Crown's actions to ensure they are consistent with the rights "recognized and affirmed" in section 35.[105] Further, it signals a willingness of the Court to question "sovereign claims" of the Crown, a notion that goes beyond merely supervising exercises of authority to questioning the Crown's claims to sovereign authority over Indigenous peoples. More precisely, while the Court does not question the existence of Crown sovereignty, it is prepared to consider the legal effects of that sovereignty. Thus, as Justice Abella wrote nearly 30 years later, "[i]n *Sparrow*, the Court found it impossible to conceive of s. 35 as anything *other than* a constitutional limit on the exercise of parliamentary sovereignty."[106]

That this is not merely the type of restriction that any individual right places on the Crown under a liberal constitution is clear when we consider the *Mitchell* and *Tsilhqot'in Nation*[107] decisions. In *Mitchell*, Justice Binnie described in his concurring opinion what he referred to as "merged sovereignty."[108] He wrote:

> The modern embodiment of the "two-row" wampum concept, modified to reflect some of the realities of a modern state, is the idea of a "merged" or "shared" sovereignty. "Merged sovereignty" asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners…. If the principle of "merged sovereignty" articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort.[109]

In *Tsilhqot'in Nation,* the Court recognized that Aboriginal title has a jurisdictional or public law dimension.[110] The title interest includes the right not only of exclusive occupation — a proprietary interest familiar to the common law — but to collectively and proactively manage the territory.[111] This latter characteristic brings jurisdiction and governance into the Aboriginal title interest. There are considerable restraints on how the Crown may impact such an interest. Consent of the Indigenous title holder is required before the Crown can use any title lands. Should that consent not be acquired, the Crown has the option of attempting to justify an infringement of the title interest. The bar for such justification is high, however, and made higher in *Tsilhqot'in Nation* by the stipulation that the Crown adhere to the "internal limit" of title: title cannot be "encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land."[112] Aboriginal title, as an interest protected by section 35, protects a sphere of Indigenous jurisdiction from state incursion.[113]

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105 *Constitution Act, 1982*, *supra* note 78, s 35(1). On shift to constitutional supremacy, see *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 72.

106 *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 86 [emphasis in original] [*Mikisew Cree*].

107 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in Nation*].

108 *Mitchell*, *supra* note 103 at para 129.

109 *Ibid* (Binnie J concurring) [emphasis in original].

110 Brian Slattery, "The Constitutional Dimensions of Aboriginal Title" (2015) 71 SCLR (2d) 45 [Slattery, "The Constitutional Dimensions"].

111 *Tsilhqot'in Nation*, *supra* note 107 at para 94.

112 *Ibid* at para 74.

113 *Constituion Act, 1982*, *supra* note 78, s 35.

In these ways the ongoing reality of Indigenous sovereignty limits the attributes or extent of Crown sovereignty. Justice Abella captured this clearly in *Mikisew Cree* (dissenting on another point):

> [W]hile the *Charter* defines a sphere of rights for individuals that are protected from state action, the majority of the Constitution, including s. 35, allocates power between governing entities, such as the division of powers between the provincial and federal governments, or the separation of powers between the branches of government. In the same way, s. 35 defines the relationship between the sovereignty of the Crown and the "aboriginal peoples of Canada."[114]

While this explanation may well explain the inclusion of "the scope of Aboriginal and treaty rights"[115] in the rule of law exception, it does not yet provide a principled answer to the question about whether the DTCA should be included. For this we turn back to *Beckman*.

The key move in *Beckman* is to identify the adequacy of consultation as a threshold question of constitutionality that must be reviewed on a correctness standard: if consultation was inadequate, the Crown's action is unconstitutional. What, then, is the relationship between the adequacy of consultation and the division of powers? Much as section 35 rights must be understood as placing a limit on Crown sovereignty, including acts of both executive and legislative authority, the DTCA can be framed in the same way. The DTCA "represents … a further step towards embracing the honour of the Crown as a limit on Crown sovereignty in relation to Indigenous peoples."[116] As Richard Stacey argues, the consultation and accommodation required by the DTCA allows "Indigenous peoples to exercise some degree of sovereign decision-making power."[117] In a practical sense, the DTCA was designed as a fetter on absolute Crown sovereign authority and as a means of including Indigenous peoples in decision-making processes where Aboriginal rights may be impacted. From a theoretical perspective, the duty to consult provides an avenue through which a deficient Crown sovereignty — one asserted over Indigenous peoples on the basis of the doctrine of discovery and hierarchical conceptions of peoples and legal orders — can be remedied through judicial supervision of Crown exercises of sovereignty.[118] As Ryan Beaton argues, the Court's frequent encouragement of negotiated outcomes seems designed to "perfect or legitimate Crown sovereignty. As Crown negotiations with First Nations stalled, however, the Court proceeded to develop its own framework for the procedural legitimation of Crown sovereignty, i.e. a framework of procedural safeguards designed to weed out 'bad' exercises of Crown sovereignty from legitimate ones."[119] If section 35 is to meet its higher aspirations as the foundation of a "generative constitutional order,"[120] negotiated forms of shared political authority must be "supported by the judiciary's role in enforcing the honour of the Crown, and holding the Crown accountable where that standard is not met."[121]

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114 *Mikisew Cree*, *supra* note 106 at para 88.

115 *Vavilov*, *supra* note 7 at para 55.

116 *Mikisew Cree*, *supra* note 106 at para 70, citing Mark D Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's LJ 470, at 513–14.

117 Stacey, "Honour in Sovereignty," *supra* note 101 at 407.

118 Ryan Beaton develops this argument in Ryan Beaton, "*De Facto* and *de Jure* Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2018) 27:1 Const Forum Const 25 [footnotes omitted].

119 *Ibid* at 25.

120 Justice Abella in *Mikisew Cree*, *supra* note 106 at para 87 citing Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR 433 at 436.

121 *Mikisew Cree*, *ibid*.

Given this, the stakes of adequate consultation are high: it is one process through which constitutional authority and jurisdiction are worked out, and it plays a legitimating function in seeking to mitigate the effects of the most colonial features of Canada's Constitution. Further, it is a direct instantiation of the honour of the Crown, an honour which "attaches to all exercises of sovereignty."[122] It is a process through which the Crown's legally and morally dubious assertion of sovereignty *over* Indigenous peoples can be made good in a reformed constitutional order.

What does this mean for the standard of review in respect of the adequacy of consultation? How should courts treat the question of whether the Crown has adequately fulfilled its consultation obligations? The distinction between correctness and reasonableness is described in *Vavilov* as whether the Court would substitute its own decision for that of the administrative decision-maker.[123] The Court should be able to substitute its own decision on the adequacy of consultation given the high stakes and consultation's role in mediating constitutional disputes. It may well be that a court has ample room on a reasonableness review to ensure adequate consultation has occurred, but the signals the judiciary sends through the choice of standard of review are important,[124] particularly when the decision-maker is not a delegated body, but the Crown itself. In such cases, the executive is in the position of assessing the adequacy of its own consultation. There, deference on questions of adequacy can give the appearance of permitting unilateral Crown decision-making, undermining the Court's position as a neutral arbiter, and raising questions of constitutional legitimacy. As Justice Abella writes, "[u]nilateral action is the very antithesis of honour and reconciliation, concepts which underlie both the duty to consult and the very premise of modern Aboriginal law."[125] The judiciary must ensure that constitutional obligations have been met, not that the Crown believes its obligations have been met, as seems to have been the Federal Court of Appeal's approach in *Coldwater.* The case for this is clear where the division and separation of powers is concerned, and the rationale applies equally to determining the adequacy of consultation.

What does this analysis look like in practice? Again, *Beckman* provides guidance. Justice Binnie held:

> In exercising his discretion under the Yukon *Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness.[126]

In other words, the adequacy of consultation establishes a threshold for assessing the constitutionality of the Crown's conduct. Once it is determined that the Crown acted within

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122 *Ibid* at para 78.

123 *Vavilov*, *supra* note 7.

124 There is also some empirical evidence that courts overturn fewer decisions when the standard of review is reasonableness, at least as reasonableness review was exercised under *Dunsmuir*: Robert Danay, "Quantifying *Dunsmuir*: An Empirical Analysis of the Supreme Court of Canada's Jurisprudence on Standard of Review" (2016) 66:4 UTLJ 555.

125 *Mikisew Cree*, *supra* note 106 at para 87 [citations omitted].

126 *Beckman*, *supra* note 22 at para 48 [citations omitted].

its constitutional bounds (that is, that it adequately consulted), subsequent decisions (for example, the issuing of a licence or permit) would be reviewed on a reasonableness standard, as would the design of the consultation process. *Vavilov* requires that constitutional questions be reviewed on the higher standard to ensure the integrity of the constitutional order and legitimacy of constitutional rule. The adequacy of consultation raises these same concerns.[127]

B. "OTHER CONSTITUTIONAL MATTERS"

If the argument above that DTCA matters are akin to matters of federalism and the division of powers proves unpersuasive, we might still argue that DTCA cases fit into the "other constitutional matters" category listed by the *Vavilov* majority as appropriate for correctness review.[128] Presumably, in referring to "other constitutional matters [that] require a final and determinate answer from the courts,"[129] the majority had in mind something other than those situations captured by the named categories. But the boundaries of this category remain undefined. One might argue that the DTCA is a good candidate for this empty box given that it does not fit neatly into the named categories but shares many conceptual similarities to division of powers and separation of powers issues, as just discussed. Ultimately, however, we do not know enough about the contours of "other constitutional matters"[130] to say whether and to what extent the DTCA fits it.

V. COUNTERVAILING CONSIDERATIONS

There are two powerful arguments against the position we advance here. The first is that, on the current law, *Charter* issues raised by administrative action are reviewed on a reasonableness standard despite their constitutional status. Therefore, on this argument, the constitutional status of the DTCA does not necessarily lead to a correctness standard. The second is the related, though more general, argument that reasonableness review promotes a more democratic conception of the rule of law. In this section we argue that neither argument is determinative in the DTCA context.

A. SHOULD THE DTCA FOLLOW THE APPROACH TO THE *CHARTER*?

The question whether the approach in *Doré v. Barreau du Québec*[131] is consistent with *Vavilov* has attracted important debate. Mark Mancini argues that *Vavilov* is shaped by a reliance on both formalist conceptions of administrative law that prioritize legislative supremacy and the rule of law and justificatory approaches that focus on the need for exercises of public authority to be justified through reasons.[132] *Doré*, in Mancini's view, is

127 It might be argued that our argument is out of step with application of the reasonableness standard to decisions of Indigenous decision-making bodies, see e.g. *Joe Pastion v Dene Tha' First Nation*, 2018 FC 648 at paras 16–29. The decisions of Indigenous decision-making bodies, however, are categorically distinct from Crown decisions concerning the DTCA. Applying a correctness standard to the latter, however, is motivated by the same concerns that motivate the application of a reasonableness standard to the former. In each case, the concern is to limit the intrusion of the Crown on Indigenous sovereign authority to the greatest extent possible to ensure the legitimacy of the constitutional order.

128 *Vavilov*, *supra* note 7 at para 55.

129 *Ibid*.

130 *Ibid.*

131 2012 SCC 12 [*Doré*].

132 Mark Mancini, "The Conceptual Gap Between *Doré* and *Vavilov*" (2020) 43:2 Dal LJ 793 at 796–97.

the product of a functionalist approach that is deferential on questions of expertise.[133] Paul Daly disagrees, arguing that

> [i]n fact, the conceptual framework of *Vavilov* supports the continued application of *Doré*. Exceptions to the presumption of reasonableness review can only be based on legislative intent or the rule of law…. In the absence of federal or provincial legislation requiring correctness review for *Charter* questions, it is only where the rule of law is engaged that *Charter* issues will be subject to correctness review under the *Vavilov* framework. But the rule of law, as defined in *Vavilov,* is engaged only where a "final and determinate" judicial interpretation is necessary to ensure "consistency."[134]

The dispute, in essence, is about the scope of the rule of law exception and, especially, the phrase "constitutional matters."[135] Construed broadly (or even on a common sense or plain language reading), the clause would clearly include *Charter* issues. Yet, the Court had an opportunity to explicitly rework *Doré* and declined to do so.[136] The lower courts have, since *Vavilov*, tended to favour a narrower reading of the rule of law exception and relied on the reasonableness presumption to establish the standard of review.[137] The "constitutional matters"[138] phrase has not been used to support a capacious reading of the exception. These cases have not, however, dealt with *Charter* issues.

We take no position here on this debate other than noting our disagreement with Daly's interpretation of *Vavilov*'s exception as applying *only* to those cases where consistency is at stake. As we argued above in Part IV.A, it is possible to conceive of questions of the division of powers that are unique or idiosyncratic, to which the correctness standard would nevertheless apply. Rather than take sides with either Daly or Mancini on the question of *Vavilov*'s consistency with *Doré*, we consider both alternatives. If Mancini is correct, and *Doré* is inconsistent with *Vavilov*, this would strengthen the argument that questions that go directly to the constitutionality of Crown conduct — such as the adequacy of consultation — fall within the rule of law exception. Admittedly, there are important distinctions between the DTCA and *Charter* rights, which are outlined below. The point here is that an approach that favours a more capacious reading of the rule of law exception, one which emphasizes the inclusion of a greater range of constitutional matters, would include the full range of the Crown's constitutional obligations within its ambit.

If the Supreme Court of Canada maintains the rule in *Doré*, which Daly argues is consistent with *Vavilov*, there are persuasive reasons for treating DTCA cases differently.

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133 *Ibid* at 797.

134 Daly, *supra* note 42 [citations omitted]. For an argument that *Vavilov*'s approach to the "culture of justification" is harmonious with *Doré,* see also Richard Stacey, "A Unified Model of Public Law: Charter Values and Reasonableness Review in Canada" (2021) 71:3 UTLJ 338. Notably, however, Stacey does not address the correctness exception for federalism issues or discuss Indigenous rights exception for federalism issues or discuss Indigenous rights.

135 *Vavilov*, *supra* note 7 at para 55.

136 *Ibid* at para 57.

137 See e.g. *Xiaoning Zang v The Minister of Citizenship and Immigration*, 2020 FC 112 at paras 19–20; *Deena Abdelsalam v The Minister of Citizenship and Immigration*, 2020 FC 196 at paras 22–24; *Irfan Ali v The Minister of Citizenship and Immigration*, 2020 FC 93 at paras 24–25; *MD Masudur Rahman v The Minister of Citizenship and Immigration*, 2020 FC 138 at paras 20–23; *Deena Abdelsalam v The Minister of Citizenship and Immigration*, 2020 FC 195 at paras 25–27; *Munira Omar v The Attorney General of Canada*, 2020 FC 408 at paras 20–21; *Coldwater*, *supra* note 1 at paras 8–10; *Borradaile v British Columbia (Superintendent of Motor Vehicles)*, 2020 BCSC 363 at paras 8–10; *Sagkeeng v Government of Manitoba*, 2020 MBQB 83 at para 101.

138 *Ibid*.

First, section 35 sits outside the *Charter*, and DTCA claims rest on an assertion of a section 35 right.[139] There should be no presumption that two distinct parts of the constitution be treated analogously: since *Doré*, in fact, federalism and *Charter* questions have given rise to differing approaches to the standard of review. The approach to the standard of review for each type of constitutional question should be justified on independent grounds. This does not, however, yet tell us whether the specific framework applied to the *Charter* should, for reasons other than any purported similarity between it and section 35, be applied to section 35 as well.

Given that federalism questions are currently reviewed on a correctness standard and *Charter* questions are reviewed on a reasonableness standard, the question for us is: which is more analogous to section 35? In our view, the rights that section 35 protects are different *in kind* from *Charter* rights. Section 35 rights are communal rights that have a jurisdictional character. Though these claims are sometimes advanced by individuals, the rights themselves depend on membership in the group; they are not individual rights in the liberal constitutional tradition and, in fact, pose deep challenges to that tradition.[140] As such, as we argued in more detail above in part IV.B, section 35 has more in common with the parts of the constitution that divide public authority and sovereignty — the division and separation of powers — than the part — the *Charter* — that protects individual rights from government intrusion. To restate the point briefly: section 35 and the associated DTCA are incomplete efforts to recognize the sovereignty of Indigenous peoples. Section 35 recognizes and protects the pre-existing sovereignty of Indigenous nations, much as the division of powers allocates sovereignty between the provincial legislatures and Parliament. *Charter* rights stem from the logic that human dignity requires certain interests be protected by the requirement that governments justify their infringement. They are principally about *how* sovereignty can be exercised — and in this respect share much in common with the "culture of justification"[141] referred to in *Vavilov* — rather than which actor is sovereign over a given subject matter or territory.

What's more, the reasoning behind the approach in *Doré* does not transfer well to section 35 disputes. In *Doré*, the Court held that the proportionality test under an *Oakes* analysis is similar enough in substance to a reasonableness review that satisfaction under the latter would equate to satisfaction of the former.[142] It is difficult to apply the same reasoning to section 35 claims. The equivalent to *Oakes* — that is, the test for determining where a state infringement of a right might be justified — was developed in *Sparrow*.[143] While similar to the *Oakes* test, the *Sparrow* test requires that the government demonstrate a compelling legislative object, minimal impairment, compensation, and consultation.[144] This last requirement is distinct from *Oakes* (as is the requirement for compensation) and imposes an additional burden on the Crown. These additional burdens were further clarified in *Tsilhqot'in Nation*, where the Court emphasized that any infringement must be consistent with the Crown's fiduciary obligation to Indigenous peoples and, importantly, established

139 On section 35 sitting outside the *Charter*, see *Sparrow*, *supra* note 104 at 1102.
140 For analysis of this issue see Duncan Ivison, *Can Liberal States Accommodate Indigenous Peoples?* (Cambridge: Polity, 2020).
141 *Vavilov*, *supra* note 7 at paras 2, 14.
142 *Doré*, *supra* note 131 at paras 55–58.
143 *Sparrow*, *supra* note 104.
144 *Ibid* at 1111–119.

that the "inherent limit"[145] that restricts the types of uses Aboriginal title lands may be used for to those which do not undermine its use for future generations, applies equally to the Crown.[146]

To put a finer point on it, the way the Court framed the issue in *Doré* was to ask "whether the presence of a *Charter* issue calls for the replacement of this administrative law framework [of reasonableness] with the *Oakes* test, the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a 'reasonable limit' under s. 1."[147] Again, the Court answered "no" because the "justificatory muscles"[148] exercised during an *Oakes* analysis — those being "balance and proportionality"[149] — are the same as those used in reviewing whether an administrative decision is in violation of the *Charter*: "[i]n both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited."[150] To use the Court's framing, then, we might ask: does the presence of a section 35 issue call for the replacement of the presumption of reasonableness with the *Sparrow* test? For the reasons outlined above, the best answer seems to be yes. The "justificatory muscles"[151] used in *Sparrow* involve too many factors beyond balance and proportionality to be said to be equivalent to a reasonableness review.

Importantly, though, this tells us little about the DTCA, which applies procedural — and some borderline substantive — burdens *before* a right is proven and, therefore, before infringement can even arise. Does reasonableness review sufficiently ensure that the Crown has adequately discharged its constitutional duties? Are the questions relevant to reviewing the adequacy of consultation parallel to reasonableness review in the same way that the *Doré* Court held that questions of proportionality are parallel to reasonableness review? Again, in *Doré* the *Oakes* test was said to rest on the principles of balance and proportionality. This can hardly be said to be the case for the DTCA. The question in reviewing DTCA issues is whether the consultation and accommodation undertaken and offered by the Crown sufficiently discharged its constitutional obligations. Balance and proportionality feature in the *infringement* test, but not the consultation analysis. From a doctrinal standpoint, then, the justification for applying a reasonableness standard to *Charter* rights is an uneasy fit where the DTCA is concerned.

Further, from a practical perspective, one of the Court's concerns in *Doré* was that

> [a]n adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective?[152]

145 *Tsilhqot'in Nation*, *supra* note 107 at para 67.
146 *Ibid* at paras 77–88.
147 *Doré*, *supra* note 131 at para 3.
148 *Ibid* at para 5.
149 *Ibid*.
150 *Ibid* at para 6.
151 *Ibid* at para 5.
152 *Ibid* para 4.

This concern *may* apply to the *Sparrow* justification test, but it is not relevant to the DTCA. Under a DTCA review, the question is whether the administrative decision-maker was correct in holding that the duty to consult had been adequately discharged. There is no need to identify a pressing or substantial objective, nor to justify the elements of a proportionality test. The reasons provided by the decision-maker will attest to their considerations as to the adequacy of consultation. Nothing more is needed. For these reasons, it would be difficult to coherently apply a reasonableness review to DTCA issues, including the adequacy of consultation, on the basis of *Doré*.

B. REASONABLENESS REVIEW AND THE DEMOCRATIC RULE OF LAW

One of the key challenges to expanding the range of decisions to which a correctness standard applies is David Dyzenhaus's theory of the democratic rule of law. For Dyzenhaus, the "traditional" approach — a reading of the constitution that favours a strict separation of powers and seeks to minimize the extent to which common law or unwritten constitutional powers may encroach on parliamentary sovereignty — prohibits constitutional evolution and restricts constitutional interpretation to an elite judiciary, taking the constitution out of the hands of "the people."[153] When the interpretation and creation of legal meaning is diffused throughout the state, it is more democratic. The potential for arbitrariness is mitigated by employing a standard of reasonableness, ensuring that all exercises of state power are justified in terms consistent with the law that allocates that power. If this is true for the exercise of state power, it is not clear that much changes once constitutional considerations are present. The meaning of the Constitution, like the meaning of a statute, should be in the hands of the people. Though it must be justifiable to courts, this meaning need not be their exclusive purview. In Justice McLachlin's (as she then was) words: "[t]he *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people."[154] This is a powerful line of argument, only partially rehearsed here. We respond in two ways.

First, while justification is a key aspect of *Vavilov* and resonates with Dyzenhaus's approach, *Vavilov* nevertheless retains correctness review for some matters.[155] As a matter of law, then, there are clearly some questions about which the Court retained for itself the ability to remake decisions. As argued above, these are matters that either require a consistent answer or are so fundamental to the constitutional order that without robust judicial supervision, the rule of law may be undermined. We made the case in Part IV as to why the adequacy of consultation is one of those matters. Second, and more fundamentally, there are good reasons to except Indigenous-state relations from the argument that the creation of legal and constitutional meaning, and the act of constitutional interpretation, ought to be diffused throughout the state. A starting point for this analysis is the distinct place that Indigenous peoples occupy in the constitutional order and their distinct relationship to the state; Indigenous peoples are, in at least one important respect, distinct from other citizens. As Duncan Ivison notes, only in respect of Indigenous peoples is there

153 David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27:2 Queen's LJ 445 at 477.

154 *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 70.

155 Mancini, *supra* note 132.

always a prior question concerning the legitimacy of the state's authority.[156] While there may well be democratic and emancipatory possibilities that emerge when constitutional interpretation is dispersed, the effect does not take into account the existence of a special category of peoples who are subject to what Roger Merino has termed the paradox of inclusion/exclusion.[157] As Merino points out, the positing of a single homogenous "people" who have a mutually constitutive relationship with the nation state powerfully undermines Indigenous political agency: to become part of "the people," Indigenous peoples must assimilate and lose their unique political status, often becoming "wards" of the state.[158] But, if an Indigenous people rejects such incorporation, they may lose their ability to make any legal or constitutional claims against the state. Efforts to democratize legal interpretation that might bring the law closer to "the people" run the risk of neglecting those groups better understood as "peoples" on their own, generative of their own popular sovereignties, who might contest the state's legislative authority over their traditional lands and resources.

If this is correct and the argument for reasonableness review through the democratic rule of law does not work well in the context of state-Indigenous relations, why might we think correctness review better addresses this context? A purpose of the DTCA is, as Ryan Beaton argues,[159] to legitimate the Crown's sovereignty; it does this by making space for some exercises of Indigenous sovereignty through the expression of the wishes of Indigenous groups in the consultation process.[160] Crown actors will often have strong incentives and motivations to minimize this space if dominant non-Indigenous groups are in favour of the approval of a particular project with potential effects on Indigenous rights. The democratic principle — as expressed through parliamentary sovereignty and majority rule — consistently works against the interests of marginalized minorities. Given these pressures and the minority status of Indigenous groups, the ability for the Crown to be granted deference in the assessment of the adequacy of its own consultation is fraught with challenges. Courts, while subject to extraneous pressures, are safeguarded by their institutional independence and security of tenure. Of the various branches of government, courts are in the best position to act as neutral arbiters and ensure the state's constitutional obligations are fulfilled. Again, the analogy to federalism is apposite. Where the representatives of different aspects of sovereignty (or different sovereignties) meet, one hopes disagreements can be resolved through negotiation, but where those fail, an impartial decision-maker is necessary: "[i]nherent in a federal system is the need for an impartial arbiter of jurisdictional disputes over the boundaries of federal and provincial powers…. That impartial arbiter is the judiciary."[161]

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156 Ivison, *supra* note 140 at 88–94.

157 Roger Merino, "Law and Politics of Indigenous Self-Determination: The Meaning of the Right to Prior Consultation" in Irene Watson, ed, *Indigenous Peoples as Subjects of International Law* (Abingdon: Routledge, 2017) at 122–28.

158 *Ibid*.

159 Beaton, *supra* note 118.

160 Stacey, "Honour in Sovereignty," *supra* note 101 at 431–37.

161 *Reference re* Securities Act, 2011 SCC 66 at para 55 [references omitted].

C. IF REASONABLENESS REVIEW IS "ROBUST" AND VAVILOV ATTEMPTS TO LIMIT CORRECTNESS EXCEPTIONS, WHY BOTHER?

A final set of objections to our approach here stems from more general interpretations of *Vavilov*. One interpretation would argue that *Vavilov* expresses a general policy of limiting correctness review by establishing a general presumption of reasonableness review.[162] Arguing that DTCA cases, previously reviewed on a reasonableness standard, should be reviewed on a correctness standard, goes against *Vavilov*'s intended impact. To this objection, we respond that, while limiting correctness review is certainly an intention of *Vavilov*, it nevertheless crafts some principled exceptions to this presumption, and specifically notes that the categories of correctness review are not closed.[163] As argued above, we believe the principles that structure these exceptions apply to DTCA cases.

Finally, another interpretation of *Vavilov* is that its description of reasonableness review narrows the meaningful difference between correctness and reasonableness review because the latter is now more robust.[164] In other words, arguing that the DTCA should be subject to the correctness standard is simply not worth the effort. To this, we respond that while reasonableness review has become more demanding under *Vavilov*, it nevertheless finds "its starting point in judicial restraint and respects the distinct role of administrative decision makers."[165] Correctness review starts from a different perspective, with the reviewing court deciding the issue for itself. Clearly, at least the majority of the Court believed there was a difference between reasonableness and correctness, otherwise it would not have retained the categories. For all the reasons detailed in Part IV, we believe this is the appropriate approach for DTCA issues.

VI. CONCLUSION

The standard of review in administrative law has bedeviled Canadian jurisprudence for decades, with a significant recalibration seeming to emerge every 10 years since the 1970s.[166] The DTCA was developed to address the very different, persistent problem of legitimating the sovereignty claims of a colonial state. It is no surprise that when these two legal doctrines overlap that difficulties are multiplied. At bottom, however, we have argued that given the nature of Indigenous groups' interests in Aboriginal rights and their relation to state sovereignty, courts should be able to hold executive actors to the highest standard in the review of their decisions. It must be recalled that since confederation Indigenous peoples have been "partners in the emerging federation of Canada."[167] The "constitutional character"[168] of the relationship between the Canadian state and Indigenous peoples must be honoured. This can be done by safeguarding an impartial arbiter in cases where conflicting interests might pull executive actors in multiple directions in their decision-making.

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162 *Vavilov*, *supra* note 7 at para 10.
163 *Ibid* at para 70.
164 *Ibid* at paras 72, 82–83.
165 *Ibid* at para 75.
166 *CUPE v NB Liquor Corporation*, [1979] 2 SCR 227; *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048; *Dunsmuir*, *supra* note 16; *Vavilov*, *supra* note 7.
167 Slattery, "The Constitutional Dimensions," *supra* note 110 at 47 [footnotes omitted].
168 *Ibid*.