

SELECTING STANDARDS OF REVIEW ON STATUTORY APPEALS: A MAJOR CHANGE FROM *VAVILOV* GARNERING MINIMAL ATTENTION BUT HAVING SIGNIFICANT THEORETICAL AND PRACTICAL IMPLICATIONS

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Although the Supreme Court of Canada’s decision in Canada (Minister of Citizenship and Immigration) v. Vavilov has garnered attention for its simplification of standard of review analysis, often overlooked is the impact the decision had regarding statutory appeals: that selection of the standard of review on statutory appeals is now governed by the Housen v. Nikolaisen framework. This article describes the substantial impact this change has had in jurisdictions where statutory appeals are a prominent method of judicial review, using Saskatchewan as an example. The article explores the implications that Vavilov’s treatment of statutory appeals has had on administrative law theory and practice, emphasizing the impact of questions of law on statutory appeals being reviewed on the standard of correctness.

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INTRODUCTION

When the Supreme Court of Canada decided *Canada (Minister of Citizenship and Immigration) v. Vavilov*,¹ the change to the standard of review framework applicable to common law judicial reviews was seen as the most significant aspect of the case, by many in both the academy and the judiciary alike. It was thought that a clear presumption in favour of the reasonableness standard on a common law judicial review, along with the identification of those limited categories of questions that will attract correctness review, would significantly reduce the instances where the *selection* of the standard of review was in dispute,

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¹ 2019 SCC 65 [*Vavilov*].



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leaving the parties to focus on its application to the decision under review. For the most part, this appears to have been the case.

Not given much additional thought, however, was the other change effected by *Vavilov*, at least as it pertains to the selection of the standard of review: that, when an administrative decision is subject to a statutory right of appeal, the selection of the applicable standard of review would now be governed by the framework established in *Housen v. Nikolaisen*.² The purpose of this article is not normative. Rather, it is to describe what *Vavilov* has meant, and continues to mean, in relation to the selection of the standard of review when an administrative decision is subject to a statutory appeal. In those provinces where a disproportionate number of decision-makers exercising delegated statutory or regulatory authority are subject to an explicit appeal right — particularly the western provinces — this change from *Vavilov* has been significant, impacting issues of both administrative law theory and practice.

I. *VAVILOV* AND STATUTORY APPEALS

As noted by Jonathan Silver and Henry Federer, “[t]he great debates in administrative law have not focused on appeal rights.”³ Indeed, prior to *Vavilov*, Canadian courts “differentiated between appeal rights from trial courts and appeal rights to courts from administrative tribunals,”⁴ and the standard of review framework — whether arising out of *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*⁵ or *Dunsmuir v. New Brunswick*⁶ — applied regardless of the procedural vehicle that led to the review of the decision by a court. In undertaking a revamp of the standard of review framework in *Vavilov*, the Supreme Court of Canada explicitly addressed statutory appeal rights and, for the first time, stated that as a matter of legislative intent statutory appeals should be treated differently from common law judicial review applications and the same as appeal rights from trial courts, for the purposes of selecting the standard of review applicable to an administrative decision-maker. Going forward, where “the legislature has provided for a different institutional structure through a statutory appeal mechanism,”⁷ it has signalled its “intent that appellate standards apply when a court reviews the decision.”⁸

The majority’s stated reasons in *Vavilov* for making this change are grounded in principles of statutory interpretation and legislative intent. For the majority, the fact that the legislature has explicitly prescribed a role for the courts in reviewing decisions of a particular statutory delegate through the creation of a statutory right of appeal is an important “institutional design choice,”⁹ and suggests that “the court is to perform an appellate function.”¹⁰ Moreover, having “subjected the administrative regime to appellate oversight,” the legislature has “indicated that it expects the court to scrutinize such administrative decisions on an appellate

² 2002 SCC 33 [*Housen*].

³ Jonathan Silver & Henry Federer, “What is an Appeal? *Vavilov* and the New Framework for Statutory Appeals” (2021) 34:2 Can J Admin L & Prac 179 at 181.

⁴ *Ibid* at 182, 196. See also David Stratats, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” (2016) 42:1 Queen’s LJ 27 at 41–42.

⁵ 1998 CanLII 778 (SCC) [*Pushpanathan*].

⁶ 2008 SCC 9 [*Dunsmuir*].

⁷ *Vavilov*, *supra* note 1 at para 8.

⁸ *Ibid* at para 17.

⁹ *Ibid* at para 26.

¹⁰ *Ibid* at para 36.

basis.”¹¹ This means that the applicable standard will be determined by virtue of the specific nature of the question before the court on appeal and the *Housen* framework, as well as the jurisprudence dealing with appellate standards of review more generally.¹²

The Supreme Court justified this move with reference to both academic and judicial criticism of its treatment of statutory appeal rights in its recent jurisprudence, and chose to “seize on the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal.”¹³ Put another way, respect for “legislative choice is not one-dimensional; rather, it pulls in two directions.”¹⁴ Indeed, the majority was of the view that while the prior push for simplification reflected in *Dunsmuir* was laudable, “it did not justify ceasing to give *any* effect to statutory appeal mechanisms,” particularly without any explicit rationale for doing so.¹⁵ Nor was there any “convincing reason to presume that legislatures mean something entirely different when they use the word ‘appeal’ in an administrative law statute than they do in, for example, a criminal or commercial law context.”¹⁶ Rather, the principle of statutory interpretation relating to the presumption of consistent expression required the Supreme Court to give effect to the legislature’s use of the word “appeal,” and the majority inferred from this use of the word “appeal” that the legislature intended that appellate standards of review apply to all “appeals,” regardless of the underlying context or subject matter.¹⁷ If the same standard of review framework applied to both common law judicial reviews and statutory appeals of administrative decisions, the creation of appeal provisions would be rendered completely redundant and, the majority added, legislatures are presumed not to speak in vain.¹⁸ In short, a legislature’s choice of “a more involved role for the courts in supervising administrative decision making”¹⁹ had to be respected, and it would be inconsistent with principles of statutory interpretation “to disregard clear indications that the legislature has intentionally chosen a more involved role for the courts.”²⁰

As I will explain, treating statutory rights of appeal from administrative decisions in the same way as statutory rights of appeal from trial courts, and the related shift to an application of the *Housen* appellate standards of review to administrative decision-makers, has had a disproportionate impact in jurisdictions where the predominant procedural vehicle for the judicial review of administrative action is a statutory appeal. The most significant collateral effect of this change, from the perspective of administrative law theory, is that questions of law decided by administrative decision-makers, and in particular questions of statutory interpretation, are now reviewed on the non-deferential standard of correctness. However, practical implications for how the judicial review of administrative decision-making is actually conducted have also arisen.

¹¹ *Ibid.*

¹² *Ibid* at para 37.

¹³ *Ibid* at para 39.

¹⁴ *Ibid.*

¹⁵ *Ibid* at para 43 [emphasis in original].

¹⁶ *Ibid* at para 44.

¹⁷ *Ibid.*

¹⁸ *Ibid* at paras 44–45.

¹⁹ *Ibid* at para 46.

²⁰ *Ibid.*

II. THE STATUTORY SETTING — SASKATCHEWAN AS A CASE STUDY

Saskatchewan offers a particular example of the degree of change reflected by *Vavilov*'s direction that statutory rights of appeal from administrative decision-makers are now subject to the *Housen* framework and the appellate standards of review. That is because the Saskatchewan Legislature has created at least 109 separate statutory appeal rights²¹ from the exercise of delegated statutory or regulatory decision-making. Examples include decisions of the surface rights board,²² professional regulatory bodies like the College of Physicians and Surgeons²³ and the Law Society of Saskatchewan,²⁴ bodies created to deal with municipal tax and zoning-related appeals,²⁵ and decisions regarding statutory entitlement to no-fault automobile accident benefits,²⁶ among many others.²⁷

Moreover, and in recognition of the principle that “legislatures have the flexibility to create appeal rights in an administrative scheme through a variety of appeal mechanisms,”²⁸ many of these statutory rights of appeal are limited to questions of law or jurisdiction, and the designated appeal court is the Court of Appeal for Saskatchewan, not the Court of King's Bench. In other words, the vast majority of litigants involved in an administrative law dispute in Saskatchewan will never see the inside of a section 96 superior court. Rather, they are institutionally required by virtue of the doctrine of exhaustion²⁹ to challenge the administrative decision in an appellate court, whose historical function has been to adjudicate questions of law.

More fundamentally, however, for each of these appeals, both the parties and the designated appellate court are not selecting the standard of review pursuant to the *Vavilov* framework (where the standard is presumptively reasonableness including on questions of law and statutory interpretation, subject to limited, narrow exceptions). Rather, they proceed on the basis that the applicable standard of review — or standards of review, if more than one ground of appeal is being advanced — will be determined with reference to the *Housen* framework. Since pursuant to the *Housen* framework questions of law are reviewed for correctness, statutory decision-makers in Saskatchewan are no longer entitled to deference on questions of law, including the statutory interpretation of what used to be referred to as their “enabling” or “home” statute. They are also no longer afforded any deference based solely on the concept of their perceived expertise. Decades of jurisprudence recognizing

²¹ In order to arrive at this number, we undertook a review of the consolidated statutes of Saskatchewan as posted on CanLII. We reviewed, and then counted, those statutes that contained some type of “appeal” provision to a court, but excluded those statutes that contained only internal appeals to other administrative bodies. Therefore, while it is possible that our search is not comprehensive, we are confident in our conclusion, based on the search we undertook as we have described it, that there are, at least 109 distinct statutory rights of appeal from administrative decision-makers to either a superior or an appellate court in Saskatchewan.

²² *The Surface Rights Acquisition and Compensation Act*, RSS 1978, c S-65, s 71.

²³ *The Medical Profession Act*, 1981, SS 1980-81, c M-10.1, s 62.

²⁴ *The Legal Profession Act*, 1990, SS 1990-91, c L-10.1, s 56.

²⁵ See e.g. *The Cities Act*, SS 2002, c C-11.1, s 329; *The Municipalities Act*, SS 2005, c M-36.1, s 365.

²⁶ *The Automobile Accident Insurance Act*, RSS 1978, c A-35, ss 191, 194.

²⁷ Other examples include *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01, s 57; *The Water Security Agency Act*, SS 2005, c W-8.1, s 84; *The Public Health Act*, 1994, SS 1994, c P-37.1, s 40; *The Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1, s 97.

²⁸ Silver & Federer, *supra* note 3 at 182.

²⁹ See e.g. *Nadler v College of Medicine, University of Saskatchewan*, 2017 SKCA 89 at paras 34–35.

expertise and espousing deference were therefore rendered irrelevant overnight, particularly in the context of economic regulation, municipal planning and taxation, and professional regulation. However, generally these decision-makers will be afforded perhaps even more deference than *Vavilov* reasonableness would afford them to their fact-finding, including to inferences of fact and the weighing of evidence, as well as their application of the facts to the settled law.

III. SELECTING THE STANDARD OF REVIEW UNDER THE *HOUSEN* FRAMEWORK

One of the stated goals of both *Dunsmuir* and *Vavilov* was, to paraphrase Justice Binnie, getting the parties away from arguing about the tests and back to arguing about the substantive merits of the case. Justice Binnie's concurring reasons in *Dunsmuir* provide the best articulation of this concern, where he suggested that judicial review had "become unduly burdened with law office metaphysics."³⁰

If one were to simplify matters, selecting the standard of review pursuant to the *Housen* framework on a statutory appeal is, in this sense, relatively straightforward: questions of law are reviewable for correctness, questions of fact are reviewable for palpable and overriding error, and questions of mixed fact and law, absent an "extricable question of law,"³¹ will also be reviewed for palpable and overriding error. However, as any experienced appellate lawyer can attest, there is a large body of jurisprudence dealing with the *kinds* of determinations, decisions, or questions that will fall into the categories of questions of law, fact, and mixed law and fact, respectively.³² Indeed, as the Supreme Court of Canada noted in *Teal Cedar Products Ltd. v. British Columbia*, "characterizing the nature of the specific question before the court requires delicate consideration of the narrow issue actually in dispute."³³

In traditional appellate litigation, how the issues before the court are characterized is often a hotly contested issue. As the Supreme Court noted in *Teal Cedar*, properly identifying the nature of the specific question before the reviewing court, whether for the purposes of determining jurisdiction or the applicable standard of review, is an essential aspect of both appellate advocacy and appellate adjudication:

Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question — for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments — are transparent (*Sattva*, at para. 54; *Southam*, at para. 36). A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).

³⁰ *Dunsmuir*, *supra* note 6 at para 122.

³¹ *Housen*, *supra* note 2 at para 34.

³² In support of both of these propositions, see generally William Shores & Ashley Reid, "Vavilov and Professional Regulation Revisited" (2024) 37:3 Can J Admin L & Prac 99 at 106.

³³ 2017 SCC 32 at para 47 [*Teal Cedar*].

From this standpoint, the characterization of a question on review as a mixed question rather than as a legal question has vastly different consequences in appeals from arbitration awards and civil litigation judgments. The identification of a mixed question when appealing an arbitration award defeats a court's appellate review jurisdiction (*Arbitration Act*, s. 31; *Sattva*, at para. 104). In contrast, the identification of a mixed question when appealing a civil litigation judgment merely raises the standard of review (*Housen*, at para. 36).

Given these principles, a question of statutory interpretation is normally characterized as a legal question. In contrast, identifying a question, broadly, as one of contractual interpretation does not necessarily resolve the nature of the question at issue. Contractual interpretation involves factual, legal, and mixed questions. In consequence, characterizing the nature of the specific question before the court requires delicate consideration of the narrow issue actually in dispute. In general, though, as the Court recently explained in *Sattva*, contractual interpretation remains a mixed question, not a legal question, as it involves applying contractual law (principles of contract law) to contractual facts (the contract itself and its factual matrix) (para. 50).³⁴

As Justice Rothstein put it in *Sattva Capital Corp. v. Creston Moly Corp.*, in order to identify the applicable standard of review, or to determine whether requirements for leave are met, “reviewing courts are regularly required to determine whether an issue decided at first instance is a question of law, fact, or mixed fact and law.”³⁵

The application of the correctness standard of review to a particular question on appeal empowers the reviewing court to consider that question without reference to the reasons or conclusions of the initial decision-maker, as opposed to having to consider the matter through a more deferential lens. Therefore, it has always been in the interests of an appellant to attempt to frame the issues before the court as questions of law, triggering the correctness standard. Similarly, it has always been in the interests of a respondent to attempt to frame the issues before the court as questions of fact or mixed fact and law, triggering the palpable and overriding error standard. While in the abstract the selection of the standard of review on a statutory appeal may be relatively straightforward and not disputed, the parties will often very much dispute how the questions before the court should be framed for the purposes of identifying the applicable standard, and considerable ink — by both judges and advocates alike — will be spent on this question.

More importantly, particularly given the body of jurisprudence dealing with what amounts to a question of law for the purposes of triggering the correctness standard of review, it is now much easier on a statutory appeal than it is on common law judicial review to have a reviewing court review an administrative decision pursuant to the correctness standard.

The first reason for this is the ability to persuade a court that what might otherwise be characterized as a question of mixed fact and law should be instead framed as a question of law. The appellant can argue either that because of the mixed question's precedential value, or because in applying the legal test the decision-maker effectively applied a different test, the decision-maker has therefore committed an error of law. That error need not necessarily

³⁴ *Ibid* at paras 45–47.

³⁵ 2014 SCC 53 at para 42 [*Sattva*]. See also Yves-Marie Morissette, “Appellate Standards of Review Then and Now” (2017) 18:1 J App Pr & Pro 55 at 74–78.

be “extricable.” The best articulation of such an error is found in *Canada (Director of Investigation and Research) v. Southam Inc.*:

[I]f a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.³⁶

As the Supreme Court noted in *Teal Cedar*, the kinds of legal questions described in *Southam* are better understood as being a covert form of legal question, and not a question of mixed fact and law.³⁷ The issue is not the explicit description of the applicable law or legal test, but rather its implicit application to the factual matrix of the case.

The second way that an appellant can persuade a court to apply the correctness standard to an administrative decision on a statutory appeal is to argue that there has been an error of law in the fact-finding process or in the exercise of a statutory discretion,³⁸ questions that would unquestionably attract deference under the *Vavilov* reasonableness standard, but also under the *Housen* framework if they were characterized instead as questions of fact or discretion.

As noted above, in Saskatchewan the vast majority of administrative decision-making is subject to a statutory right of appeal. Often these appeal rights are limited to questions of law, and the designated appellate court is the Court of Appeal. There is now an evolving body of case law from that Court that, in its effect, has arguably expanded the categories of questions or issues that will be deemed to be “questions of law,” for the purposes of attracting the correctness standard of review, in the two ways identified above.

For example, in *Kot v. Kot*,³⁹ the Court of Appeal for Saskatchewan confirmed a change to the standard of review applicable to questions of discretion. Prior to *Kot*, exercises of discretion were reviewed pursuant to the standard established in *Rimmer v. Adshead*: an appellate court would intervene in an exercise of discretion only if the decision-maker erred in principle, misapprehended or failed to consider material evidence, failed to act judicially, or rendered a decision so clearly wrong that it would result in an injustice.⁴⁰ However, in *Kot*, the Court of Appeal adopted a standard of review for exercises of discretion that, in its view, was more consistent with subsequent articulations of that standard established by the Supreme Court: “[A]ppellate intervention in a discretionary decision is appropriate where [there is] a palpable and overriding error in [the] assessment of the facts, including as a result of misapprehending or failing to consider material evidence,” or a failure to correctly identify or apply the “legal criteria which governed the exercise of [the] discretion,” including “a failure to give any or sufficient weight to a relevant consideration,” which amounts to an error of law.⁴¹ This modified standard of review applicable to exercises of discretion has been

³⁶ 1997 CanLII 385 at para 39 (SCC) [*Southam*].

³⁷ *Teal Cedar*, *supra* note 33 at para 44.

³⁸ *Best Buy Canada Ltd v Canada (Border Services Agency)*, 2025 FCA 45 at para 11 [*Best Buy*].

³⁹ 2021 SKCA 4 [*Kot*].

⁴⁰ 2002 SKCA 12 at para 58.

⁴¹ *Kot*, *supra* note 39 at para 20.

applied in the administrative context, post-*Vavilov*.⁴² As a result, rather than looking to the outcome of the exercise of discretion and whether the conclusion reached was open to the decision-maker, the reviewing court or an appellant can attempt to tease out an error of law or principle, or the disregarding of evidence, in the making of the discretionary decision that would then permit correctness review.

Even on the *Housen* standards of appellate review, the weighing of evidence, the assessment of credibility and reliability, and the drawing of inferences from the evidence, have generally been characterized as factual questions, reviewed on the extremely deferential standard of palpable and overriding error.⁴³ However, the Court of Appeal for Saskatchewan has also recognized that a number of errors made in the course of the fact-finding process can be characterized as errors of law, thereby instead attracting correctness review. In *Murphy v. Saskatchewan Government Insurance*, the Court of Appeal held that “a finding of fact may be grounded in an error of law, as will be the case, for example, when a finding: (a) is based on no evidence; (b) is made on the basis of irrelevant evidence or in disregard of relevant evidence; or, (c) is based on an irrational inference of fact.”⁴⁴ William Shores and Ashley Reid have observed a variety of approaches by appellate courts as to the characterization of the issues decided by professional regulatory bodies — such as findings of professional misconduct, imposition of penalty, and the application of the *Charter* — for the purposes of identifying the applicable standard of review.⁴⁵

The move to the *Housen* framework for determining the standard of review, coupled with the necessary exercise of question-framing inherent to appellate advocacy and adjudication, has had implications for administrative law as a matter of both theory and practice.

IV. WHAT DOES THIS MEAN IN THEORY AND IN PRACTICE?

The change to the *Housen* framework, and treating statutory appeals from administrative decision-makers the same way as appeals from superior courts, has had both theoretical and practical implications.

On the question of theory, proponents of the concept of deference to administrative decision-makers on questions of law and interpretation, and of implied expertise,⁴⁶ may very well be dismayed by the fact that questions of law decided by administrative decision-makers — broadly defined — are now reviewable pursuant to the correctness standard. Deference and relative expertise are two concepts that have been central to modern Canadian administrative law, and the Supreme Court of Canada’s modern approach to the standard of

⁴² See e.g. *Strom v Saskatchewan Registered Nurses’ Association*, 2020 SKCA 112; *Abrametz v Law Society of Saskatchewan*, 2023 SKCA 114.

⁴³ *Housen*, *supra* note 2 at paras 22–25.

⁴⁴ 2008 SKCA 57 at para 5 [*Murphy*], citing *PSS Professional Salon Services Inc v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149 at paras 60–65. This is not dissimilar to the criminal law context, where certain factual errors have been characterized as legal errors thus permitting the Crown to raise them via its statutory right of appeal that is otherwise limited to questions of law: see e.g., *R v JMH*, 2011 SCC 45 at para 24; *R v Hodgson*, 2024 SCC 25 at paras 32–35.

⁴⁵ Shores & Reid, *supra* note 32 at 106–07.

⁴⁶ See, for example, the administrative law jurisprudence of Justice Abella, culminating in her concurring reasons in *Vavilov*, *supra* note 1 at paras 198–229; see also David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279.

review framework, beginning with *C.U.P.E. v. N.B. Liquor Corporation*.⁴⁷ It was central to the frameworks established by both *Pushpanathan*⁴⁸ and *Dunsmuir*.⁴⁹ Both deference and expertise were manifested, at least in some sense, in the direction that when an administrative decision-maker subject to judicial review makes a decision on a question of law or statutory interpretation, that decision will be reviewed for “reasonableness” as opposed to “correctness.” With the effect of *Vavilov* being that the determination of questions of law by administrative decision-makers that are subject to a statutory appeal right will be reviewed for correctness, it may be thought that the Supreme Court has eliminated any role for deference and perceived expertise when courts are reviewing administrative decisions that a legislature has explicitly made subject to a statutory right of appeal.

Though again, the goals of this article are not normative, there are nevertheless two answers to this proposition that are equally grounded in theory. The first is grounded in legislative intent. Prior to *Vavilov*, Canadian administrative law treated privative clauses and statutory appeals differently in terms of their respective relevance to the question of selecting the standard of review, despite the fact that they are *both* reflections of legislative intent that *explicitly* address the relationship between the decision-maker and courts. As the Supreme Court noted in *C.U.P.E. v. Ontario (Minister of Labour)*, respect for legislative intent is the “polar star” of judicial review.⁵⁰ Just as the establishment of a privative clause is an indication that courts should have a minimal role in the underlying statutory scheme,⁵¹ the fact that the legislature has created a statutory right of appeal, particularly when that appeal is limited to questions of law and the designated appellate court is a Court of Appeal, is an indication not only of a greater role for the courts in the statutory scheme, but a greater role specifically in determining questions of law that arise in that scheme. If Canadian administrative law respects the legislative intent to vest decision-making in a body other than a court, it must also respect the intent to involve the courts in that regime.

The second is grounded in long-standing appellate theory. Indeed, appellate courts showing deference to original decision-makers, particularly as it pertains to deciding questions of fact and applying the facts to settled law, has been a well-grounded principle in the appellate jurisprudence long before it ever became a concept as a matter of administrative law. In *Housen*, the Supreme Court discussed at length the division of labour between fact-finding courts and the supervisory jurisdiction of an appellate court, starting its judgment by noting that the fact that an appellate court should not interfere with a trial judge’s reasons unless there is palpable and overriding error was a “proposition that should be unnecessary to state.”⁵² The majority wrote that while “the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with

⁴⁷ 1979 CanLII 23 (SCC).

⁴⁸ *Supra* note 5.

⁴⁹ *Supra* note 6.

⁵⁰ 2003 SCC 29 at para 149, cited in *Vavilov*, *supra* note 1 at para 33.

⁵¹ As Chief Justice DeMontigny notes in *Democracy Watch v Canada (Attorney General)*, 2024 FCA 158 at para 46 [*Democracy Watch 2024*], historically and prior to the jurisprudential evolution culminating in *Dunsmuir*, privative clauses delineated “as off-limit for judicial review an area of exclusive jurisdiction for administrative decision-makers” (*ibid* at para 46).

⁵² *Housen*, *supra* note 2 at para 1.

respect to matters of law.”⁵³ The authority of an appellate court to apply the correctness standard to questions of law is grounded in two considerations: the principle of universality, which requires appellate courts to ensure that the same legal rules are applied in similar situations; and the recognized law-making role of appellate courts.⁵⁴ By contrast, trial judges are generally owed deference on factual findings and the application of those findings to settled law, based on the presumption of fitness, “a presumption that trial judges are just as competent as appellate judges to ensure that disputes are resolved justly.”⁵⁵

The Supreme Court in *Housen* relied on the following passage from *Standards of Review Employed by Appellate Courts*:⁵⁶

If we have confidence in these systems for the resolution of disputes, we should assume that those decisions are just. The appeal process is part of the decisional process, then, only because we recognize that, despite all effort, errors occur. An appeal should be the exception rather than the rule, as indeed it is in Canada.⁵⁷

As the majority noted, “[f]requent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.”⁵⁸ Deference to trial judges on questions of fact and mixed fact and law is justified for three principled reasons: (1) it would limit the number, length, and cost of appeals;⁵⁹ (2) it would promote the autonomy and integrity of trial proceedings;⁶⁰ and (3) it would recognize the expertise of the trial judge and his or her advantageous position.⁶¹ These principles also justified deference to trial judges on inferences of fact⁶² and to questions of mixed fact and law, when the inference required to reach the necessary conclusion is factual, as opposed to legal.⁶³

In *H.L. v. Canada (Attorney General)*, the Supreme Court emphasized *Housen*’s confirmation of the separation between the role of the trial court and that of an appellate court, reiterating that “an appellate court ought never to retry a case,” and “that deference is owed to all findings of fact made by the trial judge, whether those findings are based on direct evidence or on inferences drawn from facts proved directly.”⁶⁴ More recently, in *Sattva*, Justice Rothstein on behalf of a unanimous bench addressed the “purpose of the distinction between questions of law and those of mixed fact and law,” a central one of which is to “limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute” so as to ensure the consistency of the law,

⁵³ *Ibid* at para 9.

⁵⁴ *Ibid*.

⁵⁵ *Ibid* at para 11.

⁵⁶ Roger P Kerans, *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994) at 10–11.

⁵⁷ *Housen*, *supra* note 2 at para 11.

⁵⁸ *Ibid* at para 17. On the importance of respecting the judicial division of labour as between trial and appellate courts generally, and how this translates to the question of appellate standards of review specifically, see also *HL v Canada (Attorney General)*, 2005 SCC 25 at paras 52–59 [*HL*]. Both *Housen* and *HL* arose out of Saskatchewan.

⁵⁹ *Housen*, *supra* note 2 at para 16.

⁶⁰ *Ibid* at para 17.

⁶¹ *Ibid* at para 18.

⁶² *Ibid* at paras 19–25.

⁶³ *Ibid* at paras 26–37.

⁶⁴ *HL*, *supra* note 58 at para 64.

as opposed to “providing a new forum for parties to continue their private litigation.”⁶⁵ As such, the narrower the rule, or precedential value, of the question or decision, the less useful will be intervention by the Court of Appeal.⁶⁶ Again, successful appeals in Canada “should be the exception rather than the rule.”⁶⁷

The long-standing acceptance of the judicial division of labour as between trial and appellate courts is also reflected in commentary. In his article entitled “Appellate Standards of Review Then and Now,”⁶⁸ Justice Yves-Marie Morissette provides an apt history of the appellate tradition, including the emergence of the narrow permission to intervene in a trial court’s fact-finding. Rather, in most common law jurisdictions, the focus on appellate intervention lay historically on ensuring the rule of law and safeguarding legal principles.⁶⁹ Similarly, Daniel Jurtas observed that “whatever weight is given to the idea that appeals must remain exceptional, and that trial judges must be afforded a measure of deference in order to sustain the authority of trial proceedings, the competing imperative of public confidence in judicial institutions requires that legal norms be stated clearly and applied uniformly.”⁷⁰ In other words, to the extent that we have appeal courts, “the core of their competence should be to state the law, and to rectify [legal errors].”⁷¹

Therefore, in the appellate context, there has been a long, well-defined, historic division of labour as between first-instance and appellate courts, and an approach to appellate intervention based on restraint. What is new as a matter of Canadian administrative law, following *Vavilov*, is that this division of labour as between factual questions and legal questions now applies more explicitly to those administrative decision-makers subject to a right of appeal. Both the administrative judicial review frameworks that have existed over time, as well as the *Housen* appellate standards, have always come with sufficient flexibility such that a reviewing court can intervene in a decision if it wishes to do so. But that is not a phenomenon unique to appellate review, and it is not something that originates with *Vavilov*. Based on the long-standing tradition of deference inherent in appellate theory in Canada, which long predates the adoption of the concept in administrative law, there is no reason at least as a matter of theory to think that a move to the *Housen* standards of review will necessarily eliminate deference to administrative decision-makers. The palpable and overriding error standard remains an onerous one.

On the question of practice, prior to *Vavilov*, common law judicial review applications and administrative statutory appeals were argued and adjudicated the same way. The shift to the adoption of the appellate standards of review for administrative statutory appeals has led to three important changes to how these kinds of challenges to administrative decision-making are now argued by the parties and adjudicated by the designated appellate courts.

⁶⁵ *Satva*, *supra* note 35 at para 51.

⁶⁶ *Ibid.*

⁶⁷ Kerans, *supra* note 56 at 11.

⁶⁸ Morissette, *supra* note 35.

⁶⁹ *Ibid* at 58.

⁷⁰ Daniel Jurtas, “The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?” (2006) 32:1 *Man LJ* 61 at 67.

⁷¹ *Ibid* at 68.

First, and most fundamentally, while the parties may no longer have as much margin to dispute the selection of the applicable standard of review, they certainly are incentivized to dispute how the questions before the court are framed for the purposes of triggering that standard. While this is inherent in the exercise of appellate persuasion, it is arguably contrary to the stated goal of making administrative law less about “law office metaphysics.”⁷²

When it comes to appeals, the bulk of the work of an appellate lawyer is in identifying the grounds of appeal, for the purposes of arguing that a specific *Housen* standard should apply. This may be because the person challenging the decision wishes to attempt to frame the issue in a manner that will attract a less deferential standard of review. But it also may be because the person challenging the decision needs to do so — for example by persuading the court that it has identified a question of law — in order to ensure that the court has jurisdiction over the appeal.

An example of this exercise is reflected in the Supreme Court’s decision in *Teal Cedar*.⁷³ While the underlying decision in *Teal Cedar* was an arbitration award and not an administrative decision, the comments made by the Supreme Court relating to the importance of issue framing for the purposes of establishing jurisdiction over an appeal are equally relevant. The Supreme Court observed that the question of jurisdiction matters to appellate review in a way that it does not in the context of judicial review:

Unlike privative clauses which merely “signa[l]” deference in the context of judicial review of administrative tribunal decisions, statutory limitations on the scope of appellate review of arbitration awards are “absolute” (*Sattva*, at para. 104). In consequence, a finding that the questions on appeal — the Valuation, Interest and Lillooet Issues — are not questions of law would wholly dispose of the issue of the courts’ jurisdiction to review those questions.⁷⁴

How the issue is framed by the court on appeal will often wholly dispose of the matter, whether explicitly (as a matter of jurisdiction, when appeals are limited to questions of law) or implicitly (by dictating the applicable standard of review).

In *Dunsmuir*, Justice Binnie intimated that by simplifying the process for selecting the applicable standard of review, the parties would hopefully focus less on the question of selecting the standard of review, and more on the merits of the case:

People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. The disposition of the case may well turn on the choice of standard of review. If litigants do take the plunge, they may find the court’s attention focussed not on their complaints, or the government’s response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer’s preparation and court time devoted to unproductive “lawyer’s talk” poses a significant cost to the applicant. If the challenge is unsuccessful, the unhappy applicant may also face a substantial bill of costs

⁷² *Dunsmuir*, *supra* note 6 at para 122.

⁷³ *Supra* note 33.

⁷⁴ *Ibid* at para 42.

from the successful government agency. *A victory before the reviewing court may be overturned on appeal because the wrong “standard of review” was selected.* A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome. Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features.⁷⁵

However, as a matter of appellate practice and theory, it is simply not possible to separate the *merits* of an appeal (as opposed to the merits of the underlying decision) from how the issues are framed, for the purposes of selecting the applicable standard of review. If a party can successfully persuade the appellate court that it has identified material questions of law, the court is then authorized to consider the question of how the law should apply to the findings of fact as a *de novo* matter. On the other hand, if the party defending the decision on appeal can persuade the appellate court that the appeal raises only questions of fact, then intervention by the court is unlikely. The framing of the issues is almost always contested, and it is the central exercise of persuasion before the court. This is where the heart of appellate advocacy takes place: in the dispute over how the questions before the court should be characterized, *specifically* for the purpose of selecting the applicable standard of review. It is now going to be an inherent feature of administrative law litigation, as well, when the administrative decision is subject to a statutory appeal.

Second, while reviewing courts have always had the discretion to refuse to decide a judicial review application on the merits,⁷⁶ a party with a statutory right of appeal has the right to a decision on the merits of that appeal, provided it is not moot.⁷⁷ Finally, since *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*,⁷⁸ the focus on a judicial review application has been on the outcome or bottom line of the decision, and whether it is reasonable (or, in rare instances, correct). In other words, parties to a judicial review application have generally *not* been permitted to try and isolate a specific ground or question decided along the way to making a decision, and argue that the specific question either did not fall within the decision-maker’s expertise, was outside his or her jurisdiction, or constituted some other “siloed” type of question to which a non-deferential standard of review should apply.

V. A WORD ON *YATAR v. TD MELOCHE MONNEX*

I noted earlier in this article that there is a disproportionate number of statutory appeals from administrative decision-makers in Saskatchewan limited to questions of law, and where the designated appellate court is the Court of Appeal. Decisions that remain subject to common law judicial review will proceed in Saskatchewan’s section 96 superior court, the Court of King’s Bench.

⁷⁵ *Dunsmuir*, *supra* note 6 at para 133 [emphasis added].

⁷⁶ See *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 at para 54 [*Yatar*]; *Strickland v Canada (Attorney General)*, 2015 SCC 37 at para 37; *Saskatchewan Power Corporation v International Brotherhood of Electrical Workers, Local 2067*, 2025 SKCA 33 at paras 22–26.

⁷⁷ See generally *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342.

⁷⁸ 2007 SCC 15 [*VIA Rail*].

In *Yatar v. TD Insurance Meloche Monnex*,⁷⁹ the Supreme Court of Canada held that, in circumstances where a statutory appeal right is limited to questions of law, the superior court has the discretion to nevertheless hear a judicial review application in relation to questions falling outside of the statutory appeal right, namely questions of fact and mixed fact and law.⁸⁰ The questions of law being appealed would be reviewed pursuant to correctness, while any residual questions of fact or mixed fact and law would be reviewed on the *Vavilov* reasonableness standard.⁸¹

In jurisdictions where the court with jurisdiction over common law judicial review applications is the same as that with jurisdiction pursuant to a statutory appeal — such as, as in *Yatar*, the Ontario Divisional Court — conducting a statutory appeal and a common law judicial review in parallel may be appropriate. It will be the same court making the determination, with the guidance of *Yatar*, whether it is appropriate to exercise the discretion to grant judicial review. However, in provinces like Saskatchewan, the rule established in *Yatar* will, in cases where the statutory right of appeal is to the Court of Appeal and is limited to questions of law, necessarily result in a bifurcation of proceedings. The statutory right of appeal must be heard by the Court of Appeal. The common law judicial review application must be heard in the Court of King's Bench. While the Court of Appeal for Saskatchewan has a narrow discretionary authority to “exercise original jurisdiction to grant relief in the nature of a prerogative writ,”⁸² “the Court exercises that jurisdiction only in extraordinary circumstances,” most notably when the Court of King's Bench would not be the appropriate forum for a judicial review application because the decision-maker subject to review, for example a University Visitor or provincial Commissioner of Inquiry, is a member of that court.⁸³

A complete analysis of the implication of *Yatar* is, of course, beyond both the scope and purpose of this article. However, *Yatar* nevertheless may present particular difficulties for a province like Saskatchewan, with implications for the exercise of framing the issues before the court on the statutory appeal and, as a result, on the selection of the standard of review. *Yatar* suggests that the residual common law judicial review application should proceed when the limited statutory right of appeal does not provide an adequate alternative remedy.⁸⁴ In Saskatchewan, a different court from the one deciding the statutory appeal on the merits will likely have to make that determination. All of this may cause the appellate court to take a deliberately broad view of whether the issues raised in the parallel judicial review application can actually be characterized as questions of law for the purposes of falling within the statutory right of appeal. And this may take on even greater importance once the Supreme Court of Canada opines on the question of whether a statutory appeal on a question of law

⁷⁹ *Supra* note 76.

⁸⁰ *Ibid* at paras 43–66.

⁸¹ *Ibid* at para 48.

⁸² See *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, s 11.

⁸³ See *Zunti v Saskatchewan Government Insurance*, 2023 SKCA 82 at para 79, and the examples discussed therein.

⁸⁴ *Yatar*, *supra* note 76 at paras 56–57.

and a privative clause oust residual judicial review on other issues, a question explicitly left open in *Yatar*,⁸⁵ when it hears the appeal of *Democracy Watch 2024*.⁸⁶

It may be that the more expansive view of what amounts to a question of law reflected in the Saskatchewan jurisprudence discussed above, particularly pertaining to the fact-finding process, can capture grounds of review that might otherwise be characterized as questions of mixed fact and law or questions of fact, rendering these obstacles less salient. In this sense, the statutory appeal right might still provide the applicant with the “adequate alternative remed[y]” to judicial review discussed in *Yatar*,⁸⁷ or avoid any concerns about the potential ousting of residual judicial review by a privative clause. As Justice Stratas noted in *Best Buy Canada Ltd. v. Canada (Border Services Agency)*, just because “parties *can* bring a separate application for judicial review doesn’t mean they *should*. In fact, in most cases they shouldn’t.”⁸⁸ This is because, in his view, “[j]ust about anything that can be raised in a separate application for judicial review can be raised in a statutory appeal where only ‘questions of law’ can be raised.”⁸⁹ Justice Stratas added that, to the extent a party wished to bring a judicial review application in order to ask the reviewing court to re-weigh the evidence, reviewing courts “never do that under the reasonableness standard”⁹⁰ in any event.

However, the consequence of an even more expansive understanding of what amounts to a “question of law” — for the purposes of avoiding the *Yatar* problem — would be the review of an even greater number of issues decided by administrative decision-makers pursuant to the correctness standard, arguably contrary to *Vavilov*. Put another way, were it not for a desire to avoid a bifurcation of proceedings by characterizing questions of mixed fact and law or errors in the fact-finding process as questions of law, those issues, if subject to a common law judicial review application, would unquestionably be reviewed for reasonableness.

It may be that the procedural issues raised by *Yatar*, for a province with a significant number of statutory rights of appeal to an appellate court that are limited to questions of law, can be addressed through legislative or regulatory intervention, or both. Again, any further analysis of these important questions lies beyond the scope of this article.

VI. CONCLUSION

The majority’s decision in *Vavilov* to subject statutory appeals from administrative decisions to the *Housen* appellate standards of review has significantly impacted the manner in which the judicial review of administrative action occurs in those jurisdictions with a high number of statutory rights of appeal. Unquestionably, this shift no longer entitles decision-makers subject to a statutory right of appeal to deference on their determinations of legal

⁸⁵ See the dissenting reasons of Khullar CJA in *Northback Holdings Corporation v Alberta Energy Regulator*, 2025 ABCA 186, beginning at para 56 [*Northback Holdings*].

⁸⁶ *Supra* note 51, leave to appeal granted, 2025 CanLII 38362 (SCC). There is disagreement in the intermediate appellate courts on this question. In *Democracy Watch 2024*, Chief Justice DeMontigny held that a privative clause paired with a limited statutory right of appeal will oust any residual right to seek judicial review. In *Northback Holdings*, in dissent, Chief Justice Khullar held that it does not.

⁸⁷ *Yatar*, *supra* note 76 at para 62.

⁸⁸ *Best Buy*, *supra* note 38 at para 11 [emphasis in original].

⁸⁹ *Ibid*.

⁹⁰ *Ibid* at para 12.

questions and the interpretation of statutes. However, it also preserves a deferential approach to their determination of factual issues, and the application of those facts to settled law. While the majority in *Vavilov* purported to justify the move to apply the *Housen* appellate standards of review in legislative intent, the polar star of judicial review, in doing so it necessarily sacrificed the equally prominent values in administrative law of deference to expert bodies on questions of law. It will be for others to argue whether this change is a positive or negative one, as a matter of normative administrative law theory. This article's aim was more modest: to demonstrate the "on the ground" effect of a change from *Vavilov* that has garnered much less attention than the adoption of the presumptive standard of reasonableness for common law judicial reviews, but has arguably had a more significant impact on the way that "judicial review" is argued and adjudicated in those provinces with a disproportionate number of administrative decisions subject to a statutory appeal mechanism.