

JUST WORDS? JUDICIAL REASONS AS REMEDY IN ADMINISTRATIVE LAW

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This article examines how judicial reasons function remedially in administrative law following Canada (Minister of Citizenship and Immigration) v. Vavilov. While reasons traditionally explain decisions, they have always had a remedial function through their normative and expressive force. Vavilov's "culture of justification" increased the remedial function of reasons by making them central not only to judicial oversight but to administrative decision-making itself. In this post-Vavilov framework, courts now write reasons that not only justify outcomes but provide the framework for administrative redetermination, transforming them into functional remedies.

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INTRODUCTION

The majority decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* made the reasons for administrative decisions the centerpiece of judicial review.¹ Expertise of the decision-maker and other formerly significant contextual considerations are now of secondary importance. The primary emphasis on reasons has transformed the judicial review of administrative decisions in the five years since *Vavilov* instilling "a culture of justification."² Courts scrutinize reasons for administrative decisions to ensure that they are

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¹ 2019 SCC 65 [*Vavilov*].

² *Ibid* at para 2.



“based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker.”³

The central thesis of this article is that we should recognize the remedial function of judicial reasons in administrative law and beyond even if reasons are not per se a remedy. The legal maxim *ubi jus, ibi remedium*⁴ holds that there is no right without a remedy and it is often said that “equity suffers no wrong without a remedy.”⁵ But the case law is replete with examples where a legal right or equitable wrong is recognized in judicial reasons but a remedy is unavailable. Sometimes a remedy is unavailable on the facts, other times a court may decline to grant a discretionary remedy, still other times a remedy may not be available at law or in equity. When a remedy is not available or not given, reasons can provide a form of remedy by rhetorically vindicating a right or expressing judicial disapproval of a wrong. Though reasons are just words, they have expressive and didactic power that can shape the law and behaviour.

Before I explore how reasons function as a remedy in administrative law after *Vavilov*, I will address the broader idea of reasons as remedy. There are many ways to conceive of judicial reasons for decision — reasons as justification;⁶ reasons as transparency, discipline, and accountability;⁷ reasons as a public good;⁸ reasons as precedent;⁹ and reasons as foundation for appellate review.¹⁰ But reasons are not typically conceived of as remedial. Remedies are normally understood to be directions of the court embodied in court orders.¹¹ The distinction between reasons and orders is embedded in our legal practice in many ways. For example, appeals are only available in respect of orders, not reasons.¹² According to the standard view, reasons are explanatory, and orders are remedial.

Vavilov’s demand for better reasons from administrative decision-makers is unmistakable; however, its demand on judicial decision-making is sometimes overlooked. *Vavilov* confirmed that the default remedy on judicial review is “to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court’s reasons.”¹³ Courts in administrative law cases must accordingly offer reasons not just to explain their own decision-making but to guide future administrative decision-making, both where a case is remitted to the administrative decision-maker and generally. For judges sitting

³ *Ibid* at para 85.

⁴ See e.g. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 25.

⁵ See e.g. *Royal Bank of Canada v W Got & Associates Electric Ltd*, 1997 ABCA 136 at para 31, *aff’d* without comment on the point 1999 CanLII 714 (SCC); Jeff Berryman, “Equity’s Maxims as a Concept in Canadian Jurisprudence” (2012) 43:2 *Ottawa L Rev* 165 at 175.

⁶ *R v REM*, 2008 SCC 51 at para 11 [*REM*].

⁷ Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 134–35; *REM*, *supra* note 6 at para 11; *R v Sheppard*, 2002 SCC 26 at paras 15, 23 [*Sheppard*].

⁸ See Richard A Posner, *Economic Analysis of Law*, 7th ed (New York: Aspen Publishers, 2007) at 41 (a public good is something available to all which may be enjoyed in common “without reducing any other person’s consumption of it”).

⁹ *REM*, *supra* note 6 at para 12.

¹⁰ *Ibid*, at para 11.

¹¹ Stephen A Smith, “Rights and Remedies: A Complex Relationship” in Robert J Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2009) 31 at 34.

¹² *SSG v SKG*, 2022 ABCA 379 at para 15; *Clarke v Canada*, 2018 FCA 47 (“it is trite law that an appeal is from the order, not the reasons” at para 5).

¹³ *Vavilov*, *supra* note 1 at para 141.

on courts of first instance, this requires a shift in mindset from reasons as mere explanation to reasons as both explanation and something akin to remedy.

I. REASONS AS REMEDY?

A. THE TRADITIONAL DISTINCTION BETWEEN REASONS AND ORDERS

Everyone who has practised before the courts knows the difference between reasons for judgment and a formal order or judgment.¹⁴ Reasons are the exclusive domain of the judge. Reasons, sometimes oral and sometimes written, explain the court's factual findings, assessment of the law, and rationales for decisions on factual and legal issues. Where a plaintiff is successful, reasons also outline the legal or equitable remedy imposed by the judge.

Formal orders are typically drafted by counsel for the approval of the judge. A formal order is usually a short document that captures the specific relief resulting from the court's decision. I can attest from my time in practice that there is often a tug-of-war between counsel drafting formal orders with one side wanting to import into the formal order as much of the reasons as possible and the other seeking to keep the content of the formal order as narrow as possible only addressing the remedy. Judges are typically indifferent to the form and content of a formal order as long as it is consistent with the reasons.

The distinction between reasons and orders can be illustrated with an example. A tort case may involve complicated factual determinations about who did what and when, legal determinations as to causation and fault, and an evaluation of the loss to be compensated with an award of damages. The reasons should provide a full account of the judge's thought process in deciding the tort case including a finding on liability and, where liability is found, a statement of the remedy. By contrast, the formal order in the same case may only state an obligation to pay a certain quantum of damages and perhaps costs. Though the content of orders varies from case to case, generally, orders focus on the remedy granted by the court.

The distinction between reasons and orders has deep roots. One author has speculated that the distinction between reasons and orders has its roots in the era when civil cases were tried by juries which did not give reasons for their decisions.¹⁵ This makes sense because where there are no reasons, the only record of a decision is the formal order. Where this surfaces most often is in appellate practice where it is well-established that an appeal is from the order, not the reasons.¹⁶ Justice Steele observed that "[r]easons for judgment do not constitute the

¹⁴ *Can Pac Ry Co v Blain*, 1905 CanLII 4 at 160–61 (SCC), Taschereau J.C., dissenting though not on this point. For the purposes of this paper, when I use the term "formal order" this includes "formal judgment."

¹⁵ Michael Taggart, "Should Canadian Judges Be Legally Required to Give Reasoned Decisions in Civil Cases?" (1983) 33:1 UTLJ 1 at 2–3.

¹⁶ *Glennie v McD & C Holdings Ltd*, 1935 CanLII 31 at 268 (SCC); John Sopinka, Mark A Gelowitz & W David Rankin, *The Conduct of an Appeal*, 5th ed (Toronto: LexisNexis, 2022) at §1.03. The principle that the appeal is from the order not the reasons is often cited to explain why a litigant who obtained relief but dislikes the reasons given cannot ask an appellate court for different reasons. The classic example is *Lake v Lake*, [1955] 2 All ER 538 at 541 (CA), where a petition for divorce on the grounds

judgment of the court. An appeal is taken not from the reasons for judgment but from the judgment itself, and it is the order of the court appealed from which binds, not the reasons assigned for making it: the reasons may be wrong but the order right.”¹⁷

Today, the mantra that an appeal is from the order not the reasons is something of a fiction because contemporary appellate courts spend most of their time scrutinizing reasons, not orders. Indeed, it is telling that the appellate standard of review prescribes the differing degrees of scrutiny to be applied to questions of fact, questions of mixed fact and law, and questions of law which are things found in reasons, not orders.¹⁸ Perhaps the most important function of an order is to signal when a court has exhausted its jurisdiction (that is, it becomes *functus officio*).¹⁹ After issuing reasons, up until the order is signed, the judge may vary her decision.²⁰

The logic of the distinction between reasons and orders, like many things passed down from earlier times, can be picked apart. But that is not my purpose here, and I think that it is important to recognize both that the distinction between reasons and orders is a permanent fixture of our legal system and one that has practical value. With these two points conceded, my task is now to show that the traditional conceptions that reasons are explanatory and orders are remedial are limiting and unhelpful. Reasons, I contend, perform important remedial functions even if they are not per se a remedy, and it is important and useful to recognize this reality.

B. THE REMEDIAL FUNCTION OF REASONS

Judicial reasons are not normally conceived of as a remedy. Chief Justice McLachlin in *R. v. R.E.M.* identified three functions of reasons for decision in a criminal trial: (1) to “tell the parties affected by the decision why the decision was made”; (2) to “provide public accountability”; and (3) to “permit effective appellate review.”²¹ All three of these functions, broadly speaking, are explanatory. The difference between the three functions is the audience for whom the explanation is intended. But I think that this understanding of the purpose of reasons is incomplete.

Judicial reasons play an important role in establishing and maintaining democracy. A central tenet democratic theory shares with the concept of the rule of law is the idea that “public policies should be justifiable to all citizens.”²² Implicit in this principle is the belief that all members of the political community can understand public policy, including law, and engage in reasoned debate.²³ Reason-giving, according to Cass Sunstein, is required by “the

of adultery was defeated by a finding that the adultery had been condoned. The successful litigant who had denied the adultery was aggrieved by the Court’s finding of adultery but was not allowed to appeal.

¹⁷ *Canadian Express Ltd v Blair* (1991), 6 OR (3d) 212 at 215 (ON Div Ct).

¹⁸ *Housen v Nikolaisen*, 2002 SCC 33.

¹⁹ *Canadian Broadcasting Corp v Manitoba*, 2021 SCC 33 at para 33.

²⁰ See e.g. *Dow Chemical Canada ULC v NOVA Chemicals Corporation*, 2021 ABCA 153 at para 31.

²¹ *REM*, *supra* note 6 at para 11.

²² John Rawls, *Justice as Fairness: A Restatement*, ed by Erin Kelly (Cambridge, Mass: Harvard University Press: 2001) at 89.

²³ This view is evident in *Thomson Newspapers Co v Canada (Attorney General)*, 1998 CanLII 829 (SCC), Bastarache J, writing for the majority (“[t]he presumption in this Court should be that the Canadian voter is a rational actor who can learn from experience and make independent judgments about the value of particular sources of electoral information” at para 112).

internal morality of democracy.”²⁴ This idea has surfaced in recent scholarship concerning the use of the notwithstanding clause. The main scholarly arguments on this subject have focused more on the ability of courts to issue a declaration in the face of the invocation of section 33 of the *Canadian Charter of Rights and Freedoms*,²⁵ which is a remedy rather than the democracy-enhancing effect of judicial reasons. Nevertheless, the understanding that judicial reason-giving is democratic is central to arguments that section 33 should not prevent courts from hearing cases and opining on the constitutionality of legislation even if the legislation would continue to operate notwithstanding the expression of the court’s opinion.²⁶ Judicial reasons are essential to section 33 fulfilling its democratic function; the public requires judicial reasons to evaluate the conduct of a government invoking section 33 and determine how to exercise their right to vote. Reasons on this conception are both explanatory and remedial.

Even though the common law has not always demanded reasons for decision,²⁷ today reason-giving is understood to be essential to the rule of law.²⁸ An important thread in the tapestry of the rule of law is that the law must guide the conduct of both the governors and the governed.²⁹ Judicial reasons play a crucial role in explaining the law to both those charged with enforcing the law and those subject to the law. Justice Binnie made this point in *R. v. Sheppard*, holding that “[t]hrough reasoned decisions, members of the general public become aware of rules of conduct applicable to their future activities. An awareness of the reasons for a rule often helps define its scope for those trying to comply with it.”³⁰ Judicial reasons contribute to the development of the law and public understanding of the law and, as such, are a public good.

The role of judicial reasons reinforcing the rule of law is not just explanatory or didactic; judicial reasons may be said to perform a general or public remedial function. Sometimes individuals accused of crimes allege that authorities breached their *Charter* rights in connection with their investigation and arrest and seek as remedies the exclusion of evidence or a stay of proceedings. However, even where *Charter* breaches are established, it is common for courts to find the impugned evidence admissible and the remedy of a stay of proceedings is disproportionate to the public interest in prosecution of crime.³¹ Where a breach is found but a *Charter* remedy is not granted, the reasons can provide direction to authorities so that they can modify their behaviour to avoid breaching the *Charter* rights of

²⁴ Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass: Harvard University Press, 1999) at 70.

²⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 33 [*Charter*].

²⁶ See Eric M Adams & Erin RJ Bower, “Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the *Charter*” (2022) 26:2 & 27:1 *Rev Const Stud* 121 at 142–43; Robert Leckey & Eric Mendelsohn, “The Notwithstanding Clause: Legislatures, Courts, and the Electorate” (2022) 72:2 *UTLJ* 189 at 214–15.

²⁷ *REM*, *supra* note 6 at para 8.

²⁸ *Sheppard*, *supra* note 7 at para 55. Justice Lauwers explained that he did not see the “project of justification” described in *Vavilov* as being limited to administrative law: *Bruno v Dacosta*, 2020 ONCA 602 at para 14.

²⁹ Jeremy Waldron, *Thoughtfulness and the Rule of Law* (Cambridge, Mass: Harvard University Press, 2023) at 120–21. See also Joseph Raz, “The Rule of Law and Its Virtue” in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979) 210.

³⁰ *Supra* note 7 at para 22.

³¹ *R v Babos*, 2014 SCC 16 at para 44.

those accused of crimes in the future. The reasons are remedial in a general or societal sense because they contribute to better conduct by authorities. As I put it in *R. v. El-Ajami*, even in the absence of a *Charter* remedy, “judicial recognition of an infringement of a right enhances knowledge of the content and significance of the right, both among those who hold the right and among the individuals charged with enforcing the criminal law, such that the right may be more frequently honoured.”³²

Judicial reasons can also perform a specific remedial function by addressing the wrong to the individual. Using the same example of an accused whose *Charter* rights have been infringed but the court has determined that a *Charter* remedy is not appropriate, reasons can function something like an apology. Though an apology in the proper sense is made by a wrongdoer and seeks atonement or forgiveness, a central function of an apology is the recognition that something wrongful occurred.³³ The recognition of a wrong is important because it affirms the dignity or worth of the person who was wronged and their experience. In my view, “[t]here is value in acknowledging a breach of *Charter* rights even if no remedy is available. Acknowledging that a wrong has been committed pays respect to the individual who suffered the wrong.”³⁴

Central to the reasons/order distinction is that orders are binding, and reasons are not. This is true in the sense that you cannot file reasons for decision against the title to real or personal property or otherwise take enforcement action on reasons. But it is important to recognize that reasons are binding in other ways. A court’s decision expressed in reasons may give rise to *res judicata* between the parties³⁵ and a precedent that is binding on parties at large through the doctrine of *stare decisis*.³⁶ *Res judicata*, I acknowledge, will exist where there is only an order, but in practice determining what has been decided by a court often requires reference to the reasons for decision.³⁷ *Stare decisis* is a system of precedent built on reasons, not orders.³⁸ The methodology of *stare decisis* — identifying *ratio decidendi* and *obiter dicta* — is a matter of parsing reasons. The binding effect of reasons through these legal doctrines means that they are remedial in the sense that reasons decide issues between the parties such that re-litigation is prevented, and clarify and state the law.

The idea that reasons are remedial because they are binding by operation of legal doctrines is sometimes implicit in the discretion exercised by courts. A good example of this

³² *R v El-Ajami*, 2023 ABKB 394 at para 135 [*El-Ajami*].

³³ See generally Trudy Govier & Wilhelm Verwoerd, “The Promise and Pitfalls of Apology” (2002) 33:1 *J Soc Philosophy* 67 for a discussion of the centrality of acknowledgment of wrongdoing to the concept of an apology.

³⁴ *El-Ajami*, *supra* note 32 at para 135. Conceiving of reasons as performing an important expressive function in affirming the dignity of individuals affected by the reasons and establishing norms is consistent with the expressive theory of law: see Cass R Sunstein, “On the Expressive Function of Law” (1996) 144:5 *U Pa L Rev* 2021; Elizabeth S Anderson & Richard H Pildes, “Expressive Theories of Law: A General Restatement” (2000) 148:5 *U Pa L Rev* 1503.

³⁵ *Butera v Chown, Cairns LLP*, 2017 ONCA 783 at para 16.

³⁶ *R v Kirkpatrick*, 2022 SCC 33 at para 187 [*Kirkpatrick*].

³⁷ *Peters v Remington*, 2004 ABCA at para 17.

³⁸ See Malcolm Rowe & Leanna Katz, “A Practical Guide to *Stare Decisis*” (2020) 41 *Windsor Rev Legal Soc Issues* 1 at 7 (“[f]or all decisions, it is essential to identify the *ratio decidendi* and *obiter dicta* to understand whether and how the precedent applies. The Latin term *ratio decidendi* means ‘the reason for deciding’ and *obiter dicta* means ‘something said in passing.’ Courts are bound only to follow what was actually decided in earlier cases—that is, the *ratio decidendi*. Courts are not bound to follow *obiter dicta*, what was merely said in passing—as it is by definition not part of the reasoning by which the result was determined” [footnotes omitted]).

is the discretion to grant or refuse declaratory relief. A declaration “set[s] out the parameters of a legal state of affairs or the legal relationship between the parties.”³⁹ This, of course, is often what reasons do. Reasons and declarations, then, occupy some of the same space. And so, when reasons are binding on the parties, why should a court issue a declaration? Justice Stratas made this point with characteristic panache, saying that parties too often seek declarations to transform reasons “from a remedy typed in lower case to a remedy typed in upper-case.”⁴⁰ The critical idea here is that reasons are remedial. He drove the point home, holding, “[w]hen reasons for judgment suffice, the *added remedy* of a declaration is of no practical use and will not be granted.”⁴¹

II. ARE JUDICIAL REASONS AN ADMINISTRATIVE LAW REMEDY?

A. ARE JUDICIAL REASONS BINDING ON ADMINISTRATIVE DECISION-MAKERS?

The question of the binding or remedial effect of reasons for decision was considered in *Copyright Collective of Canada v. Bell Canada*.⁴² The Copyright Collective applied for judicial review of a redetermination decision made by the Copyright Board of Canada (the Board). The redetermination decision followed an earlier judicial review decision of the Federal Court of Appeal.⁴³ The substantive issue between the parties was how to calculate payments by broadcasters to copyright holders. The first judicial review concluded that there were two errors made by the Board and “set aside the Board’s decision to the extent of its use of the wrong pricing data in its proxy price calculation and of the wrong profit margin.”⁴⁴ The Board’s redetermination decision “went beyond the issues that were considered in the JR Decision” because during the redetermination required by the Court, the Board discovered and corrected other errors.⁴⁵

Justice Locke, writing for the Court, sidestepped the question of why the previous judicial review decision was binding on the Board and proceeded on the basis that the “parties agree that the scope of the Board’s jurisdiction is constrained by the JR Decision.”⁴⁶ Justice Locke went on to observe that “only instructions explicitly stated in a judgment are binding on the subsequent decision-maker.”⁴⁷ He cited *Canada (Citizenship and Immigration) v. Yansane* where Justice de Montigny, as he then was, held “the comments and recommendations made by the Court in its reasons would have to be considered mere *obiters*, and the decision-maker would be advised to consider them but not required to follow them.”⁴⁸ Justice Locke

³⁹ *Shot Both Sides v Canada*, 2024 SCC 12 at para 66.

⁴⁰ *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para 104, *aff’d* without comment on this point 2022 SCC 30.

⁴¹ *Ibid* at para 106 [emphasis added].

⁴² 2025 FCA 92 [*Copyright Collective of Canada* 2025].

⁴³ *Bell Canada v Copyright Collective of Canada*, 2021 FCA 148.

⁴⁴ *Ibid* at para 96.

⁴⁵ *Copyright Collective of Canada* 2025, *supra* note 42 at para 12.

⁴⁶ *Ibid* at para 21.

⁴⁷ *Ibid*. Justice Locke uses the term “judgment” to refer to what others might call an “order.” The key thing to understand is that he is referring to the summary statement of the remedy, not the judicial reasons.

⁴⁸ 2017 FCA 48 at para 19.

concluded in *Copyright Collective of Canada 2025* that even though the reasons were not binding, they could be used to interpret the Court's order.⁴⁹

Copyright Collective of Canada 2025 shows that courts have traditionally treated orders in administrative law the same way that they have treated orders in other areas of law. The facts of *Copyright Collective of Canada 2025*, however, neither required the Court to explore the conceptual basis on which the prior decision of the Court bound the Board, nor did they demand that the Court interrogate the basis for treating reasons as non-binding. Perhaps a future case will force those issues into a court's crosshairs. For present purposes, the most notable thing about *Copyright Collective of Canada 2025* is that it ignored a competing line of Federal Court of Appeal authority that holds, "[e]ven where the reviewing court chooses not to grant declaratory relief, its reasons for judgment on the merits will be binding on the parties, the administrative decision maker, and (depending on the judicial hierarchy) other courts."⁵⁰

B. A CONCEPTUAL BASIS FOR THE BINDING EFFECT OF JUDICIAL REASONS ON ADMINISTRATIVE DECISION-MAKERS

The default remedy in judicial review proceedings according to *Vavilov* is to return the matter to the administrative decision-maker "with the benefit of the court's reasons."⁵¹ How are we to understand this direction? A possible way to conceive of the Supreme Court's instruction is that the administrative decision-maker must only turn its mind to the court's reasons, not that it must follow the court's reasons. This is the traditional perspective expressed by Justice de Montigny in *Yansane*. According to this conception an administrative decision-maker may respond to a court's reasons with something less than compliance. I characterize this as a kind of dialogue-type model where the court and the administrative decision-maker may offer differing accounts of the law and facts. Peter Hogg and Allison Bushell conceived of constitutional decision-making by courts and legislative responses as dialogue between courts and legislatures or Parliament.⁵² Perhaps judicial review of administrative decision-making is a dialogue between courts and the executive.

Though attractive in some ways, dialogue is the wrong way to think of the relationship between courts and administrative decision-makers. Dialogue implies an ongoing, possibly endless, conversation between equals. A constitutional debate between courts and legislatures or Parliament may extend over many years and may never be definitively settled. The majority in *Vavilov*, however, rejected this model for administrative law when it expressed disdain for "an endless merry-go-round of judicial reviews and subsequent reconsiderations."⁵³ *Vavilov* recognized the power of a court to decline to return a question to an administrative decision-maker where the "outcome is inevitable and that remitting the case would therefore serve no useful purpose."⁵⁴ The clear message in *Vavilov* is that, subject to

⁴⁹ *Copyright Collective of Canada 2025*, *supra* note 42 at para 21.

⁵⁰ *Makivik Corporation v Canada (Attorney General)*, 2021 FCA 184 at para 60, Laskin JA.

⁵¹ *Vavilov*, *supra* note 1 at para 141.

⁵² Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75.

⁵³ *Vavilov*, *supra* note 1 at para 142.

⁵⁴ *Ibid* at para 142. Examples of where courts have done this include: *Lawrence v Alberta (Director of SafeRoads)*, 2024 ABCA 361 at para 18; *Lausen v Alberta (Director of SafeRoads)*, 2023 ABCA 176 at para 61.

the margin of appreciation afforded to administrative decision-makers by the reasonableness standard of review, where the court and an administrative decision-maker disagree the court gets the last word.

This stance rests on the implicit assumption that the administrative decision-maker is obliged to follow the court's reasons when deciding the question that has been remitted by the court. This assumption permeates the case law, but courts have not offered a coherent account of why this is the case. Perhaps this is because in many circumstances the reason why an administrative decision-maker must follow a court's reasons does not matter. But I suspect, in some cases a theoretical framework is not only helpful, but necessary. A conceptual basis as to why court decisions — and, specifically, judicial reasons — must be followed by administrative decision-makers on remand may be extrapolated from some of the legal doctrines that provide the architecture for the rule of law: *res judicata*, *stare decisis*, and *functus officio*.

One of the most basic ways that decisions bind parties is through the doctrine of *res judicata*. The essence of *res judicata* is that once an issue or cause of action has been decided between parties those parties cannot re-litigate the matter in another proceeding.⁵⁵ *Res judicata* is a rule of evidence which prevents a party in a subsequent proceeding from offering evidence to challenge the earlier result. Justice Doherty explained in *C.U.P.E., Local 1394 v. Extendicare Health Services Inc.*, “the doctrine operates to admit into evidence at the second proceeding the judicial determination of the relevant issue at the earlier proceedings. Not only is that earlier determination rendered admissible, it is also declared to be conclusive with respect to that issue.”⁵⁶ To prove *res judicata* “[t]he court is entitled to look at the reasons for judgment as well as the pleadings and formal judgment.”⁵⁷ Through *res judicata*, then, reasons may have a binding effect.

The doctrine of *res judicata* applies as between administrative tribunals and courts and vice versa.⁵⁸ The logic of *res judicata*, if anything, applies a fortiori where matters are remanded to an administrative decision-maker by a court following judicial review proceedings. This point, however, is mostly absent from the case law perhaps because it is so obvious that courts feel that it need not be expressed. Chief Justice McLachlin, however, did make the point in dissent in *Régie des rentes du Québec v. Canada Bread Company Ltd.*⁵⁹ The issue that divided the Supreme Court in *Régie* was the effect of declaratory legislation. The majority concluded that the declaratory legislation “nullif[ie]d the effects of a final judgment that would otherwise be binding as between the parties.”⁶⁰ Chief Justice McLachlin, however, took the view that the effect of the declaratory legislation should be

⁵⁵ *Res judicata* has two branches, issue estoppel and cause of action estoppel: *R v Sullivan*, 2022 SCC 19 at para 67. The differences between the two branches are not relevant for the present discussion.

⁵⁶ (1993), 104 DLR (4th) 8 at 15 (ONCA).

⁵⁷ Donald J Lange, *The Doctrine of Res Judicata in Canada*, 5th ed (Toronto: Lexis Nexis, 2021) at 19 citing *Johanesson v Canadian Pacific Railway* (1922), 2 WWR 761 at 771–72 (Man CA).

⁵⁸ *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44 at paras 33–42. For a decision of an administrative official to give rise to issue estoppel the official must have been exercising “adjudicative functions in a judicial manner” (*ibid* at para 41). See also *Kaiser v Dural*, 2003 NSCA 122 holding that a prior determination in a court proceeding gave rise to *res judicata* (issue estoppel) binding an administrative tribunal.

⁵⁹ 2013 SCC 46 [*Régie*].

⁶⁰ *Ibid* at para 40.

interpreted narrowly to deprive the earlier decision of its “precedential value” but not its binding effect as between the parties.⁶¹ With the issue of the effect of the legislation put aside, Chief Justice McLachlin explained the effect of the doctrine of *res judicata* in cases where a matter is remanded to an administrative decision-maker following judicial review. She observed that “the court’s determination of the rights and obligations of the parties attracts the authority of *res judicata*.”⁶² She continued, holding that

the authority of *res judicata* applied to [the subject matter] and the Régie could not disturb the Court of Appeal’s definitive resolution of the legal issues as between the parties. It had to fulfill the task for which the case had been remitted to it, i.e. compute the precise monetary liability that resulted from the substantive rights and obligations determined by the Court of Appeal. By failing to do so, the Régie effectively circumvented the process of judicial review and reinstated its original decision without having the jurisdiction to do so.⁶³

Res judicata and *stare decisis* are different doctrines that serve complementary functions. Justices Côté, Brown, and Rowe, concurring in *Kirkpatrick*, explained that “[r]es judicata prevents re-litigation of specific cases. *Stare decisis* guards against this systemically, by preventing re-litigation of settled law. Both doctrines promote judicial efficiency.”⁶⁴ *Stare decisis*, however, is narrower in scope than *res judicata* because it is concerned with propositions of law whereas *res judicata* extends to factual findings.⁶⁵ Though Justice Wagner, as he then was, in *Régie* held, “[w]here an administrative decision-maker has a duty to follow the directions of a reviewing court, it is on the basis of *stare decisis*,”⁶⁶ this cannot explain why administrative decision-makers must follow a reviewing court’s conclusions on matters of fact or mixed fact and law. Similarly with questions of law, even though the reasonableness standard usually applies, courts are reluctant to defer to administrative decision-makers’ interpretations of judicial decisions. Paul Daly observed that “Canadian courts do not give administrative decision-makers much room to manoeuvre when interpreting judicial precedent.”⁶⁷ *Stare decisis* alone, then, is an inadequate explanation for why administrative decision-makers must follow a reviewing court’s decision on remand. *Res judicata* must be part of the reason.

There is a practical way in which reasons are binding on administrative decision-makers on remand. Often, courts return matters to administrative decision-makers with a reference to the court’s reasons. *Vavilov* gives a nod to this practice in describing the usual judicial review remedy as returning the matter to the administrative decision-maker with the benefit of the court’s reasons.⁶⁸ The strongest form of this instruction is where a court says that it is returning these matters to the administrative decision-maker for a new hearing “in accordance

⁶¹ *Ibid* at para 64–65.

⁶² *Ibid* at para 72.

⁶³ *Ibid*.

⁶⁴ *Supra* note 36 at para 187.

⁶⁵ *Angle v MNR*, 1974 CanLII 168 at 253–54 (SCC).

⁶⁶ *Régie*, *supra* note 59 at para 46.

⁶⁷ Paul Daly, “The Principle of *Stare Decisis* in Canadian Administrative Law” (2015) 49 RJTUM 757 at 772. This is also true when an administrative tribunal follows a judicial decision that the reviewing court considers not to be binding as a matter of law or on the specific facts: see e.g. *Pepa v Canada (Citizenship and Immigration)*, 2025 SCC 21 at paras 76–77, Martin J for the majority [*Pepa*].

⁶⁸ *Vavilov*, *supra* note 1 at para 141.

with these reasons.”⁶⁹ This instruction in reasons is typically then repeated in the Court’s order.⁷⁰ Other variations of this type of instruction, sometimes expressed with less force, can be found throughout the case law.⁷¹ The strong form of this instruction expressed in an order, in my opinion, makes the reasons binding on the administrative decision-maker on remand irrespective of any other legal doctrine.

Through *res judicata*, where reasons are treated as evidence of what a court has decided, *stare decisis*, a system of precedent built on reasons, and the express terms of orders, judicial reasons are binding on administrative decision-makers. But the sense in which reasons are binding on administrative decision-makers should not be overstated. First, there is often considerable room for reasonable disagreement over what a court has decided in its reasons.⁷² Second, a rigid approach to following prior court decisions is inconsistent with principles of administrative law that inform the Supreme Court’s choice of reasonableness as the default standard of review. This is evident in the Supreme Court’s approach to another fundamental doctrine of law, *functus officio*.

Upon making a final decision, an administrative decision-maker becomes *functus officio* just like a court. The principle of finality is important in the administrative context because administrative decision-makers are no less vulnerable than courts to the curse of re-litigation. The doctrine of *functus officio* promotes judicial economy and administrative economy alike. *Functus officio*, however, does not apply as strictly in the context of administrative decision-makers where there is a limited right of appeal or no right of appeal. The majority in *Chandler v. Alberta Association of Architects* held that the doctrine of *functus officio* is “more flexible and less formalistic” in the administrative context and that it “should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation.”⁷³ This makes good sense especially in the context of regulated industries where administrative supervision of participants is an ongoing and often iterative process.⁷⁴

Vavilov does not speak directly to the question of how an administrative decision-maker must engage with judicial reasons when a case is remitted for redetermination. The majority’s view, however, may be inferred from its discussion of administrative decision-makers’

⁶⁹ See examples of the Supreme Court using this formulation: *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 6; *Ontario (Energy Board) v Ontario Power Generation Inc.*, 2015 SCC 44 at para 161, Abella J, dissenting; *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at para 10. For examples of other courts using this formulation: *Giffen v TM Mobility Inc.*, 2024 FCA 213 at para 2; *United Food and Commercial Workers Canada Union, Local 401 v Sobeys-Safeway Operations (Provincial)*, 2019 ABCA 175 at para 28; *Davis v British Columbia (Securities Commission)*, 2018 BCCA 149 at para 89; *Metrolinx v Amalgamated Transit Union, Local 1587*, 2025 ONCA 415 at para 46.

⁷⁰ See e.g. *Copyright Collective of Canada 2025*, *supra* note 42 at para 8.

⁷¹ Courts sometimes use the words “consistent with these reasons”: see e.g. *Jane Doe v Canada (AG)*, 2018 FCA 183 at para 34; *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19 at para 37. See also *Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025 at para 81 (Sharpe JA directing “reconsideration in light of these reasons”).

⁷² For example, Daly explains that even a “correct” interpretation of a statute by a court may not be “clear”: Daly, *supra* note 67 at 770–73.

⁷³ [1989] 2 SCR 848 at 862.

⁷⁴ *Clearview AI Inc v Alberta (Information and Privacy Commissioner)*, 2025 ABKB 287 at paras 181–82.

obligations regarding administrative precedents. An administrative decision-maker is not “bound by internal precedent in the same manner as courts” but “[w]here a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons.”⁷⁵ A decision-maker’s failure to meet this burden renders the decision unreasonable. The burden on an administrative decision-maker to justify a departure from judicial reasons must be at least as onerous as the burden to justify a departure from administrative precedent. This view is supported by Justice Martin’s finding in *Pepa*. There, writing for the majority, she considered the inverse situation where an administrative decision-maker failed to critically engage with what it believed was binding judicial precedent. She found the administrative decision-maker’s conclusion that the judicial precedent was binding “cannot be reasonable without explanation of the reasoning behind such a conclusion.”⁷⁶

The logical implication from *Vavilov*’s holding that departures from administrative practices and precedent must be justified, and Justice Martin’s finding that following judicial precedent without justification is unreasonable, is that the *Vavilovian* culture of justification requires that administrative decision-makers engage with judicial reasons. A failure to engage with judicial reasons remitting a matter to the administrative decision-maker is unreasonable. Where the judicial reasons permit or where circumstances have changed such that an administrative decision-maker has latitude to depart from an earlier judicial decision, it is incumbent on the administrative decision-maker to justify any apparent departure from the court’s reasons. The *Vavilovian* culture of justification demands nothing less. Of course, even where an administrative decision-maker provides a reasoned justification for going beyond the parameters of a remand, a court may find that the administrative decision-maker’s interpretation of the judicial decision is incorrect and unreasonable as in *Copyright Collective of Canada 2025*.⁷⁷

C. REASONS AS A GUIDE FOR ADMINISTRATIVE DECISION-MAKERS

Quite apart from the question of whether a court’s reasons are binding on an administrative decision-maker, the default remedy in *Vavilov* suggests that courts, through their reasons, are to guide administrative decision-makers. I surmise this because *Vavilov*’s statement that an administrative decision-maker will “benefit” from judicial reasons only makes sense if judicial reasons have substantive content that is relevant to the work of the administrative decision-maker. This, in turn, places an onus on the judicial review judge or panel of judges when returning a matter to the administrative decision-maker to consider how their reasons might assist the administrative decision-maker. And, where appropriate, the judicial review judge or panel of judges may provide instruction in their reasons to the administrative decision-maker.⁷⁸

⁷⁵ *Vavilov*, *supra* note 1 at para 131 [emphasis in original].

⁷⁶ *Pepa*, *supra* note 67 at para 76.

⁷⁷ *Supra* note 42 at paras 29, 40.

⁷⁸ A specific example of where courts should provide instruction or guidance in their reasons is found in *Vavilov*, *supra* note 1 at para 132 (“reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body’s decisions.... [T]he court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement”).

The best example of a court providing guidance to administrative decision-makers in the post-*Vavilov* environment is found in a trio of decisions from the Federal Court of Appeal.⁷⁹ Each of the three cases was somewhat different. *Sexsmith* concerned decisions by firearms officers, and Justice Stratas, writing for the Court, concluded that because this was the first case where the Court had a chance to review a firearms officer's decision after *Vavilov*, "firearms officers, including those to whom [this] application will be remitted, may benefit from our guidance in this area."⁸⁰ Justice Rivoalen decided that guidance was required in *Safe Food Matters*, which was the first time the court had an opportunity to review a decision of the Pest Management Regulatory Authority.⁸¹ The Court again decided to provide guidance to the administrative decision-maker in *Galindo Camayo* which was "the first opportunity that [the] Court has had to deal with a cessation case since ... *Vavilov*."⁸² In each decision, the Court used bullet points to outline the approach that it expected the administrative decision-maker to follow when it reheard the case.⁸³ The guidance in each case was specific to the circumstances but also provided general instructions to the administrative decision-maker to follow in all cases. The Court's decision to give both specific and general guidance to the administrative decision-makers in these cases appears to be a self-conscious attempt to avoid what *Vavilov* described as the "endless merry-go-round of judicial reviews and subsequent reconsiderations."⁸⁴ Despite giving detailed guidance to the administrative decision-makers in each case, the Court emphasized that it was "not recommending or suggesting any outcome" and that the "[t]he merits of the redeterminations are for those redetermining [the] application, not this Court."⁸⁵

Not every court is suited to giving the kind of guidance offered by the Federal Court of Appeal. The Federal Court of Appeal presides over an abundance of administrative law cases every year and, as such, has a level of comfort and degree of expertise that is lacking in some other courts. A lone provincial superior court judge hearing a judicial review application would be ill-advised to offer general guidance to an administrative decision-maker in the fashion of the Federal Court of Appeal. But with that said, *Vavilov* still admonishes that judicial reasons are to benefit the administrative decision-maker on a rehearing. Justice Rowe, dissenting in part in *Pepa*, offered a tantalizing suggestion. He explained that, in his view, "the appropriate remedy is to remit the matter to the [administrative decision-maker] for redetermination with the guidance provided in this Court's reasonableness analysis."⁸⁶ Perhaps reasonableness analysis *is* guidance for the administrative decision-maker and maybe this says something about how courts should approach reasonableness analysis. *Vavilov*'s prescription for how to conduct reasonableness review should be understood as requiring courts to *demonstrate* in their reasons why administrative decisions are reasonable or unreasonable; it is not enough to offer conclusory opinions. If reasonableness review is a

⁷⁹ *Sexsmith v Canada (AG)*, 2021 FCA 111 at paras 29–38 [*Sexsmith*]; *Safe Food Matters Inc v Canada (AG)*, 2022 FCA 19 at paras 64–67 [*Safe Food Matters*]; *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at paras 80–84 [*Galindo Camayo*].

⁸⁰ *Sexsmith*, *supra* note 79 at para 30.

⁸¹ *Safe Food Matters*, *supra* note 79 at para 64.

⁸² *Galindo Camayo*, *supra* note 79 at para 80.

⁸³ *Ibid* at para 84; *Sexsmith*, *supra* note 79 at para 35; *Safe Food Matters*, *supra* note 79 at para 65.

⁸⁴ *Galindo Camayo*, *supra* note 79 at para 80, quoting *Vavilov*, *supra* note 1 at para 142.

⁸⁵ *Sexsmith*, *supra* note 79 at para 38, with similar comments made in *Safe Food Matters*, *supra* note 79 at para 67 and *Galindo Camayo*, *supra* note 79 at para 81.

⁸⁶ *Pepa*, *supra* note 67 at para 149.

“robust” evaluation of administrative decisions, that necessarily means that reviewing courts must offer robust reasons.⁸⁷

Recognizing that a function of courts in judicial review proceedings is to provide guidance to the administrative decision-maker in reasons opens the potential for the decisions of judicial review judges to be attacked on the basis that they fail to provide such guidance. A version of this argument was made by the appellant in *Syncrude Canada Ltd v. Alberta (Energy)*.⁸⁸ The appellant was successful in the lower court. The decision of the Alberta Minister of Energy was found to be unreasonable, and the matter was “remitted to the Minister for reconsideration.”⁸⁹ Despite success in the lower court, the appellant appealed on the basis that the judicial review judge failed to decide the issues herself or, in the alternative, that she failed to provide the Minister with sufficient guidance.⁹⁰ Justice Woolley, writing for the Court, found that there was “no basis for interfering with the decision of the chambers judge on the argument that she ought to have provided further guidance or direction to the Minister.”⁹¹ Central to her conclusion was her finding that the judicial review judge’s “reasons sufficiently explained her conclusion that the Minister’s decision was unreasonable.”⁹² Justice Woolley’s decision supports the view that, most of the time, the judicial review judge need only provide robust reasons explaining her reasonableness analysis. A judge may, but is not required to, go farther in offering specific guidance to the administrative decision-maker as to how to conduct the redetermination or more general guidance as to how to make decisions.

III. CONCLUSION

Judicial reasons are often binding on an administrative decision-maker and, even where they are not, the judicial reasons matter. This reality has implications for how administrative decision-makers approach their roles. When a matter is remanded by a court, it is critical for the administrative decision-maker to take the measure of the court’s reasons as well as its order. Even if the order does not refer to the reasons, the reasons may be binding in some respects. And, in the *Vavilovian* culture of justification, a failure to engage with the reasons may itself be unreasonable. An administrative decision-maker that focuses on a court’s remand order to the exclusion of the court’s reasons leaves its decision open to attack on further judicial review.

Judges writing reasons in administrative law cases must keep in mind that their reasons are binding in many respects on administrative decision-makers. The binding nature of judicial reasons in administrative law cases means that in a practical sense judicial reasons are remedial. Judicial reasons not only explain the judge’s reasoning and the outcome of the decision to the parties, where a case is returned to an administrative decision-maker, the reasons should provide guidance and sometimes limits on the scope of the administrative decision-maker’s jurisdiction. For judges on courts of first instance, this requires a shift of mindset from approaching reasons as explanatory to understanding reasons as also having a remedial function. *Vavilov*’s invocation of a culture of justification must be recognized as a

⁸⁷ *Vavilov*, *supra* note 1 at para 12.

⁸⁸ 2024 ABCA 366 [*Syncrude ABCA*].

⁸⁹ *Syncrude Canada Ltd v Alberta (Minister of Energy)*, 2023 ABKB 317 at para 145.

⁹⁰ *Syncrude ABCA*, *supra* note 88 at para 12.

⁹¹ *Ibid* at para 17.

⁹² *Ibid*.

call for judges to understand the function of reasons in broader terms and to recognize that reasons can be remedial both in the administrative context and beyond.