VAVILOV AT 5: LOOKING AHEAD WHILE LOOKING BACK

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The "*Dunsmuir* decade" that sought to clarify the law of judicial review in Canada started with promise, only to lead to significant disagreement at the Supreme Court. Much like *C.U.P.E. v. New Brunswick Liquor Corp*,[1] *Canada v. Southam*,[2] and *Pushpanathan v. Canada*,[3] a rare clear thing about the law of judicial review was that it was not clear. One Federal Court of Appeal judge lamented that "[o]ur administrative law is a never-ending construction site where one crew builds structures and then a later crew tears them down to build anew, seemingly without an overall plan."[4] Justice Binnie's observation in *Dunsmuir v. New Brunswick* that "[j]udicial review is an idea that has lately become unduly burdened with law office metaphysics" was showing no signs of abating.[5]

The December 2019 decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* sought to resolve this state of affairs.[6] With a compromise majority decision jointly written by seven judges,[7] the Supreme Court not only prescribed a comprehensive framework for determining the standard of review — but also gave significant guidance on how it should be applied.

In June 2025 in Edmonton, we brought together a group of scholars, judges, and lawyers from across Canada to analyze the first five years of this seminal decision at the *Vavilov* at 5 Conference. Recent decades have suggested that a leading administrative law case on substantive review is only to be leading for about ten years. Is this time going to be different? And, in any event, what have we learned? This volume represents the panelists' contributions, contributions that analyze the effects of this decision from many different angles.

The first contributions of this volume concentrate on the framework for selecting the standard of review. Mary Liston, in the volume's opening piece, compares and contrasts *Vavilov* with *Baker v. Canada (Minister of Citizenship of Immigration)*,[8] Canada's leading

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1 *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corp*, 1979 CanLII 23 (SCC).
2 *Canada (Director of Investigation and Research) v Southam Inc*, 1997 CanLII 385 (SCC).
3 *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC).
4 David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42:1 Queen's LJ 27 at 29.
5 2008 SCC 9 at para 122 [*Dunsmuir*].
6 2019 SCC 65 [*Vavilov*].
7 Paul Daly, "A Consensus, If You Can Keep It: Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65" (20 December 2019), online (blog): [perma.cc/332V-MBBM].
8 1999 CanLII 699 (SCC).

case on procedural fairness. In doing so, she considers what is a good legal framework more generally.

Paul Warchuk then takes this volume from the theoretical to the analytical, by assessing whether the Federal Court and Federal Court of Appeal are spending less time considering the issue of standard of review. Using novel artificial intelligence methodology, he concludes that indeed there *is* less dispute over the standard of review post-*Vavilov*. This may suggest *Vavilov* is fulfilling its purposes, though he is careful to qualify his analysis and does not claim to have isolated causation.

Lauren Wihak then explores a consequence of *Vavilov* in the realm of statutory appeals. Somewhat of an afterthought in the decision itself, this has had tremendous consequences in provinces with many statutory appeals, Saskatchewan being a prime example. This is explored both descriptively and normatively.

We then turn to the implications of *Vavilov* in applying the standard of review. In his contribution, Paul Daly revisits his 2015 article published in this journal and analyzes the scope and meaning of reasonableness review, arguing that *Vavilov* has achieved normative and sociological legitimacy that its predecessor never could.[9]

Monica Popescu and Kevin Bouchard, in discussing the standard of review, argue that that there is a particular conception of the law of judicial review that links together procedural fairness and substantive review. For them, "*Vavilov*'s prescriptions concerning the conduct of reasonableness review and *Baker*'s instructions relating to procedural fairness review are essentially different expressions of the same test."

The implications of *Vavilov* are also the subject of David Said and Greg Flynn's empirical analysis. Bringing political science tools and putting them to good use on administrative law, Said and Flynn study whether *Vavilov* has had a measurable impact on outcomes in Ontario's Divisional Court, one of the country's busiest judicial review courts. They describe deference to the administrative state as alive and well in the *Vavilov* era — though they note that ministerial decisions are less likely to survive judicial review post-*Vavilov*.

Robert Diab then considers a question destined to become more important in the near future: can a decision made by artificial intelligence satisfy *Vavilov*'s requirements of reasonableness? Engaging with first principles and the case law, Professor Diab suggests that the answer to this question is "yes," though he is sure to add caveats.

The volume then addresses how *Vavilov* has affected administrative law remedies. Justice Colin Feasby of the Alberta Court of King's Bench begins by analyzing the remedial role that reasons play. He explores how reasons can be thought of as a remedy, even more so after *Vavilov*, despite not being a traditional prerogative writ.

Kate Glover Berger provides commentary and analysis, from a remedial perspective, on the Supreme Court's latest foray into the area: *Pepa v. Canada (Citizenship and*

[9] See Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52:4 Alta L Rev 799.

Immigration).[10] She suggests that while the majority signals adherence to *Vavilov*'s underlying principle of remedial deference, upon closer examination the case departs from this organizing principle. For this reason, Glover Berger notes that *Pepa*'s discussion of remedies should be treated with caution.

For her part, Joanne Murray advances the case that *Vavilov*'s remedial framework explains how courts perceive their role in the post-*Vavilov* landscape. She argues that the remedial flexibility contemplated by *Vavilov* aligns with a collaborative, common law constitutionalist vision of administrative law.

We end in the realm of theory. Megan Pfiffer begins by interrogating the asymmetry that Canadian administrative law has had in conducting procedural review and substantive review. She suggests that the asymmetry is "more apparent than real." Seeking to unify the law of judicial review (whether on procedural or substantive grounds) as fundamentally concerned with rights, she makes strides to a coherent theory of Canadian administrative law that is "normatively attractive on its own terms."

Normativity is the subject of Matthew Lewans's paper as well. Articulating a contrast between judicial review as a model of rules and judicial review as a practice of principle, Lewans argues that a practice of principle better coheres with the rule of law by ensuring that "administrative decisions are produced through transparent, inclusive, and reasoned processes of proof and argumentation." In his view, *Dunsmuir* fetishized rules and in its approach to statutory appeals *Vavilov* does too, all to the detriment of the culture of justification.

Gerard Kennedy then contemplates a related issue that explores a paradox at the heart of Canadian public law: why are jurists who advocate most strongly for deference to the administrative state least likely to advocate for deference to legislatures? And why is the reverse true? After exploring the existence of this phenomenon and adding caveats to it, he explores why this may be the case based on different conceptions of public law.

Finally, just like the day of the Conference, we conclude with an afterward by Justice David Stratas of the Federal Court of Appeal. Not always known to be fond of Supreme Court of Canada public law decisions in recent years, Justice Stratas praises the *Vavilov* decision in light of his decades of experience in administrative law.

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[10] 2025 SCC 21.

Justice Malcolm Rowe of the Supreme Court of Canada, William Shores, Will Tao, and Alyssa Tomkins. Though they do not have papers in this volume, they have left their marks on it. Finally, we thank the Workers' Compensation Board Endowment that generously supported the Conference — and, accordingly, this volume.

Prior to *Vavilov*, the "never-ending construction site" of Canadian administrative law was continuously revamped every decade or so. These are the lessons of five years of *Vavilov*. Something tells us that it will still be with us for a while longer.