De Jure Submission and *De Facto* Courteous Regard: Places for Two Types of "Deference" Post-*Vavilov*

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I. Introduction

Sometimes words mean different things in different contexts. The word "bar" can mean "a barrier", "a place where alcohol is sold and consumed" or "a group of lawyers". Other times, words have related but subtly distinct meanings. The word "conservative" can mean "risk-adverse", "traditional" or "on the political right". If Jane tells Mary that Sarah is "very conservative" because Sarah is very risk-adverse, it would be a mistake for Mary to assume that Sarah is necessarily on the political right. This linguistic confusion can also apply to the law. This article seeks to explore a commonly used word in Canadian administrative law, perhaps *the* most commonly used word in Canadian administrative law: deference. Specifically, this article posits that this word is used to describe two different phenomena: surrendering authority as a matter of obligation, and humbly choosing to yield recognizing that another's opinion on a matter is coming from a privileged position. This article explores this distinction in Canadian administrative law, ultimately concluding it is sound in principle and need not be confusing in practice.

Section II of this article demonstrates how seemingly common words have different meanings in different contexts and this has the potential to cause confusion. Section III discusses how this is the case for the word "deference" in the English language, even outside the legal context. Section IV then notes how this has caused confusion in administrative law, a confusion arguably apparent in much of the concurrence in *Canada (Minister of Citizenship and Immigration) v. Vavilov*.[1] Section V then proposes how to avoid this confusion, so long as there is recognition of the difference between *de jure* submission (or "space") and *de facto* respect (or "weight").[2] Not only is this distinction consistent with *Vavilov* and the theoretical bases that underlie administrative law, it recognizes the primacy of language in legal

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[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.) [hereinafter "*Vavilov*"].

[2] Inspired by Peter L. Strauss, "'Deference' is Too Confusing – Let's Call Them '*Chevron* Space' and '*Skidmore* Weight'" (2012) 112 Columbia L. Rev. 1143.

analysis, and has already been reflected in lower courts picking up on this distinction.

II. LINGUISTICS 101

It is not controversial that words have different meanings in different contexts. "Bar" meaning "a barrier" or a "place where alcohol is served" or "a group of lawyers" is a particularly clear example. Rarely is this going to cause confusion, and if it does, it is frequently a matter of humour. "Two guys walked into a bar" is how many jokes start. If it is followed by, "which is kind of stupid because if the first guy walked right into it, you'd think the second guy would've seen it", the joke is funny precisely because it played with the listener's expectations.[3]

While common sense frequently prevents instances such as this from actually causing confusion, the potential exists, particularly when the distinction is more subtle. A teacher needs to be careful when using the word "you" in a class, because context can change this from reference to a single person (previously "thou") to the plural: the class as a whole or a group of students therein. The word "conservative" can mean "preserving of tradition" or "risk-adverse" or "on the political right". While there is some overlap between these definitions, and one can understand how the first one gave rise to the latter two,[4] they are absolutely not synonymous. If I report, "my sister has a very conservative approach to gun ownership", do I mean that she is risk-adverse or a fan of right-wing approaches to addressing gun ownership?

The potential for confusion can arise in law as well. Chief Justice John Roberts of the Supreme Court of the United States amusingly explored this in *Federal Communications Commission v. AT&T Inc.*[5] The case concerned whether AT&T possessed "personal privacy" within the meaning of the *Freedom of Information Act*.[6] The Court of Appeals for the Third Circuit concluded that the answer to this question was "yes" on the basis that the word "personal" derives from "person" and AT&T, a corporation, is a "person".[7] Chief Justice Roberts demonstrated that this analysis was too simplistic, largely because adjectives can come to have different meanings than their root nouns:

> Adjectives typically reflect the meaning of corresponding nouns, but not always. Sometimes they acquire distinct meanings of their own. The noun "crab" refers variously to a crustacean and a type of apple, while the related adjective "crabbed"

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[3] I must confess to remembering hearing this joke on the radio in 1998 or 1999, but cannot attribute it to anyone.

[4] A desire to preserve tradition is the quintessential "conservative" insight that gave rise to the philosophy of Edmund Burke: see, *e.g.*, *Reflections on the Revolution in France* (New York: Oxford University Press, 1999 [1790]), at 96-97.

[5] *Federal Communications Commission v. AT&T Inc.*, 562 U.S. 397 (2011).

[6] *Freedom of Information Act*, 5 U.S.C. § 552(b)(7)(C).

[7] *Federal Communications Commission v. AT&T Inc.*, 562 U.S. 397 (2011), at 3.

> can refer to handwriting that is "difficult to read,"; "corny" can mean "using familiar and stereotyped formulas believed to appeal to the unsophisticated," which has little to do with "corn," ("the seeds of any of the cereal grasses used for food"); and while "crank" is "a part of an axis bent at right angles," "cranky" can mean "given to fretful fussiness".[8]

In any event, "personal privacy" need not necessarily mean "privacy of a person": "We understand a golden cup to be a cup made of or resembling gold. A golden boy, on the other hand, is one who is charming, lucky, and talented. A golden opportunity is one not to be missed."[9] Chief Justice Roberts, for a unanimous Court, ultimately concluded that, even though corporations are "persons" for certain purposes, they are incapable of possessing "personal privacy".

III. THE WORD "DEFERENCE" IN THE ENGLISH LANGUAGE

Now that we have addressed this in the abstract, let us analyze the word "deference". The *Oxford English Dictionary* gives three definitions of "deference":

> 1. "the action of offering or proffering; tendering, bestowing, yielding. *Obsolete. Rare*."[10]
>
> 2. "**submission to** the acknowledged superior claims, skill, judgment, or other qualities, of another."[11]
>
> 3. "**courteous regard** such as is rendered to a superior, or to one to whom respect is due; the manifestation of a disposition to yield to the claims or wishes of another."[12]

The phrase "in deference to" is defined as "in respectful acknowledgment of the authority of, out of practical respect or regard to".[13]

The first definition is rarely used in the English language anymore. But the latter two, despite being similar, differ in subtle but important ways. "Submitting" to another's view of a matter is distinct from giving "courteous regard" to another's

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[8] *Federal Communications Commission v. AT&T Inc.*, 562 U.S. 397 (2011), at 4 (citations omitted).

[9] *Federal Communications Commission v. AT&T Inc.*, 562 U.S. 397 (2011), at 8.

[10] Oxford English Dictionary, "Deference, n: Oxford English Dictionary" (2020), online: *Oxford English Dictionary* <www-oed-com.uml.idm.oclc.org/view/Entry/48816?redirectedFrom=deference#eid>.

[11] Oxford English Dictionary, "Deference, n: Oxford English Dictionary" (2020), online: *Oxford English Dictionary* <www-oed-com.uml.idm.oclc.org/view/Entry/48816?redirectedFrom=deference#eid> (emphasis added).

[12] Oxford English Dictionary, "Deference, n: Oxford English Dictionary" (2020), online: *Oxford English Dictionary* <www-oed-com.uml.idm.oclc.org/view/Entry/48816?redirectedFrom=deference#eid> (emphasis added).

[13] Oxford English Dictionary, "Deference, n: Oxford English Dictionary" (2020), online: *Oxford English Dictionary* <www-oed-com.uml.idm.oclc.org/view/Entry/48816?redirectedFrom=deference#eid>.

view. The former implies that the person deferring has little if any discretion but to accept the other's view. The latter does not. For instance, a nun must defer to her superior as a matter of obedience. Other times, we use this word to mean deference as a matter of respectful common sense, in the way that the same nun, if she is a school principal, may "defer" to a teacher in deciding whether to suspend a student. But in this second situation, she remains the person with the ultimate decision-making power. In the former, she does not.

These two uses come to the fore in the law as well. *Black's Law Dictionary* defines "to defer" in part by simply incorporating "deference": "To show deference to (another); to yield to the opinion of <because it was a political question, the courts deferred to the legislature>".[14] The second definition (after the semi-colon) implies limited discretion but to adopt the other's opinion. For instance, appellate judges *must* defer to trial judges on factual matters (save in very narrow circumstances)[15]: in other words, they must submit to the judgment of the trial judges given their superior position. But appellate judges *may* defer to them on legal matters even when they are not obligated to do so as a courteous regard, particularly when that trial judge is particularly learned in a particular area. This is in line with the first *Black's Law Dictionary* definition (preceding the semi-colon). For instance, judges on the Court of Appeal may defer to the views of a trial judge who is expert in insolvency law, such as Chief Justice Morawetz of the Ontario Superior Court, even when the appellate judges are clearly not obligated to do so *de jure*. Similarly, when an appellate court goes out of its way to emphasize that that a trial judge is "very experienced",[16] it can be taken as a sign that the appellate court is giving particular "courteous regard" to the views of the trial judge, despite knowing it is not obliged to do so.

This should not be controversial. For instance, in *Bernard v. Canada (Attorney General)*,[17] the Supreme Court of Canada was confronted with the question of whether it should defer to an understanding of the Federal Court of Appeal regarding one of its previous orders, when Chief Justice Blais was one of the three judges interpreting the original order, and one of the three judges who gave the original order. *De jure* deference was presumably not owed, but Abella and Cromwell JJ. held: "Giving some weight to the Court of Appeal's interpretation of its own order in these circumstances is not so much a matter of deference as of operating on the

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[14] *Black's Law Dictionary*, 7th ed. (St. Paul, Minnesota: West Group, 1999), *sub verbo*, "defer". This is also defined as "to postpone" — an entirely different meaning of the word.

[15] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.).

[16] See, *e.g.*, the Court of Appeal for Ontario referring to the "very experienced trial judge" not making reversible error, even if it would have been preferable for him to caution himself about the limitations of a particular type of evidence in *R. v. T. (G.)*, [2015] O.J. No. 1636, 2015 ONCA 221 (Ont. C.A.).

[17] *Bernard v. Canada (Attorney General)*, [2014] 1 S.C.R. 227, 2014 SCC 13 (S.C.C.).

common-sense assumption that the Court knew what it meant."[18]

Judges emphasizing the experience of particularly learned counsel is an even more obvious example where prudential yielding is permitted as courteous regard but mandatory submission is not. This has been done in criminal law for an advocate such as Marie Heinen,[19] or in tax litigation for a figure such as Al Meghji.[20] By and large, this should be a matter of common sense that appears uncontroversial in most areas of law. The large exception, however, is administrative law.

IV. Different Uses of "Deference" in Administrative Law

"Deference" has historically been given in administrative law for different reasons. At times, it is because the legislature has sought to insulate the administrator's decision from judicial interference, such as through the use of a privative clause[21] or the mere fact that it has set up an administrative agency to decide a legal issue.[22] This is the *institutional design* rationale for deference. At other times, however, deference has been justified on the basis of the purported expertise of the administrative decision-maker.[23] This is the *expertise* rationale for deference.[24]

It should be evident that these are different rationales for "deference". Do they both clearly lead to *de jure* deference as submission? The first should, barring constitutional concerns,[25] as a matter of courts respecting legislative supremacy.

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[18] *Bernard v. Canada (Attorney General)*, [2014] 1 S.C.R. 227, 2014 SCC 13, at para. 35 (S.C.C.).

[19] See, *e.g.*, Blair J.A. accepting Ms. Henein's arguments that a verdict was unreasonable (a high threshold) in *R. v. L. (G.)*, [2009] O.J. No. 2533, 2009 ONCA 501 (Ont. C.A.), noting her submissions at paras. 5, 7 and 18.

[20] See, *e.g.*, Rothstein J. accepting Mr. Meghji's submissions, referring to him by name rather than the intervenor he was representing, in *Daishowa-Marubeni International Ltd. v. Canada*, [2013] 2 S.C.R. 336, 2013 SCC 29, at para. 35 (S.C.C.).

[21] See, *e.g.*, *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982, at paras. 30-31 (S.C.C.); David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (Hart Publishing, 1997) 279, at 283.

[22] See, *e.g.*, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 30 (S.C.C.).

[23] See, *e.g.*, *Pezim v. British Columbia (Superintendent of Securities)*, [1994] S.C.J. No. 58, [1994] 2 S.C.R. 557 (S.C.C.); the concurrence in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.).

[24] This terminology is noted in Jonathan Silver & Henry Federer, "What is an Appeal? *Vavilov* and the New Framework for Statutory Appeals" (2021) 34 Can. J. Admin. L. & Prac. 179, at 180.

[25] See, *e.g.*, criticisms of the Supreme Court of Canada's decision in *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, 2012 SCC 12 (S.C.C.), both judicially (see, *e.g.*, the opinions of McLachlin C.J.C., Rowe J., and Coté and Brown JJ. in *Law Society of British Columbia*

Does the same hold of the second rationale, however? For some jurists, notably the recently retired Justice Abella, the answer appears to be "yes". Much of the concurrence that she and Karakatsanis J. wrote in *Vavilov*, as well as much of her previous judicial[26] and extra-judicial[27] writing, concentrated on the *expertise* of administrative decision-makers as a reason for courts to defer to them. The extent to which administrative decision-makers possess legal expertise in matters such as statutory interpretation, as distinct from policy expertise or being able to discern the facts on the ground, is debatable.[28] Even so, they clearly frequently do. Does recognizing this fact also mandate that judges submit to their decisions? Or can the expertise rationale for deference be met through employing the "courteous regard" conception of deference? But if so, could parsing two different uses of the word "deference" be confusing, in practice, if not in principle? That is the subject of this article's next section.

V. TOWARDS PRINCIPLED USAGE

Fortunately, there is a way out of this conundrum, one that requires synthesis rather than reworking of precedents, and one that lower courts have already recognized. The earlier discussion of language and its different meanings in different contexts assists. Courts should recognize that it is only when the legislature prescribes deference to administrators that a court *must* defer to an administrator as a matter of submission. This is a corollary of the principle of legislative supremacy; however, given the principle of constitutional supremacy, even it may need to yield

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v. Trinity Western University, [2018] 2 S.C.R. 293, 2018 SCC 32 (S.C.C.)), and extra-judicially (see, *e.g.*, The Honourable Justice Peter Lauwers, "What Could Go Wrong with *Charter* Values?" (2019) 91 S.C.L.R. (2d) 1; Audrey Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 S.C.L.R. (2d) 561; Christopher D. Bredt & Ewa Krajewska, "*Doré*: All That Glitters Is Not Gold" (2014) 67 S.C.L.R. (2d) 339).

[26] See, *e.g.*, *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 283, 2012 SCC 35, at para. 64 (S.C.C.); *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3, 2015 SCC 16 (S.C.C.).

[27] Rosalie Silberman Abella & Teagan Markin, "Thinking about Administrative Law in Canada: From Doctrine to Principle" in *The Promise of Law: Essays Marking the Retirement of Dame Sian Elias as Chief Justice of New Zealand* (Auckland: LexisNexis New Zealand, 2019).

[28] See, *e.g.*, the witty observation of Rowe J. in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, [2018] 1 S.C.R. 635, 2018 SCC 22, at para. 129 (S.C.C.):

> I would agree that "working day to day" with an administrative scheme can build "expertise" and "field sensitivity" to policy issues and to the weighing of factors to be taken into account in making discretionary decisions. But how does "working day to day" give greater insight into statutory interpretation, including the scope of jurisdiction, which is a matter of legal analysis? The answer is that it does not. This is one of the myths of expertise that now exist in administrative law.

if the administrative action violates the Constitution.[29] But it is still always permissible and frequently prudent to "defer" to a learned administrator in determining the correct interpretation of a legislative provision. This type of "deference" is courteous regard to counsel or lower court judges, in the veins cited above. It is not owed as a matter of obligation. As Justice Scalia described, writing extrajudicially:

> If I had been sitting on the Supreme Court when Learned Hand was still alive, it would similarly have been, as a practical matter, desirable for me to accept his views in all of his cases under review, on the basis that he is a lot wiser than I, and more likely to get it right. But that would hardly have been theoretically valid. Even if Hand would have been *de facto* superior, I would have been *ex officio* so. So also with judicial acceptance of the agencies' views. If it is, as we have always believed, the constitutional duty of the *courts* to say what the law is, we must search for something beyond relative competence as a basis for ignoring that principle when agency action is at issue.[30]

Insofar as Justice Scalia implied that legislatures, as a matter of *their* constitutional authority to make the law, cannot prescribe that courts give space to administrative agencies, he was likely overstating matters. But regarding the general concern that competence and expertise, which usually exist on a spectrum rather than as an all-or-nothing matter, do not mandate that courts *submit* to administrative actors, his analysis appears unimpeachable. And in the American context, there has already been distinguishing of the type of deference prescribed from *Skidmore*[31] as being epistemic or having "weight" while deference from *Chevron*[32] is doctrinal, prescribing "space".[33]

As noted, coming to this realization need not entail another reworking of Canadian administrative law. On the contrary, it is consistent with *Vavilov* and administrative law principles generally. The majority in *Vavilov* noted that, even when *de jure* deference is not owed, because the legislature that has given an administrator its power has not indicated that there should be *de jure* deference (and, in fact, frequently suggests the opposite through specific appeal rights[34]), "defer-

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[29] See *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, 2012 SCC 12 (S.C.C.).

[30] Justice Antonin Scalia, "Judicial Deference to Administrative Interpretations of Law" (1989, No. 3) Duke L.J. 511, at 514 (emphasis in original).

[31] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[32] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[33] Peter L. Strauss, "'Deference' is Too Confusing – Let's Call Them '*Chevron* Space' and '*Skidmore* Weight'" (2012) 112 Columbia L. Rev. 1143; Paul Daly, *Defining Deference*, 2012 CanLIIDocs 6.

[34] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at paras. 36-37 (S.C.C.).

ence" can nonetheless be given if circumstances demonstrate actual experience.[35] This has caused mischief in administrative law partially because certain jurists seem to assume the lack of *de jure* deference as submission is somehow incompatible with *de facto* deference as courteous regard. Posing different but helpful terminology, the American scholar Peter L. Strauss has posited that these phenomena should be re-labelled "space" (for *de jure* submission) and "weight" (for *de facto* courteous regard).[36] Based on OED definitions, I have described these two types of deference as "*de jure* submission" and "*de facto* courteous regard", though Professor Strauss's terminology is also useful. And as this article has demonstrated, these are two different phenomena and courts should not be shy to recognize as much.

This need not be confusing. Indeed, courts have already recognized this. Perhaps the most obvious instance is the decision, decided within months of *Vavilov*, of Swinton J. in *Planet Energy (Ontario) Corp. v. Ontario Energy Board*.[37] The case addressed the aftermath of the Ontario Energy Board licensing a company to provide certain electricity and internet services. Two "Independent Business Operators" ("IBOs") had personally enrolled electricity customers in the appellant's electricity program, rather than leaving it to the customers to enroll themselves online. This was against regulations. The Ontario Energy Board found the company could be held responsible for the IBOs' actions. By statute, the OEB's decision was appealed to the Ontario Divisional Court.[38] Given that this was a statutory appeal, the standard of review on questions of law was correctness. Justice Swinton nonetheless recognized that this was entirely compatible with giving great respect to an administrative decision-maker. This was a reason to decline to decide an issue pending the Ontario Energy Board deciding it at first instance:

> While the Court will ultimately review the interpretation of the Act on a standard of correctness, respect for the specialized function of the Board still remains important. One of the important messages in *Vavilov* is the need for the courts to respect the institutional design chosen by the Legislature when it has established an administrative tribunal (at para. 36). In the present case, the Court would be greatly assisted with its interpretive task if it had the assistance of the Board's interpretation respecting the words of the Act, the general scheme of the Act and the policy objectives behind the provision.[39]

Planet Energy does not undermine the coherence of *Vavilov*. Though *Vavilov*

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[35] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 93 (S.C.C.).

[36] Peter L. Strauss, "'Deference' is Too Confusing – Let's Call Them '*Chevron* Space' and '*Skidmore* Weight'" (2012) 112 Columbia L. Rev. 1143.

[37] *Planet Energy (Ontario) Corp. v. Ontario (Energy Board)*, [2020] O.J. No. 442, 2020 ONSC 598 (Ont. Div. Ct.).

[38] *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, s. 33.

[39] *Planet Energy (Ontario) Corp. v. Ontario (Energy Board)*, [2020] O.J. No. 442, 2020 ONSC 598, at para. 31 (Ont. Div. Ct.).

assigns to courts the exclusive power to say "what the law is" in certain contexts, seeking an opinion before coming to that determination is not the same as abrogating the duty to determine, as this article has sought to demonstrate. Nor does this create islands of deference that were not intended, given that *Vavilov* contemplated giving weight to decision-makers that could demonstrate their expertise.[40] In sum, there is nothing incompatible with recognizing that there are circumstances where giving "courteous regard" to the decision of an administrative decision-maker is appropriate, even when the court must make the final determination on a legal provision's meaning.

This notion of "deference as respect" is very consistent with David Dyzenhaus's conceptualization of deference in administrative law.[41] To be sure, Dyzenhaus has suggested that "deference as respect" *should* lead to *de jure* deference to administrative decision.[42] But he arguably falls into the fallacy, which the concurrence in *Vavilov* also fell into, that deference as "courteous regard" necessarily requires "deference as submission". This is an understandable fallacy given that the word "deference" is used differently in different circumstances. But as common sense and cases such as *Planet Energy* demonstrate, it seems unlikely that such legal, *de jure* "deference as submission" is actually necessary to achieve the goal that Dyzenhaus seeks: deference as respectful, courteous regard.

VI. Conclusion

I have written before that "Something was awry in 1970s administrative law with judges ignoring obvious statutory language requiring deference."[43] In the face of this, the *C.U.P.E.* decision[44] ushered in an era of deference to administrators to mandate that courts give space to administrative actors to make determinations of law. While the original rationale for this was always respect to the legislature's

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[40] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 93 (S.C.C.).

[41] See, *e.g.*, David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (Hart Publishing, 1997) 279; David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17 Rev. Const. Stud. 87; Mark Walters, "Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law" in Mark Elliott & Hanna Wilberg, eds., *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford: Hart Publishing, 2015), ch. 15.

[42] David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17 Rev. Const. Stud. 87, cited by Abella and Karakatsanis JJ. in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at paras. 36-37, 212 (S.C.C.).

[43] Gerard Kennedy, "Day Five: Gerard Kennedy" (December 29, 2018), online (blog): *Double Aspect* <https://doubleaspect.blog/2018/12/29/day-five-gerard-kennedy/>.

[44] *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] S.C.J. No. 45, [1979] 2 S.C.R. 227 (S.C.C.).

institutional design choices, another rationale emerged: expertise of the administrators. But this second rationale was never the *reason* for *C.U.P.E.* and, in any event, is not always present. The different uses of the word "deference" in the English language served to further sow confusion by conflating the two rationales for "deference" even though the "deference" mandated by the two rationales leads to two different conceptualizations of deference.

Fortunately, there is a way forward: to simply acknowledge that the effect of "deference" differs in light of whether the legislature has indicated that the administrator is to be given "space" in its legal determination. If so, *de jure* deference as submission will follow. If not, *de facto* deference as courteous regard (or "weight") may follow but only if the "expertise" rationale for deference is also present in fact. *Vavilov* provides the pieces to go forward in this regard. To be sure, this does not resolve the normative dispute about whether deference as courteous regard *should* lead to legal submission, as Dyzenhaus and others have called for.[45] Insofar as the English language causes confusion about the legal effects of these two conceptualizations of deference, however, this article hopefully demonstrates that such confusion is not inevitable.

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[45] David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (Hart Publishing, 1997) 279; David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17 Rev. Const. Stud. 87; Mark Walters, "Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law" in Mark Elliott & Hanna Wilberg, eds., *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford: Hart Publishing, 2015), ch. 15. See also Jonathan M. Coady, "The Time Has Come: Standard of Review in Canadian Administrative Law" (2017) 68 U.N.B.L.J. 87.