Chapter 11

Hard Cases in a Culture of Justification

Michelle Biddulph*

The Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*[1] has been hailed — and criticized — for ushering in a new "culture of justification" in Canadian administrative law.[2] This culture of justification leaves space for administrative decision-makers to develop their own strands of jurisprudence within the policy-laden fields in which they operate, though subject to judicial review for substantive reasonableness.[3]

However, the Court's choice to leave space for administrative jurisprudential development also reveals a potential tension between the culture of justification and the rule of law. The *Domtar/Wilson*[4] problem is tolerated in a culture of justification: administrative decision-makers can legitimately disagree and reach opposite conclusions on a similar question of law so long as the reasons are appropriately justified. This leads to the potential for persistent discord on hard questions,[5] which

---

* BA (Saskatchewan), JD (Saskatchewan), Associate Lawyer, Greenspan Humphrey Weinstein LLP.

[1] [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.) [hereinafter "*Vavilov*"].

[2] See, *e.g.*, Paul Daly, "Vavilov and the Culture of Justification in Contemporary Administrative Law" (2020) S.C.L.R. (2d) (forthcoming); Katherine Hardie, "Deference after the Trilogy: What is the Impact of a 'Culture of Justification'?" (2020) 33 Can. J. Admin. L. & Prac. 145.

[3] While there are limited situations in which correctness still applies, this article is focused on the *Vavilov* conception of reasonableness review and its impact on consistency of decision-making in an administrative decision-maker's jurisprudence. I will, therefore, refer only to the standard of review of reasonableness throughout this article.

[4] *Domtar Inc. v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] S.C.J. No.75, [1993] 2 S.C.R. 756 (S.C.C.); *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29, 2016 SCC 29 (S.C.C.).

[5] I use "hard questions" in the Dworkin sense, being cases where no settled rule dictates a clear decision either way: see Ronald Dworkin, "Hard Cases" (1975) 88 Harvard Law Review 1057 at 1060. However, while I borrow Dworkin's terminology as an apt descriptor

can undermine the rule of law. *Vavilov* rejects calls for correctness review where there is persistent discord on a question of law, reasoning that persistent discord is vague and difficult to identify, and that internal and horizontal constraints between decision-makers will make the persistent discord problem rare, if not eliminate it entirely.[6]

This reasoning rests on the Court's acceptance that, though horizontal *stare decisis* does not apply to administrative decision-makers, internal institutional constraints and external judicial constraints are sufficient to prevent or remedy the problem of persistent discord on questions of law. These propositions, however, are questionable from a rule of law perspective. This article suggests that the internal and external constraints suffer from fairness problems, vagueness problems, and end up inviting disguised correctness review anyway. The *Vavilov* solution to the persistent discord problem may not be much of a solution at all.

I. THE PERSISTENT DISCORD PROBLEM

The "persistent discord" problem, or the problem of conflicting jurisprudence from an administrative tribunal, was first addressed by the Supreme Court in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*.[7] In *Domtar*, the respondent tribunal had consistently interpreted an income replacement provision in a workers' compensation statute as providing for income replacement payment for each day that a worker would have worked but for the injury, regardless of whether extrinsic forces would have affected the worker's ability to carry out his employment.[8] In finding this interpretation to be patently unreasonable, the Quebec Court of Appeal relied on a single decision of the Labour Court, issued in a penal context, which had interpreted the same provision and reached a different result.[9] The Supreme Court held that the Quebec Court of Appeal had erred in overturning the CALP decision, which was based on a long line of consistent CALP jurisprudence, by relying on a decision issued by a different tribunal in a different context.[10] However, even if there was a persistent discord in the interpretation of the provision, Justice L'Heureux-Dubé rejected the proposition that a reviewing court

---

of the types of cases where the persistent discord problem is likely to arise in the administrative law context, I do not profess to apply Dworkin's concept of rights-oriented judgment to the resolution of hard cases in the administrative context.

[6] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at paras. 129-132, 2019 SCC 65 (S.C.C.).

[7] [1993] S.C.J. No. 75, [1993] 2 S.C.R. 756 (S.C.C.) [hereinafter "*Domtar*"].

[8] *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] S.C.J. No. 75, [1993] 2 S.C.R. 756 at 776 (S.C.C.).

[9] *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] S.C.J. No. 75, [1993] 2 S.C.R. 756 at 778 (S.C.C.).

[10] *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] S.C.J. No. 75, [1993] 2 S.C.R. 756 at 783 (S.C.C.).

ought to intervene on the correctness standard and divine the correct interpretation. She reasoned that, though consistency in administrative decision-making is desirable, courts are not the entities that ought to be tasked with imposing that consistency given the institutional relationship that underpins judicial review.[11]

The Supreme Court considered the matter again in 2016 in *Wilson v. Atomic Energy of Canada Ltd*.[12] *Wilson* addressed a longstanding issue in labour arbitrator jurisprudence: whether the *Canada Labour Code*[13] permitted federally-regulated employers to dismiss an employee without cause. The majority of labour arbitrators said no.[14] A significant minority, however, held that the employer could dismiss employees without cause but appropriate notice or pay in lieu of notice.[15] The majority of the Supreme Court dismissed the argument that this longstanding and persistent discord justified correctness review to settle the question of whether a federally-regulated employee could be dismissed without cause,[16] though it went on to conclude that there was only one reasonable interpretation — that an employee could not be dismissed without cause.[17]

This issue of persistent discord appeared one more time in *Vavilov*, this time through the argument of *amicus curiae*. The majority in *Vavilov* rejected the suggestion that correctness review ought to apply where there is persistent discord in administrative jurisprudence on a question of law, reasoning that the new robust form of reasonableness review was sufficient to address the threat that the persistent

---

[11] *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] S.C.J. No. 75, [1993] 2 S.C.R. 756 at 795-796 (S.C.C.).

[12] [2016] S.C.J. No. 29, 2016 SCC 29 (S.C.C.).

[13] R.S.C. 1985, c. L-2.

[14] *Wilson v. Atomic Energy of Canada Ltd.*, [2015] F.C.J. No. 44 at para. 47, [2015] 4 F.C.R. 467, 2015 FCA 17 (F.C.A.). The Supreme Court's decision is rather obscure as to the extent to which arbitral jurisprudence supported either interpretation, as the majority suggested that 1,740 decisions supported the "with cause" interpretation while only 28 supported the "without cause" interpretation: *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29 at para. 60, 2016 SCC 29 (S.C.C.). However, as the dissent pointed out, the majority's purported number of decisions favouring the without cause interpretation actually included *every* decision rendered by an arbitrator under the *Canada Labour Code* regardless of whether that decision considered the issue of whether an employee could be dismissed without cause: *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29 at para. 110, 2016 SCC 29 (S.C.C.). The Federal Court of Appeal's description of the conflict therefore appears to be more accurate.

[15] *Wilson v. Atomic Energy of Canada Ltd.*, [2015] F.C.J. No. 44 at para. 48, [2015] 4 F.C.R. 467, 2015 FCA 17 (F.C.A.).

[16] *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29 at paras. 16, 17, 2016 SCC 29 (S.C.C.).

[17] *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29 at para. 39, 2016 SCC 29 (S.C.C.).

discord problem poses to the rule of law.[18] The majority posited two suggestions to prevent the persistent discord problem or remedy it when it arises: internal constraints within an administrative entity that foster a "harmonized decision-making culture";[19] and the external burden imposed by reasonableness review to justify any decision that departs from "longstanding practices or established internal decisions".[20]

II. THE INTERNAL CONSTRAINT: A HARMONIZED DECISION-MAKING CULTURE

The first solution to the persistent discord problem suggested by the *Vavilov* majority is the development of a harmonized administrative decision-making culture, fostered by internal constraints on decision-making such as internal legal opinions, standards, policy directives, plenary meetings, training manuals, check-lists and templates.[21] However, while such harmonized decision-making may quell dissent, it does so at the expense of transparency: a party that appears before a particular administrative decision-maker should have access to the documents and guidelines that may be used to shape the ultimate decision. Where an internal legal opinion is commissioned that favours a particular interpretation of a statutory provision, for example, a party's ability to advocate for a different interpretation is hampered. This is because the party will likely not even be aware of the existence or content of the legal opinion, as the opinion would be protected by privilege.[22] The same is true of things such as internal standards, policy directives or the outcomes of plenary meetings.[23] The rule of law suffers when the rules and principles guiding a decision are not revealed to the person affected by that decision.

---

[18] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at paras. 71, 72, 2019 SCC 65 (S.C.C.).

[19] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 129, 2019 SCC 65 (S.C.C.).

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

[21] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 130, 2019 SCC 65 (S.C.C.).

[22] *Pritchard v. Ontario (Human Rights Commission)*, [2004] S.C.J. No. 16 at paras. 28-31, 2004 SCC 31 (S.C.C.).

[23] And, in many cases, access to reasons for past decisions: for example, the Parole Board of Canada does not publicly release its reasons for decision. If a party before the Parole Board wishes to have access to a past decision of the Parole Board, even a decision on a general issue of law, the party must (a) know the name of the decision; and (b) submit a specific request to the Parole Board of Canada's decision registry with detailed description of the identity of the requesting party and the reason for the request. See Parole Board of Canada, "What is the Decision Registry?" (December 5, 2018), online: <https://www.canada.ca/en/parole-board/services/decision-registry/what-is-the-decision-registry.html> (last accessed August 10, 2020).

While a harmonious decision-making culture is desirable from a rule of law perspective in that it helps minimize the risk of arbitrary conflicting decisions on similar issues,[24] a culture that is developed in private and shielded from the eyes and submissions of the parties that are affected by the decisions, as well as from the courts tasked with reviewing those decisions, is a culture that is inconsistent with the rule of law. Where a party seeks judicial review of the substance of an administrative decision, the judicial review is ordinarily focused only on the decision itself with no extraneous evidence admissible.[25] If the reasons for decision do not disclose the impact of the internal harmonized decision-making culture on the outcome of the decision, and if the affected party has no knowledge of the internal constraints that may have impacted the decision,[26] a reviewing court has no means by which it can ensure the decision-maker did not fetter its discretion or otherwise act improperly in reaching the particular decision. The culture of justification requires a decision-maker's reasons to "meaningfully account for the issues and concerns raised by the parties",[27] while simultaneously encouraging decision-makers to implicitly base their decisions on factors and considerations which may be shielded from the affected party. So long as a decision-maker refrains from referring to those considerations in its reasons, these internal constraints will escape judicial review.

III. THE EXTERNAL CONSTRAINT: REASONABLENESS REVIEW

The Court held in *Vavilov* that reasonableness review serves as an external constraint on the persistent discord problem because an administrative decision-maker bears a justificatory burden to explain a departure "from longstanding practices or established internal authority". As a result, reviewing courts will be able to minimize the "risk of arbitrariness" in administrative decision-making by ensuring that the decision-maker adequately justifies any departure from precedent.[28] If the persistent discord remains, and if parties submit evidence of that discord to the courts, the court may "telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagree-

---

[24] See *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] S.C.J. No. 20, [1990] 1 S.C.R. 282 at 327 (S.C.C.).

[25] *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] F.C.J. No. 93 at para. 19, 2012 FCA 22 (F.C.A.).

[26] And is therefore unable to compel the tribunal to produce that evidence, whether pursuant to r. 317 of the *Federal Court Rules*, SOR/98-106 or similar provincial rules of court.

[27] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 127, 2019 SCC 65 (S.C.C.).

[28] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 131, 2019 SCC 65 (S.C.C.).

ment".[29] Where this occurs, "it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord".[30]

There are several things missing from this optimistic articulation of reasonableness review. First, the Court offers no explanation as to how reasonableness review ought to be conducted where a decision-maker is beginning to grapple with a hard question and no "longstanding" authority has yet been developed. Does a decision-maker bear a justificatory burden to explain a departure from a single precedent on the issue? Or is each decision subject to reasonableness review *de novo* for an unspecified period of time until one particular interpretation begins to accrue enough support to become "longstanding"? Does the justificatory burden kick in once a particular interpretation is affirmed to be reasonable on judicial review? The matter is left unresolved.

Given the Court's rejection of the *amicus*' call for correctness review on conflicting decisions and given the Court's acknowledgment that horizontal *stare decisis* does not apply between administrative decision-makers, one must presume that the Court intended to leave space for decision-makers to, in the words of Paul Daly, "work inconsistencies pure".[31] The problem with *Vavilov* is that it does little to provide guidance to courts on how to identify the dividing line between a decision that is part of a legitimate process of "working inconsistencies pure" and one that departs from "established internal decisions".[32] In the former, the decision is reviewed purely for its reasonableness.[33] In the latter, the decision is unreasonable unless the decision-maker can adequately explain why it chose not to follow the established precedent.[34] Reviewing courts are left with little guidance as to the circumstances in which they must impose a justificatory burden on the administra-

---

[29] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 132, 2019 SCC 65 (S.C.C.).

[30] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 132, 2019 SCC 65 (S.C.C.).

[31] Paul Daly, "The Principle of *Stare Decisis* in Canadian Administrative Law" (2015) 49 Revue Juridique Themis 757 at 775.

[32] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 132, 2019 SCC 65 (S.C.C.).

[33] Of course, if the parties before the decision-maker each advance different interpretations and each can provide internal precedent to support the argument, the decision-maker is required to address each precedent in its reasons as part of the obligation to be responsive to the submissions of the parties: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at paras. 127, 128, 2019 SCC 65 (S.C.C.). However, the requirement to consider and address competing submissions seems to be less stringent than the burden to justify a departure from past precedent.

[34] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 131, 2019 SCC 65 (S.C.C.): "Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that

tive decision-maker to explain why it did not follow a particular decision. In essence, *Vavilov*'s proposed solution to the issue of persistent discord suffers from the very vagueness problems that the Court identified in rejecting the correctness standard of review. Simply sheltering the vagueness problem under the reasonableness umbrella does little to actually solve the issue.

Second, the Court's proposed resolution to persistent discord on a question of law — the "telegraphing" of the existence of an issue, where evidence of that issue has already been put before the court — stands in tension with the reasonableness framework that the Court insists must apply regardless of the existence of persistent discord. The suggestion that, once such judicial "telegraphing" puts a decision-maker on notice as to the existence of the issue,[35] the decision-maker will find it increasingly difficult to justify decisions that "serve only to preserve the discord" opens the door for the revival of disguised correctness review. Administrative decision-makers, one must presume, are rational actors that make decisions for legitimate reasons. They do not reach particular conclusions on points of law for the fun of it — there will be a legitimate reason why one decision-maker resolves a hard case one way, and another resolves that same hard case a different way. To suggest that, at some point, one strand of administrative reasoning on a hard case becomes unjustifiable because it exists solely to preserve the discord seems to cast doubt on the legitimate intentions of a particular decision-maker, which is at odds with the ostensibly respectful premises of reasonableness review.

Vavilov implicitly invites courts to engage in disguised correctness review to resolve a true issue of persistent discord, since at some point a court must make a determination that a particular decision on a point of law only "preserves the discord". Once a court deems one particular interpretation to be legitimate and the other as unnecessarily preserving the discord, the court has, effectively, pronounced its opinion on the interpretation it believes to be correct. This is correctness review by any other name. To the extent that the majority in *Vavilov* queried when, if ever, a persistent discord could be accurately identified in order to justify the application of correctness review, the majority's description of reasonableness review seemed to answer that question. If a court on reasonableness review is capable of identifying a persistent discord and deeming a particular interpretation on an issue as serving only to preserve the discord, the court is equally capable of identifying a discord and applying correctness review to resolve it.

Third, given the majority's rather unfortunate characterization of a particular strand of interpretation serving to "preserve a discord", the *Vavilov* framework appears self-contradictory. Once a particular interpretation receives judicial favour

---

departure in its reasons. If the decision maker does not meet that burden, the decision will be unreasonable".

[35] Which is a rather unhelpful outcome given that the parties would have already compiled evidence of the persistent discord issue to put before the court in the first place. They presumably need no reminder of the existence of the problem.

and another is deemed only to preserve a discord, it would appear difficult, if not impossible, for an administrative decision-maker to later justify a decision adopting the rejected interpretation. While this may be viewed as a laudable result from a rule of law perspective, it stands in tension with the culture of justification created by *Vavilov*. In essence, it tells a decision-maker that, once a court has stepped in on disguised correctness review to resolve a persistent discord issue that the decision-maker was incapable of resolving internally, any decision that seeks to depart from the accepted interpretation seeks only to renew the discord. It is difficult to imagine how a decision-maker could adequately meet its justificatory burden in this scenario.[36] The culture of justification appears to end where disguised correctness review begins.

IV. CONCLUSION

The Supreme Court's rejection of the correctness standard of review where persistent discord threatens the rule of law was based on the Court's optimistic view that such discord is capable of resolution internally, that reasonableness review will effectively constrain any emerging discord, and, in any event, that persistent discord is too vague and difficult to identify to justify correctness review. While the Court's proposed solutions seem facially unobjectionable, once probed a little deeper, significant issues begin to emerge.

The administrative decision-maker bears the bulk of responsibility to solve emerging discord issues. However, encouraging the administrative decision-maker to find internal solutions to emerging discord on hard cases risks hampering transparency in the decision-making process. It is all too easy for such internal constraints to escape judicial review, as they are generally undisclosed and therefore unknowable to the parties. Further, where a party seeks judicial review of a decision on the basis that it conflicts with another interpretation issued by that decision-maker, courts are placed in an impossibly vague position. It is difficult, if not impossible, to determine whether the conflict arises from the internal process of working inconsistencies pure or whether it arises from a departure from an established internal precedent in hard cases that have no easy answer.

Vavilov, like *Dunsmuir* before it, represents a significant and good faith attempt to simplify and strengthen the framework for judicial review. Like *Dunsmuir*, however, the *Vavilov* framework has its own weaknesses. The potential for reduced

---

[36] Imagine, for example, the facts of *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29, 2016 SCC 29 (S.C.C.). If a court ruled, as the Supreme Court effectively did in *Wilson*, that any decision of a labour adjudicator holding that the *Canada Labour Code* permits employees to be dismissed without cause is a decision that only serves to preserve the discord, it is impossible to imagine a situation where a labour adjudicator could later rule that the *Canada Labour Code* does permit employees to be dismissed without cause. Regardless of how impeccable the adjudicator's reasoning may be, it is very difficult to see how a court could be willing to find that the decision is reasonable and thereby renew the discord that had been quashed.

transparency in administrative decision-making and for disguised correctness review on lingering hard questions is one significant potential weakness of the *Vavilov* framework. The problem of how courts ought to review administrative decisions on hard cases is one that has lingered since *Domtar*, as the conflict between the consistency interest of the rule of law and the democratic interest in respect for decision-making autonomy is at its highest with these types of cases. While *Vavilov* claimed to have solved the problem, in reality, it seems to have only become more entrenched.